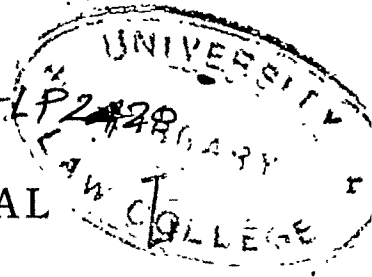


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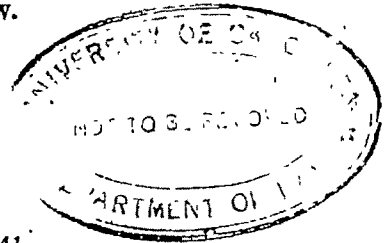
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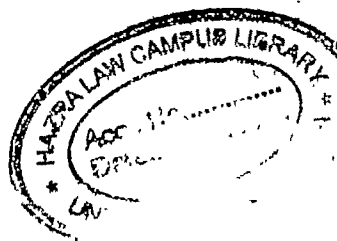
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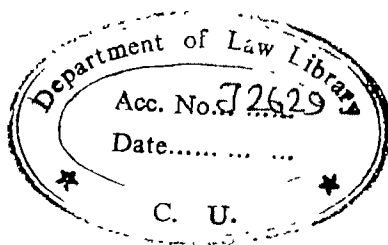
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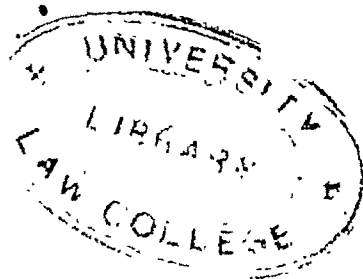
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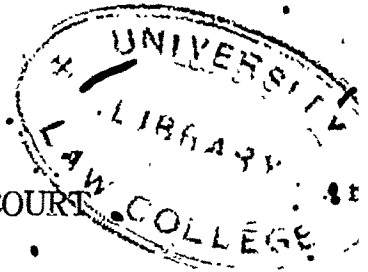
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| " | <i>v. Tokarsi Narsi</i> , 43 Bom. L. R.                           | .. F.B. | 238 |                  |
| " | <i>Hussenbhoy Lalji v. Rashid Vershi</i> , 43 Bom. L. R.          | .. F.B. | 523 | [1941] Bom. 492  |
| " | <i>J. D. Boywalla v. Sorab Engineer</i> , 43 Bom. L. R.           | ..      | 529 |                  |
| " | <i>Lalchand Hirachand v. Tuljaram Raoji</i> , 43 Bom. L. R.       | ..      | 964 |                  |
| " | <i>Mirza Akbar v. Emperor</i> , 43 Bom. L. R.                     | .. P.C. | 20  |                  |
| " | <i>Parashuram D. Shamdasani v. Sir Hugh Cocke</i> , 43 Bom. L. R. | ..      | 961 |                  |
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| " | <i>Shamdasani v. Sir Hugh Cocke</i> , 43 Bom. L. R.               | ..      | 961 |                  |
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# The Bombay Law Reporter.

## REPORTS.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

Present :

VISCOUNT MAUGHAM, LORD WRIGHT, AND SIR GEORGE RANKIN.

• SHANKARRAO DAGADUJIRAO JAHAGIRDAR

v.

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*Bombay Land Revenue Code (Bom. V of 1879), Secs. 83, 135 J—Permanent tenancy—Presumption—Antiquity of tenancy—Proof of origin of tenancy—Enhancement of rent paid by permanent tenant—Tenancy for agricultural purposes—Presumption as to permanency of tenancy—Record of Rights, entry in—Presumption as to its truth—Indian Evidence Act (I of 1872), Sec. 13—Kulkarni, statement by, as to character of tenancy—Relevancy of statement—Civil Procedure Code (Act V of 1908), Secs. 100, 101—Second appeal—Findings of fact.*

The particular presumption mentioned in s. 83 of the Bombay Land Revenue Code, 1879, is not directed to be made save upon two conditions (among others) : first, that there is no satisfactory evidence of the date of the commencement of the tenancy, and, secondly, that this lack is due to the antiquity of the tenancy. The first condition is not excluded by showing that the tenancy had its origin at some date within a period of twenty years which cannot be more precisely ascertained. This is not satisfactory evidence of the date of its commencement. By a tenancy's antiquity the section does not intend any reference to remote ages in the past or to "time immemorial" in the sense of the English law. It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted.

Hence, where lands are held under tenancies which are not proved to have been in existence before 1892, the presumption under s. 83 cannot properly be applied to them, notwithstanding that the evidence by no means excludes the possibility of an earlier origin.

*Narayan Ramchandra v. Pandurang Balkrishna*,<sup>1</sup> overruled.

Section 83 of the Code shows that a right on the part of the landlord to enhance a rent payable is not unknown in the Province of Bombay.

<sup>1</sup> (1922) I. L. R. 47 Bom. 4, s.c. 24 Bom. L. R. 831.

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An entry in the Record of Rights that a tenant has permanent interest in the land is presumed to be true by virtue of s. 135 J of the Bombay Land Revenue Code of 1879. Proper effect should be given to such a statutory presumption. The presumption is not weakened by the mere consideration that when the record was made the landlord was a minor and his property was being managed by the Collector on his behalf, nor does the fact that at the time of the preparation of the record the permanency of the interest of the tenants was not disputed in any way detract from the force of the presumption.

Where the existence of a Record of Right does not appear from the judgment of the first appellate Court to have been appreciated by it and no effect whatever has been given to the statutory presumption under s. 135 J of the Bombay Land Revenue Code, the questions of fact as well as of law are open to the High Court on second appeal and can be considered by the Privy Council on appeal.

The fact that a tenancy is for agricultural purposes does not *prima facie* indicate that it is permanent or indeed that it is more than an annual tenancy. The inference of permanence is an inference which it is difficult to make and which requires the presence of circumstances explicable when taken as a whole only on the hypothesis of permanence.

*Secretary of State for India v. Maharajah Luchmeswar Singh<sup>1</sup> and Nabakumari Debi v. Behari Lal Sen,<sup>2</sup>* referred to.

A statement by the kulkarni of a village as to the character of a tenancy right in the village is admissible in evidence under s. 13 of the Indian Evidence Act, 1872.

The findings of fact, though not the conclusions as to their effect in law, are *prima facie* conclusive in second appeal in view of ss. 100 and 101 of the Civil Procedure Code, 1908.

*Dhanna Mal v. Moti Sagar,<sup>3</sup>* followed.

*Held*, also, that there were circumstances in the case sufficient to show that the presumption in favour of the truth of the Record of Rights derived support from a number of independent considerations the cumulative effect of which should be regarded as strong.

The fact that the tenancies were granted for the purpose of agriculture could not be regarded as sufficient either in fact or in law to negative the conclusion indicated by so many strong circumstances that the tenancies were of a permanent character.

EJECTMENT suit.

The plaintiff, Shankarrao, was the inamdar of the village of Khed Digar in Shahada taluka in the district of West Khandesh.

The inam was granted in 1798 by the Holkar who governed the place. It was confirmed in 1843 by the British Government who succeeded Holkar. The Government of Bombay issued a sanad to plaintiff's father in 1880.

The plaintiff's father Dagdujirao succeeded to the inam in 1857 and held it till his death in 1904. The plaintiff was then a minor of eight years. His estate, inclusive of the inam, passed into the management of the Collector of West Khandesh, who was appointed the guardian. The Collector's management lasted from 1909 to 1917. In 1917, the plaintiff attained majority.

<sup>1</sup> (1888) L. R. 16 I. A. 6.

<sup>2</sup> (1907) L. R. 34 I. A. 160,  
s. c. 9 Bom. L. R. 846.

<sup>3</sup> (1927) L. R. 54 I. A. 178,  
s. c. 29 Bom. L. R. 870.



The village lands included in the plaintiff's inam aggregated to 1195 acres. Out of these lands measuring 770 acres 9 gunthas were in the occupation of Shambhu (defendant) as a tenant. Other lands of smaller dimensions were in the occupation of defendants in other appeals. The defendant's tenancy originated somewhere between the years 1857 and 1892. After the year 1892 all the tenants were shown to be in occupation of their lands.

At first the *out-bandhi* system prevailed in the village. The term *out* meant a plough; and it was applied to the unit of lands which could be cultivated by a plough and a pair of bullocks. The lands in the possession of the defendants admeasured forty-four *outs*. The rent fixed for each *out* was originally Rs. 4 if the tenant was a Bhil, and Rs. 6 if the tenant belonged to any other class. After 1890 the rent was raised to a uniform rate of Rs. 12 per *out*. In 1909, while the village was under the management of the Collector, survey was introduced into the village; and the rent payable to the inamdar was fixed at one rupee per acre. In the year 1917-18 revision survey came into force, when the rent was raised to Rs. 1-6-0 per acre.

In the year 1915 the record of rights of the village was prepared. In that record, the defendant as well as other tenants were shown as occupants of the lands in their possession.

On November 23, 1927, the plaintiff gave notices to the defendant and other tenants to quit the lands in their occupation on March 31, 1928. The tenants failed to comply with the notices.

On June 26, 1928, the plaintiff filed a suit to eject the defendant from the lands. He filed similar suits against other defendants.

The defendant contended *inter alia* that all the lands in the suit were in his *vahivat* from generation to generation on payment of a fixed sum of assessment and the defendant had the right to retain the *vahivat* as such. He also contended that after the introduction of survey into the village his name was entered as a *khatedar* of the lands.

The trial Court held that as the plaintiff was only a grantee of the royal share of the revenue of the village he was not entitled to evict the defendant. It also held that the plaintiff was not estopped by the entries made in the revenue record after the survey of the village lands from contending that the defendant was not an occupant of the lands in his possession. The suit was accordingly dismissed.

The plaintiff appealed to the High Court.

The appeal was heard by N. J. Wadia and Macklin JJ., on October 4, 1934, when the following judgment was delivered.

N. J. WADIA J. These six appeals arise out of suits filed by Shankarrao bin Dagdurao Matkar, the inamdar of the village of Khed Digar in the Shahada taluka of the West Khandesh District against certain persons who, according to him, were his annual tenants and from whom he sought to recover possession of lands which they had refused to hand over to him after proper notice had been given. In First Appeal No. 179 of 1930 the inamdar's suit was dismissed by the First Class Subordinate Judge of Dhulia. In the second appeals (Nos. 405 to 409 of 1931) decrees were passed in favour of the plaintiff by the Joint Subordinate Judge of Nandurbar and were confirmed in ap-

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peal by the District Judge of West Khandesh. The inamdar is the appellant in First Appeal No. 179 of 1930 and the defendants tenants are the appellants in the five second appeals. The principal questions involved in all the six appeals are the same, and I propose therefore to deal with all of them in one judgment.

In all the suits the defendants contended that the inamdar was not the owner of the soil but had only the right to recover revenue, that the defendants and their ancestors had been in possession of the lands for several generations, that they had rights over the lands similar to those of holders in unalienated villages, and that they were not liable to be dispossessed so long as they paid the amounts fixed for assessment.

The questions which arise for consideration in these appeals are, firstly, whether the inamdar was a grantee of the soil or only of the royal share of the revenue; secondly, whether the defendants have proved that by reason of the antiquity of their tenancy and owing to want of evidence of the period of its intended duration they are entitled to the benefit of the presumption arising under s. 83 of the Bombay Land Revenue Code (Bom. V of 1879) and to be treated as permanent tenants; and, thirdly, whether, even if the defendants are not entitled to the benefit of s. 83 of the Bombay Land Revenue Code, they prove that the conduct of the parties over a long period of years has been such as to justify an inference that there was an implied agreement on the part of the inamdar to treat them as permanent tenants.

[His Lordship, after commenting upon the evidence in the case, proceeded.]

With regard to the nature of the inam granted to the plaintiff, we have two documents of 1798—exhibits 110 and 109. Exhibit 110 is a letter written by Shree Mhalsakant Kashirao the son of Tukoji Holker to Rajeshri Narayanrao Yadav Kamdar of Pargana Sultanpur. It states that the village of mauje Khed Budruk which had been continuing with one Umabai Matkar as jahagir for a long time, and which had been attached, was now to be continued to her as the attachment had been removed. The document mentions that the village had been continued with Umabai as jahagir in respect of the whole of the *amal* (*darobast amal*) excepting the *mokasa* (right); that the attachment had been removed at the request of Rajeshri Babaji Matkar, and the officer to whom the letter was addressed was instructed not to interfere with the jahagirdar's management of the village. Exhibit 109 is an acknowledgment by Babaji Matkar in 1798 that he had taken the village " (the said place of the aforesaid Mouje) " into his possession. The sanad granted to the inamdar by the British Government is alleged by the plaintiff to have been lost. He has produced an extract (exhibit 37) from the Registrar of Sanads relating to his village. The extract shows that the whole village was to be continued with the plaintiff's family from generation to generation according to an order passed by Government in the Political Department on September 18, 1843. The form mentions that sanad No. 1567 had been granted to the inamdar on July 12, 1880, with regard to the village, and shows that the whole village was granted in inam subject to the deduction of an area of 120 acres 35 gunthas which had been already granted prior to the plaintiff's grant. The inamdar appears to have applied to the Government for a copy of the sanad and the reply received by him from Govern-

ment, dated September 25, 1926, had been put in—exhibit 90. In that reply the plaintiff was informed that by Government letter, dated September 18, 1843, the Governor in Council had authorised the village of Kheree Budruk held by Puddum Row Mutkur to be continued to his family as having been a hereditary possession. The plaintiff has produced a copy of the relevant extract from the Registrar of Alienated Villages and Lands in the Shahada Taluka received by him from the Government relating to the village in suit. This extract—exhibit 88—shows that the village was granted as personal inam, permanent enfranchised or private property, to the plaintiff's family. Under the heading "Particulars of the villages or land alienated"—column 12—the entire village is shown as alienated excepting the area granted in *kadim inam*. Column 10 of the statement shows that a sanad had been granted to the inamdar in Form No. 19 and a blank copy of a sanad in Form No. 19 is attached to the copy. The form deals with the grant of a whole village as an hereditary inam and contains a declaration that the village granted shall be continued for ever without increase of land-tax or *nazzerana*.

The details given in the Register of Sanads and in the Register of Alienated Villages suggest that the grant to the plaintiff's family was a grant of the soil of the village and not merely of the royal share of the revenue. The sanad in Form No. 19, which was granted to the plaintiff's family, was granted under Section XVI, clause B, of Act II of 1863. Inams so granted were of particular lands or of a whole village or of the *amal* or share of the revenue. According to Joglekar's Alienation Manual, 1921, when the inam was of the whole village the sanad given was in a certain form which is mentioned at page 49 of his Manual. The form corresponds to Form No. 19. When the grant was of the *amal* or share of the revenue, the sanad was in a different form, which is quoted at page 52 of the Alienation Manual. The form used and the reference to the grant of the whole village in the Register of Sanads and of alienated villages are in my opinion sufficient to show that the grant in this case was a grant of the whole village. In the second appeals there is some more evidence adduced which also supports this inference. A letter has been produced—exhibit 112—dated November 20, 1886, addressed by the Mamlatdar of the Shahada taluka to the Jahagirdar of Khed Digar, which mentions that a copy of a *tharav* or decision of Government to the effect that the rights regarding the forest belong to the Jahagirdar, had been sent. This letter gives strong support to the plaintiff's contention that he was a grantee of the soil and not merely of the royal share of the revenue. If he was merely a grantee of the latter kind, forest rights would not belong to him. In my opinion, therefore, the plaintiff inamdar must be held to be a grantee of the soil.

The defendants in all the suits contended that they and their ancestors had been in possession of the lands as permanent tenants for a very long time. In the suit from which First Appeal No. 179 of 1930 arises, the defendant, who was in possession of a very large area of 770 acres 9 gunthas, contended that his family had been Patils of the village for more than four generations, and had been in possession of some of the lands in suit since ancient times, and that they had subsequently purchased some other lands from occupants who had themselves been in possession for many years. In

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P. C. 1940 the suits from which the second appeals arise, although the individual holdings were small, the contentions raised were similar. The plaintiff's case was that none of the defendants had been in possession of the lands prior to 1892-93.

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DAGADUJI- exhibit 103. In the *khatawani*s of the years 1856-57, 1865-66 and 1869-70  
RAO the names of the defendants in all these suits admittedly do not appear. The  
v. plaintiff therefore contends that the tenancies of the defendants in the five  
SHAMBHU second appeals can be said to begin from 1892, or at most some time  
NATHU between 1871 and 1892, since in the *khatawani* of the year 1869-70 their  
PATIL names do not appear. With regard to the defendant in the First Appeal, the  
N. J. Wadia J. plaintiff's contention is that his tenancy can be said to begin either from 1892  
or from sometime between 1878 and 1892, since in the *aut bandi* list of the  
year 1878-79 the name of the defendant does not appear.

I will take first the case of the defendant in First Appeal No. 179 of 1930. The *aut-bandi* list of 1878-79, by which the plaintiff attempts to show that in that year neither Shambhu Nathu nor any of his ancestors was in possession of any of the suit lands, is not a document on which any reliance can be placed. It does not appear to be a recognised village form. It bears no signature or seal and is only a rough list of occupants. There is nothing to show that it is a complete list. It is not signed even by the *talati* of the village. No reliance can therefore be placed on it. The *khatawani* of 1869-70 is also not a document on which much reliance can be placed. It appears to be a proper *khatawani*, but it has been seriously damaged. Most of the entries are only partially legible. The endorsement at the end with regard to the numbering and sealing of the pages of the book by the Mamlatdar has been torn. The book does not bear the signature of the Mamlatdar, nor are the pages sealed. The *khatawani* of the year 1865-66 is better preserved than that of 1869-70, but even that book is only partially written up. Seven out of the nineteen pages are blank. In my opinion it is not possible to place any reliance on the *khatawani* of 1869-70, and it is doubtful whether much reliance can be placed on that of 1865-66. There is nothing to show that that book contains a complete list of the occupants in that year since part of the book is blank. The *khatawani* of the year 1856-57 does show that none of the defendants held lands in the village in that year. Some of the lands held by the defendant in First Appeal No. 179 of 1930 had been purchased by him or his ancestors from others. The names of the ancestors of two of such vendors Lala Govardhan and Kesaraya Dongar appear in the *khatawani* of 1856-57. Govardhan is shown as holding one *aut* in 1856-57. The *khatawani* shows that in the previous year he held no lands. Dongrya Revji the father of Kesaraya Dongar is shown as holding two *auts* of land in 1856-57 and also in the previous year 1855-56. With regard to the land at least which was purchased by the ancestors of Shambhu Nathu from Dongrya Revji, the plaintiff's own record shows that the tenancy goes as far back as 1855-56, and as he has produced no record prior to that date, it must be presumed that the tenancy continued beyond that date also.

With regard to the other lands of Shambhu Nathu and the lands of the defendants in the second appeals, the position therefore is that according to the plaintiff's own records the defendants were in possession of the lands.

in 1892-93 and were not in possession in the year 1856-57. In the suits from which the second appeals arise the plaintiff himself admitted that he could not say when the tenancies of the defendants first came into existence. All that his records prove is that their tenancies must have come into existence some time between 1856 and 1892—a period of thirty-six years. If the tenancies had commenced soon after 1856, they would be seventy-two years old at the date when the suits were filed.

In the case of Shambhu Nathu, the defendant in the suit from which the First Appeal arises, the presumption that the tenancy must have commenced soon after 1856 is all the stronger, since his ancestors were admittedly Patils of the village for several generations. The *khatawani* of the year 1856-57 bears the signature of Narji *walad* Dayal Patil, an ancestor of Shambhu Nathu. Section 83 of the Bombay Land Revenue Code, 1879, says that where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to the duration of such tenancy, the tenancy shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him. If the tenancies of the defendants in these suits began soon after 1856—and there is nothing to show that they did not, and some reason to presume at least in the case of one of the defendants that they did—the tenancies can reasonably be called ancient. All that the plaintiff had shown with regard to the commencement of these tenancies is that they must have commenced sometime during the period of thirty-six years between 1856 and 1892. In my opinion it cannot be said that this is definite evidence of the commencement of the tenancies, such as would prevent the defendants from getting the benefit of the presumption under s. 83 that they were permanent tenants. It was held by Fawcett J. in *Narayan v. Pandurang*<sup>1</sup> that in the absence of proof of the commencement of a tenancy in a particular year, a definite period, say of about twenty years, might be considered to be sufficient to show the commencement of the tenancy in order to counteract the presumption under s. 83 of the Bombay Land Revenue Code. In that case the plaintiff was able to show that the commencement of the tenancy was within a certain period of twenty years. In the cases before us the evidence shows that the tenancies may have commenced anywhere between 1856 and 1892. I am not prepared to hold that this is satisfactory evidence of the commencement of the tenancies. With regard to all the tenancies, therefore, the defendants are in my opinion entitled to the benefit of the presumption arising under s. 83 of the Bombay Land Revenue Code that their tenancies are permanent, and on this ground alone the plaintiff's suits must fail.

Even however if it were held that the commencement of the tenancies in all these cases had been satisfactorily proved, and that the defendants were not entitled to the benefit of the presumption under s. 83 of the Bombay Land Revenue Code, it is in my opinion open to the defendants to show

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that from the conduct of the parties subsequent to 1892 a presumption of permanent tenancy arises. It was strenuously contended by Mr. Desai on behalf of the inamdar that we cannot go into this question since this contention had not been put forward by the defendants in the lower Courts. I do not think there is much force in this contention. All the defendants had contended in the lower Courts that they and their predecessors had held their lands under a permanent tenancy with rights similar to those of occupants in Government villages, that after the survey had been introduced the inamdar did not repudiate it when he attained majority, and that he had, up to the date of the suits, accepted the assessment fixed by the survey, thus accepting directly and impliedly the rules and regulations of the survey. They had also alleged that they had entered into transactions with regard to these lands. In my opinion the contention raised by the defendants with regard to the conduct of the inamdar clearly suggested that their case was that apart from s. 83 of the Bombay Land Revenue Code they were entitled to be considered as permanent tenants. In the suits from which the second appeals arise the learned Subordinate Judge in the course of his judgment said :

"But though they (the defendants) may not be occupants by virtue of the Land Revenue Code provisions it is open for them to show that they are owners of *miras-dars* or permanent tenants in the land by other means such as a specific grant from plaintiff or contract, or their being on the land prior to plaintiff's grant or implied contract etc. It is fairly conceded on the part of the defendants that there is no direct proof of any such grant or contract; but an implied contract to this effect can be inferred from the above acts of the defendants which mean that from the very inception of the defendants' holding the plaintiff had given the land to the defendants as full owners."

The issues raised by the trial Court in these suits were broad enough to cover this contention. In the memorandum of appeal to the District Court the defendants contended that the lower Court should have found the defendants to be permanent tenants in view of the continuous payment of amounts equal to assessment for the land for a very long period and that it should have taken into consideration the fact that dealings by way of transfer in various ways by sinking wells and spending a lot of money on the land, by devolution of the land, by inheritance, adoption, gift, etc., by the holders of the lands, and the recognition of these in the record of the plaintiff proved that the defendants were permanent tenants. Similar contentions were raised by the defendant in the first appeal. Both sides have led evidence on this question, and I see no reason therefore why this Court should not go into it.

Section 83 of the Bombay Land Revenue Code is not exhaustive. It only provides that under certain circumstances a presumption of permanent tenancy must be drawn, but it does not say that this presumption cannot be drawn from other circumstances even when the origin of the tenancy is not lost in obscurity. Circumstances may exist which might justify the inference that the parties had all along treated the tenancy as a permanent one. In the present case we find a large number of such circumstances. Any one of these taken singly might not perhaps justify the inference that the tenancy was a permanent one, but the cumulative effect of all of them is such as to lead irresistibly to the conclusion that the inamdar has treated the defendants as permanent tenants. The records of the inamdar himself show

that during the whole period from 1856 to 1928—a period of 72 years—the inamdar has recovered only assessment from the tenants and no more. The *khatawanis* and the *lawani-patraks* produced by the inamdar show that the amounts recovered from the occupants were for assessment (*akar*). It has been argued that the word *akar* may mean either assessment or rent. But in the present case we find that the local fund cess has invariably been calculated on the amount recovered as *akar*. The local fund can be calculated only on the assessment not on the amount of rent, when the rent exceeds the assessment. The presumption therefore from this fact is very strong that the amounts which were recovered were recovered as assessment and not as a rent. The recoveries have also been at a uniform rate. We find that up to the year 1890 Rs. 4 per *aut* (plough) were recovered from Bhil tenants and Rs. 6 per *aut* were recovered from non-Bhil or Shahu tenants. After that year a uniform rate of Rs. 12 per *aut* was recovered from all tenants till the introduction of the survey. Subsequent to the survey, assessment has been recovered from all the tenants as fixed by the survey. We do not find that there were any variations in the amounts recovered from individuals. It was alleged by the plaintiff that the tenants did not always hold the same lands, and that the inamdar allotted portions of land or *auts* as he pleased, but there is no evidence on this point. It has been admitted by the plaintiff's own witness—exhibit 135—that during this whole period not a single rent-note was ever taken from any of the defendants or their ancestors or predecessors-in-title. There is evidence to show that the inamdar himself holds about 180 acres of land in the village which he has let out to tenants at various rents from Rs. 40 to Rs. 60 per acre for three years, and that for the lands so let out he has taken rent-notes from the tenants. This fact in itself suggests very strongly that there was a clearly marked distinction between the annual tenants of the inamdar and the defendants. The plaintiff has alleged that all the defendants and their predecessors-in-title were *aut-bandi* tenants. His own witness—exhibit 137—has deposed that an *aut bandi* tenant cannot be deprived of his holding so long as he continues to cultivate the land. The statement suggests clearly that an *aut-bandi* tenant was regarded as a permanent tenant.

It is not denied that the defendants as well as other occupants in the village have sold and mortgaged the lands which they held from the plaintiff. The bulk of the lands which Shambhu Nathu, the defendant in First Appeal No. 179 now holds, was acquired by him or his ancestors from previous occupants. The defendants in two of the Second Appeals, Nos. 407 and 408, have also acquired their lands by purchase. In the case of Sambhu Nathu as many as eleven purchases took place between the years 1894 and 1899, during the lifetime of the plaintiff's father. One purchase was in 1922, five years after the plaintiff himself had attained majority. There were also three mortgage deeds relating to the lands in First Appeal No. 179 of 1930 during the lifetime of the plaintiff's father. It is difficult to explain these transactions if the tenancies were annual tenancies. The purchasers would never have paid such large amounts for lands if they thought that the vendors were only annual tenants of them; nor can it be believed that the plaintiff and his father would have allowed annual tenants to sell their lands to others. It has been sug-

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gested that there is no evidence to show that the plaintiff or his father was aware of these transactions; that the inamdar was only concerned with recovering rents or assessment due for the lands and did not probably care to ascertain who were in possession. I find it difficult to accept this explanation. It may be a plausible explanation if we were dealing with only one or two transactions, but it fails to explain such a large number of transactions, spread over the whole period from 1894 to 1922. The only inference that can be drawn is that both parties—the inamdar as well as the defendants—regarded the tenancies as permanent, and this conclusion is supported by

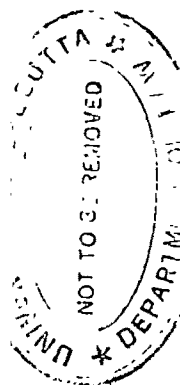
In 1909 and 1913 lands were acquired by Government for public purposes, and on both occasions compensation for the lands acquired was paid not to the inamdar but to the tenants, some of whom were the defendants in suit. In one case some land was acquired from the inamdar himself and some from his tenants, and compensation was paid to the inamdar for his land, and to the tenants for theirs. It is true that at the time when this happened the plaintiff was a minor and the village was being administered for him by the Collector as guardian, but that is no reason why we should assume that the Collector was negligent in asserting the plaintiff's rights as inamdar.

In the year 1909 when the village was being administered by the Collector it was decided by Government at the suggestion of the Collector that a survey should be introduced into the village. In the course of the inquiries which were made in connection with the survey one Ganesh Laxman Savale, who was the assistant manager of the plaintiff's village, made a statement before the Mamlatdar in October, 1912, in which he said :—

"The persons who are at present actually cultivating the lands of the village Mauje Khed Digar those very lands were in their *vahivat* and they were always cultivating the same up to this day. There is no *vahivat* of *pherapali* (i.e. *vahivat* in turns) that is, with one person (lit. in one place) for the current year, and with another person (lit. at another place) for the next year. From the day on which the village (land) was brought under cultivation, up to this day (the lands) are in the *vahivat* of those respective tenants and their lands are fixed. The *khatedars* of the aforesaid lands consider themselves as possessing *haks* (i.e. rights) over their lands and they do deal with the same by purchase, sale, mortgage, etc. Decrees have been passed by civil Courts also, and the lands have been given into possession through the Civil Courts."

It has been contended by Mr. Desai that this statement of Savale was not admissible in evidence as Savale was not examined as a witness. It appears from the records that the defendants had cited Savale as a witness. No objection was raised, however, to the admission of this statement on behalf of the plaintiff, and on this ground apparently, Savale, who had failed to appear on the first day on which he was called, was not again summoned. The statement appears to me to be admissible under s. 13 of the Indian Evidence Act. It shows clearly that the defendants regarded themselves as permanent tenants and were treated by the inamdar as permanent tenants.

There is evidence to show that one of the defendants, Shambhu Nathu, had himself let out many of the lands in suit to sub-tenants by registered rent-notes. In the Record of Rights prepared in 1915 the defendants are shown as occupants. The lands in suit have descended over a very long period.





from father to son.

There is one other piece of evidence which goes very strongly against the plaintiff's contention. Shambhu Nathu had stated in his evidence that he had sunk wells in his land at a cost of over Rs. 4,000. The defendants in Second Appeals Nos. 406 and 408 have also sunk wells on their lands, and with regard to these wells it has been admitted by the plaintiff that he himself advanced them loans to sink these wells. He has admitted having done so with regard to another tenant who is not concerned in these appeals. The plaintiff would never have done this if he had regarded the defendants as annual tenants whom he could remove at any time, and it is even less likely that the defendants would have taken loans to improve lands the tenure of which was uncertain.

The cumulative effect of all these circumstances is, as I have already stated, such as to suggest very strongly the inference that the defendants were permanent tenants. On no other supposition can such conduct, not merely on the part of the defendants, but on the part of the inamdar himself, be explained. I am of opinion therefore that the defendants have succeeded in proving that they are permanent tenants for the purposes of s. 83 of the Bombay Land Revenue Code, and that, even apart from s. 83, the evidence shows that the plaintiff has all along treated them from 1892 onwards as permanent tenants. The suits filed by the plaintiff must therefore fail.

First Appeal No. 179 of 1930 filed by the inamdar must be dismissed with costs. In Second Appeals Nos. 405 to 409 of 1931 the decrees passed by the lower Court will be reversed and the appeals allowed. Appellants to get their costs throughout.

MACKLIN J. I agree.

The plaintiff appealed to His Majesty in Council.

*W. W. K. Page*, for the appellant.

*L. P. E. Pugh K. C.* and *J. Nissim*, for the respondents.

SIR GEORGE RANKIN. In this case six appeals have been consolidated. They are brought from a decision of the High Court of Bombay dated October 4, 1934, in suits by the appellant for ejectment of the respondents from the lands of their tenancies under him. In each case the basis of the claim was that the tenancy is an annual tenancy determinable at the end of the agricultural year, namely March 31, upon three months' notice. The lands in question are arable land in the inam village of Khed Digar. This village is in the Shahada taluka of the West Khandesh District in the Presidency of Bombay, and lies upon the extreme northern boundary of the Deccan where it abuts upon the Barwani State. The total area of the village would appear to be under 1,400 acres and the population about 400 persons of whom a little more than a quarter are Bhils.

The appellant is the inamdar of the village and traces his title back to an inam grant by the Maratha ruler in 1798. This title was confirmed by the British Government in 1843, and in 1880 a sanad was granted by the Government of Bombay to the appellant's father showing that, subject to the deduction of some 120 acres alienated by grants of earlier date than 1798,

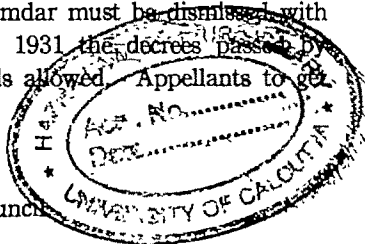
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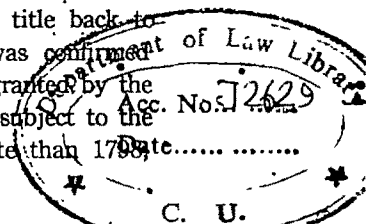
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the village was the grantee's permanent heritable property held subject to payment to Government of a *judi* or quit rent of 13 rupees per annum, and *nazarana* of rupees 14, annas 8, in all rupees 27, annas 8. It has been contended for the respondents that the appellant is not shown to be a grantee of the village but only of a certain share in the revenue of the village, but the finding of the High Court that he is grantee of the soil appears to their Lordships to be so well founded that it is unnecessary to discuss the question afresh.

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Each of the six suits was brought against a single defendant as sole tenant, but this appeal has been contested by one only of the six defendants, namely by the respondent Shambhu Nathu (herein called the first respondent), who was in possession of a large area of 770 acres. He was sued in the Court of the First Class Subordinate Judge of Dhulia on June 26, 1928, and he succeeded in that Court upon the ground (which their Lordships think to be erroneous) that the appellant had no title to the soil but only to the revenue of the village. From this decision the appeal to the High Court was a first appeal in which questions of fact as well as of law were open. The other respondents were sued in the Court of the Second Class Subordinate Judge at Nandurbar on July 6, 1928. These suits were decreed and ejectment ordered by the trial Judge (March 20, 1930), and on first appeal the District Judge affirmed this decision (January 8, 1931). The High Court dealt with all six cases by one judgment and dismissed the suits (October 4, 1934).

The appellant's father had succeeded to the inam by 1857. He lived till 1904 and was succeeded by the appellant who was then aged eight years. The Collector of West Khandesh was appointed by the District Judge as the appellant's guardian in 1905 and acted as such till the appellant came of age in 1917.

Such documentary evidence as there is of the history of the agricultural tenancies in this village has reference almost entirely to the lifetime of the appellant's father. It consists mainly of documents produced by the appellant to show that the tenancies in question cannot be traced back beyond a certain number of years. The result of the documents in this respect has been found by the High Court to be as follows : that Shambhu Nathu, who has acquired an interest in a large part of the village through purchases of the rights of other tenants made from time to time by his father and by himself, has shown that one of his tenancies goes back to 1855-56 and another to 1856-57, but that he cannot be held to have traced his other tenancies back to a period earlier than the year 1892 ; and the tenancies of the other respondents likewise are traced only to 1892. By a village ledger (*khatavani*) for the year 1856 it would appear that the lands in the village under cultivation in that year were measured as fifteen ploughs (*auts*) and no more. (It is agreed that the original meaning of *aut* as a measure of land is as much as could be cultivated by means of a plough with two bullocks). From other documents it would appear that in 1851, 1852, 1859-1860 the village was deserted (*ujad*). The tenants at this period would seem all to have been Bhils and to have possessed a single plough each. By the late seventies of last century the village had become one of fifty ploughs, and by the early nineties the number of ploughs had increased to about eighty, a number which has

never been exceeded.

Before the year 1890 the payment made by the tenants to the inamdar at a time when the tenants were Bhils was 4 rupees per plough. A few persons not Bhils were charged 6 rupees per plough in later years, but by 1890 the amount obtained per plough by the inamdar was 12 rupees and this was the position at the time when the appellant succeeded in 1904. It is plain that all the tenancies now in question began under a system of *autbandi*; and the question whether any of them have permanent rights is rendered difficult of solution by the fact that evidence of the nature or character of the *autbandi* system of cultivation as it has obtained in this village is neither plentiful nor clear. Their Lordships are not entitled or prepared to assume that it had any necessary similarity to practices which may go by similar names in other parts of India, nor do they know whether it is a system in general use in the Presidency of Bombay. It may originally have been—what the learned Subordinate Judge at Dhulia thought it—a system of assessment to land revenue, or a mere method of measurement and not a kind of tenancy at all. What it became in the village of Khed is the relevant question—a somewhat special question to which the answer must in large measure depend upon what was done and permitted in the time of the appellant's father.

In 1908 the Collector of Khandesh suggested to the Local Government that a survey should be made of the lands of the village, and by resolution of the Government of India dated January 26, 1909, it was decided that such a survey should be undertaken and a record of rights prepared. This resulted in 1915 in a record of rights, of which it is sufficient to say that it treated the tenants as having permanent tenancies, and on the basis of the survey the proper rents payable to the inamdar were fixed as 1 rupee per acre. This was to obtain only until 1917-18 when a general revision of the rates of the whole of the taluka was due to be made. The result of this survey settlement appears to have been a slight increase in the revenue of the inamdar. In 1918 this settlement was revised and the tenants' rents raised by about one-third to a figure of rupee 1, annas 6 or thereabouts. The appellant who came of age in 1917 accepted rents from the respondents on the footing of these settlements, but at the end of 1927 he appears to have decided to evict them and gave notice to quit accordingly.

The oral evidence produced by the appellant in support of his claim amounts to very little. He gave evidence himself but claimed to know little or nothing about the documents produced or the history of the village. Thus in the suit against the first respondent Shambhu Nathu he said that he did not know until the day on which he was giving evidence that the village had been surveyed; or whether a record of rights had been prepared, or if any revision survey had been made, or any assistance suits filed on his behalf. Under cross-examination for the defendants in the other cases he appeared, however, to know a little more, admitting that there had been a survey settlement, that he had certain lands in the village in his own name let out to tenants upon leases for rents that are at higher rates than the respondents' rents. He admitted also that holders of land in the village had built wells some of which had been made by money lent by himself. His main witness was his clerk Keshav Ganesh, whose evidence is of small value in view of the fact that

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before 1922 he had no connection with the village, though he appears to have officiated as village accountant in some other villages before that period. In the suit against Shambhu Nathu the appellant called a village accountant of the name of Mahadev Ramakant who professed to know about the *autbandi* system. He described it as meaning assessment charged on the basis of so much on each *aut* of land, the quality of the land not being considered in settling the assessment. A tenant, he said, cannot be ousted of his *aut* lands as long as he is cultivating : only fallow lands could be given to fresh tenants. He claimed to make this statement about *autbandi* from what he had seen, though he had not worked as a village accountant in any village where this system was prevailing. He claimed to know the system from a village accountant (*talati*) who had worked in such a village. The system, he said, was in vogue in villages mostly occupied by Bhils, the papers of such villages being in the office of the Shafada taluka. This witness gave his evidence before the First Class Subordinate Judge at Dhulia on September 17, 1929, but he was not called by the appellant in the other five cases. Evidence was called for the respondents to the effect that under the *autbandi* system the lands of the tenant were not changed though there were no survey numbers before the survey and settlement was completed in 1915. Shambhu Nathu gave evidence in the suits against the other respondents as well as in his own. He stated in cross-examination that one Ganesh Lakshman "was cultivating some land in Khed and plaintiff has retaken it from him" explaining in re-examination that "the land of Ganesh that was retaken was taken by him on new tenure system." A witness Dullav Vedu who explained that his father had four *auts* in Khed, three of which were exchanged by him for land in another village with the father of the first respondent, mentioned also that he was cultivating some other land of the village Khed near the boundary of the village and "it was retaken by the plaintiff." No evidence of either of these two transactions was offered sufficient to enable any Court to ascertain its character. Had there been any case in which the appellant or his father by giving notice had terminated a tenancy and retaken possession of the lands as of right, definite evidence to that effect would doubtless have been adduced. No instance of the sort has been proved.

The High Court came to the conclusion that the tenancies in all six cases attracted the provisions of the second paragraph of s. 83 of the Bombay Land Revenue Code, 1879 :—

"And where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claimed title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him."

The learned Judges, as already mentioned, found that as regards a part of the land of Shambhu Nathu, his tenancy is traced back as far as 1855-56, and that of the other lands all were held in possession of one respondent or another in 1892, the period between 1856 and 1892 being a blank. Hence they were of opinion that the tenancies can reasonably be called ancient and that all that has been shown with regard to the commencement of the tenan-

cies found to have been existing in 1892 is that they must have commenced some time during the period of thirty-six years between 1856 and 1892. Learned counsel for the appellant did not accept these findings contending that a number of the tenancies now in question can be traced back to a more definite origin in the seventies. Apart from this line of criticism, which it is not necessary to follow in detail, their Lordships think that there is some difficulty in the reasoning of the High Court since on any view a number of the tenancies are not proved to have originated before the nineties. Some cases have been cited to their Lordships to show the interpretation put upon this provision of s. 83 by the High Court of Bombay (*Maneklal Vamanrao v. Bai Amba*,<sup>1</sup> *Sidhanath v. Chiko*,<sup>2</sup> *Narayan Ramchandra v. Pandurang Balkrishna Ramchandra v. Dattu*,<sup>3</sup> and *Shripadbhat v. Rama*<sup>4</sup>). Their Lordships think that for the purposes of the present case it is sufficient to note that the particular presumption mentioned in the clause is not directed to be made save upon these two conditions (among others) : first, that there is no satisfactory evidence of the date of the commencement of the tenancy, and, secondly, that this lack is due to the antiquity of the tenancy. They cannot agree that the first condition is excluded by showing that the tenancy had its origin at some date within a period of twenty years which cannot be more precisely ascertained. This is not satisfactory evidence of the date of its commencement, and the view taken in *Narayan's* case (*supra*) fails in their Lordships' opinion to give effect to the ordinary meaning of the language of the clause. Again, by a tenancy's antiquity the section does not in their Lordships' opinion intend any reference to remote ages in the past or to "time immemorial" in the sense of the English law. It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted. As a number of the lands in suit are held under tenancies which are not proved to have been in existence before 1892, their Lordships do not think that the presumption can properly be applied to them, notwithstanding that the evidence by no means excludes the possibility of an earlier origin. They do not proceed as regards any of the respondents upon the presumption authorised by s. 83.

It is clear, however, and it is not disputed on behalf of the appellant, that the respondents have by the record of rights been recorded as having a permanent interest. This entry is entitled to the full benefit of the provision of s. 135J of the Bombay Land Revenue Code of 1879 :—

"An entry in the record of rights and a certified entry in the register of mutations shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor."

This provision is the same in character as that which has long prevailed in Bengal under s. 103B of the Bengal Tenancy Act and it is most important that proper effect should be given to such a statutory presumption. The suggestion that it is materially weakened by the mere consideration that when

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1 (1920) I. L. R. 45 Bom. 350,  
s.c. 22 Bom. L. R. 1394.

2 (1921) 23 Bom. L. R. 533,  
on appeal 24 Bom. L. R. 226,  
s.c. I. L. R. 46 Bom. 687.

3 (1922) I. L. R. 47 Bom. 4,  
s.c. 24 Bom. L. R. 831.

4 (1925) 27 Bom. L. R. 1258.  
5 (1926) 29 Bom. L. R. 274.

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the record was made the appellant was a minor and that his property was being managed by the Collector on his behalf cannot be accepted; and if it be the case that at the time of the preparation of the record the permanency of the interest of the tenants was not disputed this circumstance of itself in no way detracts from the force of the presumption. So far as regards the five cases which came before the High Court on second appeal the findings of fact of the District Judge, though not his conclusions as to their effect in law, would *prima facie* be conclusive in view of ss. 100 and 101 of the Code of Civil Procedure. (*Dhanna Mal v. Moti Sagar*<sup>1</sup>). But the existence of the record of rights does not appear from the judgment of the learned District Judge to have been appreciated by him, and as he has given no effect whatever to the statutory presumption, their Lordships are unable to regard the appellant as taking any advantage from the circumstance that five of the cases were dealt with in the High Court upon second appeal. The questions of fact as well as of law were open to the High Court and must be considered by the Board. The broad question before their Lordships is whether the record of rights is shown to be untrue, and the view arrived at by the learned District Judge as entitling the plaintiff to succeed in ejectment is that under the *autbandi* system there was no settled tenancy in the village, the same lands not being cultivated in different years by the same people, cultivation and tenancy being "quite uncertain and fluctuating." The evidence of the plaintiff's witness Mahadev is directly opposed to such a finding; and, though it is not clear from his own evidence whether his knowledge of the system is extensive or gained at first hand, it cannot be regarded as insignificant, coinciding as it does with other evidence firmly pointing to the conclusion that *autbandi* tenants had permanent interest in specific land.

The main features in this other evidence must now be indicated. In a *jarib-kharda* or rough draft of a land survey it is entered by the Mamlatdar of the Shahada taluka for the year 1901-02 that Nathu, father of the contesting respondent, possessed 38 ploughs in the village, "35 permanent as of the last year and three additional in the current year." In similar documents for the years 1897-98 and 1898-99 the same reference to permanent ploughs is to be found. In 1912 when enquiries were being made as to the position of the cultivators in the village, the assistant manager, who was acting as an officer of the Collector during the plaintiff's minority, stated before the Mamlatdar that the khatedars had always been in management of the same lands, that there was no practice of cultivating lands in one place in one year and in another place in another year, but from the time when lands came to be cultivated they have been in the management of the respective tenants only and their lands have been fixed. He stated also that on this understanding the khatedars had executed purchases as well as mortgages and that decrees of civil Courts had recognised these rights. This witness is shown by one of the documents to have been kulkarni of the village in 1901-02, and their Lordships are of opinion that his statement was rightly admitted under s. 13 of the Indian Evidence Act. The transactions of sale and mortgage entered into by tenants in respect of lands held on the *autbandi* system are, as the

1 (1927) L. R. 54 I. A. 178, 185, s. c. 29 Bom. L.R. 870.

High Court notes, too numerous and important for it to be supposed that the inamdar or those acting on his behalf did not come to know of them, or considered themselves entitled to object to them. It appears that in the case of Shambhu Nathu eleven purchases took place between 1894 and 1899 in the lifetime of the plaintiff's father. Three mortgage deeds are also shown to have been entered into. These transactions are difficult to explain on the supposition that the tenancies were annual tenancies and the absence of objection on the part of the inamdar reinforces this consideration. It is proved that in 1909-13 (during the minority, it is true, of the appellant), compensation for lands compulsorily acquired by the Government was on two occasions paid not to the inamdar but to the tenant. Not only were the tenants before 1890 charged for their land at a uniform rate of 4 rupees per *aut* if they were Bhils and a uniform rate of 6 rupees per *aut* if non-Bhil or Shahu tenants, but after that year 12 rupees per *aut* was recovered from all tenants without discrimination until the introduction of the survey. Again, the appellant himself holds about 180 acres of land in the village which he has let out to tenants at rates which are substantially higher than the rates charged in respect of the tenancies in suit. From these tenants of his own land he has taken "rent notes" or tenancy agreements though in respect of the tenancies in suit or other *autbandi* tenancies no rent notes would appear to have been taken at any time. It is clear, further, that the interest of the *autbandi* tenant has been treated in numerous cases as heritable, descending from father to son without objection; and at the time of the trial the recognition of the heritable character of the tenants' interest had continued for a very long time. The appellant has from time to time lent money to tenants to sink wells; and it is difficult to think that a tenant who was removable at the end of a year would have undertaken the liability for a capital sum in order to improve his land. The first respondent and at least one other has sublet his lands to others at substantial rents.

These circumstances are sufficient to show that the presumption in favour of the truth of the record of rights derives support from a number of independent considerations the cumulative effect of which must be regarded as strong. Unless, therefore, there be something in the documents, produced by the plaintiff to show the history of tenancies in suit and the precarious character of the *autbandi* system, sufficiently strong to overthrow the tenants' claim to have a permanent interest in their lands, it is difficult to refuse agreement to the conclusion of the learned Judges of the High Court that the inamdar over a long period of years has treated the tenancies as permanent. The documents produced by the plaintiff are in some respects difficult to interpret; and in their Lordships' view the difficulty arises mainly from the fact that village accountants and other officers, accustomed to accounts which in form are applicable to holders of land paying land revenue to Government, have tended to apply the same language and the same forms to an inam village, notwithstanding that what the tenant pays to the inamdar is not revenue assessed upon it by Government but rent. Ledgers (*khatawanis*) and lists of tenants (*lavari-patraks*) use the word *akar* (assessment) for the payment and *khatedar* for the tenant. In particular the local fund cess, which is to be calculated on the assessment to land revenue, has in

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this village been calculated on the *akar*. Outside an inam village, persons similar in occupation to the respondents were paying land revenue to Government and holding as occupants with permanent rights in the land; and it is not difficult to see, if only from the documents produced on behalf of the plaintiff, that the fact of the village having been granted in inam, or alienated, would not readily be regarded as implying that the position of the tenant as against the inamdar was very markedly different from the position of the khatedar in an unalienated village. A good deal of the history of the village is consistent only with the assumption that it had not occurred to the appellant's father that he should put his tenants in a position lower than their neighbours.

The clear and forceful argument of Mr. Page upon the documents was to the effect that it is necessary to look to the inception of each tenancy, and that, as in each case it is clear that the tenancy was granted for the purposes of agriculture, it should not be held that the landlord had parted with so large an interest for an agricultural purpose and at so small a rent. The smallness of the rent, however, adds considerably to the force of the other indications that the tenants were being treated as having permanent right. It is true that many of them were Bhils, a class of persons who have to be treated leniently and are unlikely to be able to support a high rate of rent. In the appellant's favour is the fact that though at one time Bhils were charged 4 rupees only per plough, after the year 1890 a uniform charge of 12 rupees is found to be collected. Their Lordships think that detailed and reliable evidence of the manner in which and the basis on which this increase of rent was made might have had great effect in the present case. From s. 83 of the Bombay Land Revenue Code of 1879 it appears that a right on the part of the landlord to enhance a rent payable is not unknown in the Province; as otherwise it would have been unnecessary to enact a saving of this right on the part of the landlord "if he have the same either by virtue of agreement, usage, or otherwise." A right of enhancement, though well understood in Bengal under the permanent settlement and not inapplicable to tenures which are perpetual (*Bamasoondery Dassyah v. Radhika Chowdhraim*,<sup>1</sup> *Krishnendra Nath Sarkar v. Kusum Kamini Devi*<sup>2</sup>) has not, so far as their Lordships know, come before the Board in any case arising from the Presidency of Bombay. It might have been much to the interest of the appellant to show the circumstances under which the rent was raised to 12 rupees: whether it was done upon the footing that the appellant had a right to terminate an annual tenancy and to impose such charge as he pleased as a condition of granting a new tenancy, or upon the footing that he was entitled to a customary or other reasonable rate whether based on the value of the staple crops or otherwise. No evidence at all upon this subject was adduced at the trial, and their Lordships are wholly unable to accept any of the documents which have been produced as showing that the plaintiff year in and year out determined what the rent chargeable should be for the year. In these circumstances the fact that the tenancies were granted for the purpose of agriculture cannot be regarded as sufficient either in fact or in law to negative the conclusion

1 (1869) 13 M. I. A. 248.

2 (1926) L. R. 54 I. A. 48.



indicated by so many strong circumstances that the tenancies were of a permanent character. Their Lordships would not willingly cast doubt upon the principle that the fact that a tenancy is for agricultural purposes does not prima facie indicate that it is permanent or indeed that it is more than an annual tenancy. The inference of permanence is an inference which it is difficult to make and which requires the presence of circumstances explicable when taken as a whole only on the hypothesis of permanence. A full exposition of the principles upon which such inference is to be made or rejected has been given by the Board in previous cases and need not here be repeated (cf. *Secretary of State for India v. Maharajah Luchmeswar Singh*,<sup>1</sup> and *Nabakumari Debi v. Behari Lal Sen*). Their Lordships agree with the High Court in thinking that the inference in the present case is fully warranted.

Considerable discussion took place before the Board upon the effect of the survey and settlement made between 1909 and 1916 in view of s. 111 of the Bombay Land Revenue Code of 1879. Attention was drawn to the terms of s. 216 and to the amendments made in 1929 to the provisions of this section. Had their Lordships been of opinion that, independently of the settlement of 1915 and the revision settlement in 1918, the respondents were unable to show a permanent interest in their lands, it would have been necessary to give careful consideration to the question whether the Collector in acting upon the survey settlement and the plaintiff in accepting rents fixed thereunder after he came of age had not given to the respondents a right to claim that they had become permanent tenants. In the result, however, this question does not require to be decided, and their Lordships must not be taken as expressing or as accepting any opinion as to the limits of a Collector's powers under these sections. Their Lordships will humbly advise His Majesty that this consolidated appeal should be dismissed. The appellant will pay to the respondent Shambhu walad Nathu Patil his costs of the appeal.

*Appeal dismissed.*

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Hy. S. L. Polak & Co.*

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<sup>1</sup> (1888) L. R. 16 I. A. 6.

<sup>2</sup> (1907) L. R. 34 I. A. 160,  
S. C. 9 Bom. L. R. 846.

[On appeal from the Judicial Commissioner's Court at Peshawar.]

Present :

VISCOUNT MAUGHAM, LORD WRIGHT, AND SIR GEORGE RANKIN.

MIRZA AKBAR

v.

EMPEROR.

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May 28.

*Indian Evidence Act (I of 1872), Sec. 10—"Common intention"—Interpretation—Anything said, done or written by conspirator during pendency of conspiracy—Relevancy of—Statement made by one conspirator against another not relevant if made after termination of conspiracy—North-West Frontier Province Courts Regulation, 1931, Sec. 7—Rules made under section—Construction.*

The evidence of a conspirator is admissible against his co-conspirator on the principle that the thing done, written or spoken was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy : or the words written or spoken may in themselves be acts done in the course of the conspiracy.

The words of s. 10 of the Indian Evidence Act, 1872, must be construed in accordance with the above principle, and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past.

The words "common intention" in s. 10 signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. Hence, any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is not admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference.

There is a distinction between communications between conspirators while the conspiracy was going on with reference to the carrying out of the conspiracy and statements made after arrest or after the conspiracy has ended, by way of description of events then past.

*Emperor v. Vaishampayan*<sup>1</sup> and *Emperor v. Abani Bhushan Chuckerbutty*,<sup>2</sup> approved.

*The Queen v. Blake*,<sup>3</sup> relied on.

Rules 1 and 3 of the rules made under s. 7 of the North-West Frontier Province Courts Regulation, 1931, construed.

THE facts appear sufficiently from the judgment.

- *H. D. Cornish* and *G. Greenwood*, for the appellant.
- *G. D. Roberts* K. C. and *W. Wtillach*, for the respondent.

1 (1931) I. L. R. 55 Bom. 839,  
s.c. 33 Bom. L. R. 1159.

2 (1910) I. L. R. 38 Cal. 169.  
3 (1844) 6 Q. B. 126.

LORD WRIGHT. This is an appeal *in forma pauperis* by special leave from a judgment and order of the Court of the Judicial Commissioner, North-West Frontier Province, dated July 10, 1939. The learned Judicial Commissioner dismissed the appellant's appeal from his conviction of an offence punishable under s. 302/120-B, Indian Penal Code, i.e., conspiracy to murder in consequence of which conspiracy murder was committed, and confirmed the sentence of death passed on him by the Additional Sessions Judge, Peshawar Division, on May 8, 1939.

The appeal raises two main points, which are the only points calling in their Lordships' judgment for consideration here. They are independent of each other. The first is a question as to the jurisdiction of the Court by which the sentence was confirmed. It was contended on behalf of the appellant that the Court was not legally constituted, because the appeal to the Court was dismissed and the sentence confirmed by a single Judge of the Court of the Judicial Commissioner sitting alone. The second was whether if the objection as to jurisdiction failed, the decision of the Court was vitiated by misreception of evidence. As their Lordships announced at the conclusion of the arguments before them, they were of opinion that both points failed the appellant and that the appeal should be dismissed. They will now state their reason for coming to that conclusion.

The appellant was charged with conspiracy to murder, in consequence of which conspiracy murder was committed under the joint effect of s. 302/120B of the Indian Penal Code. He was convicted and sentenced to death by the trial Judge, Mr. Mohammad Ibrahim, Additional Sessions Judge, Peshawar Division, assisted by four assessors who were unanimously of opinion that all three accused including the appellant were guilty. The facts of the case and the circumstances under which they were convicted will be dealt with, so far as relevant in this appeal, in connection with the second question, that of evidence. When, after some preliminary proceedings, the appeal came on for hearing before the Court of the Judicial Commissioner on July 10, 1939, it was heard by Almond, the Judicial Commissioner, sitting alone. Kazi Mir Ahmad A. J. C., the Additional Judicial Commissioner, was absent on leave. The period of his leave was for two months with effect from May 30, 1939. The Honourable Mr. M. A. Soofi had been appointed under s. 222(2) of the Government of India Act, 1935, to act as a Judge of the Court during the absence of Kazi Mir Ahmad, A. J. C. But it happened that in this particular case Mr. M. A. Soofi was disqualified from sitting on the appeal because, as the Judicial Commissioner at the outset of his judgment on the appeal explained, Mr. M. A. Soofi had exercised judicial functions in the proceedings. The question whether in those circumstances the Court was properly constituted by Almond J. C. sitting alone falls to be determined on the basis of rr. 1 and 3, of the Rules made on May 19, 1939, by the Governor of the North-West Frontier Province in the exercise of the powers conferred on him by s. 7 of the North-West Frontier Province Courts Regulation, 1931 (as amended), for the purpose of specifying the classes of civil and criminal proceedings which were to be heard by a bench of the Court of the Judicial Commissioner, North-West Frontier Province. The rules provide respectively as follows :—

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Rule 1 of the said rules provides that the following classes of criminal cases are to be disposed of by a Bench, viz., any appeal from a sentence of death or of transportation for life and any cases of confirmation or revision of any such sentence.

Rule 3 provides that notwithstanding anything contained in these rules where a Judge of the Court has in a subordinate capacity exercised judicial functions at any stage of a criminal proceeding or is personally interested therein, he shall not hear any appeal or reference arising out of such proceeding, and if it is not practicable to constitute a Bench without such Judge, such appeal or reference shall be heard by another Judge sitting alone.

That Mr. M. A. Soofi was disqualified under r. 3 was not disputed, but it was contended on behalf of the appellant that in the circumstances of the case compliance with r. 1 was not excused and that the appeal could only be legally disposed of by a bench. It was not established, so it was contended, that it was not practicable to constitute a bench without such Judge (that is Mr. M. A. Soofi), and accordingly the appeal could not legally be heard by another Judge (in this case the Judicial Commissioner), sitting alone.

Their Lordships are of opinion that the objection is not well founded. On July 10, 1939, when the appeal came on for hearing, it was not practicable to constitute a bench without Mr. M. A. Soofi, because there was no other Judge of the Court available to sit with Almond J. C. In the event the precise language of r. 3 was thus satisfied. It was however contended that the appeal might have been adjourned until the return of Kazi Mir Ahmad A. J. C., from his leave, say, until July 30, 1939, an adjournment of twenty days. But their Lordships find in the rule nothing to justify this qualification of the words of the rule. If however there is some reservation implied, so that the rule is to be construed as meaning "not reasonably practicable", there must be some authority to decide what is reasonable in the circumstances. Their Lordships think that this authority could be no other than the Judge. To decide whether or not an appeal should be adjourned is particularly a matter for the discretion of the Judge. It is not here necessary to decide whether in any case the decision of the Judge under r. 3 can be overruled, but their Lordships think that if the exercise of this discretion, which is a judicial discretion, is to be in any case overruled, strong grounds for doing so must be shown. It is enough to say that no such grounds are shown here.

No authority has been cited directly in point. Reference was made to various decisions under s. 274 of the Code of Criminal Procedure, which provides that where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and if practicable of nine persons. The language of this provision is different from that of the rule and the conditions are different, particularly in view of s. 276, which enables a deficiency to be made good by leave of the Court by choosing other jurors from persons who may be present. There has been some difference of judicial opinion as to the true effect of the s. 274, but the more recent, and, in their Lordships' opinion, better, view is that adopted in *Emperor v. Benat Pramanik*<sup>1</sup>, which is that if the Judge proceeds with seven jurors, it must be assumed in the absence of anything on the record to satisfy the Appeal Court that it was practicable to have more than seven jurors, that s. 274 had been complied with. These decisions so far as they go may

tend to support the opinion just expressed in regard to r. 3, but as already stated, they do not give direct help in the construction of r. 3.

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In their Lordships' judgment the objection of want of jurisdiction fails.

The second objection requires some statement of the facts and the evidence. The appellant was tried along with the actual murderer Umar Sher, and with Mst. Mehr Taja who had been the wife of the murdered man, Ali Askar. The murder was committed on August 23, 1938, in the village of Taus Banda about four miles from Hoti. The guilt of Umar Sher was not really open to doubt. He was practically caught red-handed. He was caught running away with a single barrel shot gun in his hand, the barrel of which smelt as if freshly discharged. There was an empty cartridge jammed in the barrel. When the appellant came up from the field in which he had been working about half a mile away from the scene of the murder he asserted that Umar Sher was innocent and should be released, but the others present refused to do so. Umar Sher's main defence seems to have been absence of motive. This fact however was relied upon by the prosecution as showing that he was a hired assassin, bribed to commit the murder by the appellant and Mst. Mehr Taja who were co-conspirators in that regard. This was found by the Court to have been the fact. The principal evidence of the conspiracy between these two prisoners consisted of three letters, two from the female prisoner to the appellant, and one from the appellant to the female prisoner. The authenticity of the letters as being what they purport to be, and the handwriting have not and could not have been contested before their Lordships.

It will be convenient to set out the relevant portions of the three letters. They are (1) exhibit P.A. in the handwriting of Mst. Mehr Taja :

"Greetings to thee O my sweet-heart. Mind not in the least if I have been hard on thee at times—pray forgive me for the same. In fact I feel offended when ill is spoken of thee. Khan Khela who had visited my house when Amir Jan was suffering from pain had a lot of talk against thee, but beware and lend not thy ears to these. They are arch devils. Partake not of anything from their hands. Now I shall sell myself and do this act if only I have thee at my back. What a blissful hour it would be when with Amir Jan wailing over Ali Askar we contract our Nikah and enjoy ourselves. Be not angry my darling for thy sorrow makes me sad. However hard on thee I have been in the past, that is all past. Henceforth I solemnly promise to desist. I do fervently cherish the hope that God will make thee mine. Try and send Mir Aftab often to me so that I may talk to him. I have found out money for thee but thou must unhesitatingly find out the man. My heart is bursting for thee and I long for thee immensely. In the end accept my greetings."

Exhibit P. B. (also in Mst. Mehr Taja's handwriting) :—

"Letter to the sweet-heart. Peace be on you. The fact, my darling is that I am in great distress : otherwise I would not have conveyed thee such harsh things. I say these to thee for I am extremely distressed. Whom but thee have I as my own in this land of the Lord ... I have a lot to tell you but I am helpless. For God's sake spare not a moment or thou wilt ever repent my loss. They are all one against me. It would be better if aught thou couldst do. Accept greetings."

Exhibit P. D. (in handwriting of the appellant) :—

"My sweet-heart and the bearer of my burden. If thou tauntest me in regard to my mother what do I care for her. I look to my God and to thee only for reliance. I cannot wait any more. For the sake of God and his Prophet do try or I will die. You must find out the money or I would die. Is it of my choice to be

P.C.. roaming about and thou be enjoying with him, but what shall I do. If I had my  
 1940 own way I would not have left you to remain with him. I am burning and have  
 — pity on me for God's sake. To me the passing of each day is like months and years.  
 MIRZA Once place thyself in my charge and satiate me with the honey of thy red lips. Even  
 AKBAR if thou cuttest my head off my neck I would still yearn for thy white breast. This  
 is my last word if only thou wouldst attend to it. I have vowed for thy sake at  
 many a shrine. The house of the torturer will be rendered desolate. Mirza Akbar's  
 limbs have grown sapless after thee."

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The Judges in the Court below have found in these letters, their authenticity being established, evidence justifying the conviction of the appellant and Mst. Mehr Taja. The Judicial Commissioner, in dismissing these prisoners' appeals, thus summed up the position, with special reference to the letters. He said :—

"There is a reference to Mirza Akbar by name in Ex. P. D. and the name clearly refers to the writer of the document. Furthermore, the three documents taken as a whole show that the two writers of the documents desired to get rid of Ali Askar so that they should marry each other and there was a question of finding money for hired assassin to get rid of him. Subsequently we find that Ali Askar was shot by a man who had no motive to shoot him. In addition to this there was the strange conduct of Mirza Akbar when Umar Sher was arrested. There is no reason for doubting the statement of the witnesses that he did request that Umar Sher should be released. It is true that in the earlier statements the witnesses did not mention this fact, but the obvious reason is that they did not attach any importance to it at the time because they had no conception as to what was the motive for the commission of the offence.

In my opinion there is no doubt whatsoever that these two appellants Mirza Akbar and Mst. Mehr Taja did enter into conspiracy to murder Ali Askar and that they hired Umar Sher to commit the actual murder, which he did."

But the appellant's contention was that this conclusion was vitiated by the admission as against him of a statement made by Mst. Mehr Taja before the Examining Magistrate after she had been arrested on the charge of conspiracy. That statement which was made in the appellant's absence was admitted in evidence both by the trial Judge and by the Judicial Commissioner on appeal as relevant against the appellant under s. 10 of the Indian Evidence Act. The Judicial Commissioner said that it had been argued that s. 10 did not apply to any statement made by conspirators if the offence to commit which they conspired has actually been committed. He rejected that argument and refused to hold that s. 10 had that limited meaning, though he held that the evidence of the statement could not have great weight as against the appellant, since he had not had any opportunity of cross-examining Mst. Mehr Taja upon it.

In their Lordships' judgment, the Judicial Commissioner misconstrued the effect of s. 10.

The English rule on this matter is in general well settled. It is a common law rule not based on, or limited by, express statutory words. The leading case of *The Queen v. Blake*<sup>1</sup> illustrates the two aspects of it, because that authority shows both what is admissible and what is inadmissible. What in that case was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator contained in various documents actually used

for carrying out the fraud. But a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other. No doubt what was contained in it amounted to a statement evidencing what had been done and also the common intent with which at the time it had been done, but it had nothing to do with carrying the conspiracy into effect. Lord Denman said at p. 138 that the evidence must be rejected

on the principle that a mere statement made by one conspirator to a third party or any act not done in pursuance of the conspiracy is not evidence for or against another conspirator.

Patteson J. described it as "a statement made after the conspiracy was effected". Williams J. said that it merely related "to a conspiracy at that time completed". Coleridge J. said that it "did not relate to the furtherance of the common object". The words relied upon in s. 10 of the Indian Evidence Act are "in reference to their common intention". These words may have been chosen as having the same significance as the word 'related' used by Williams and Coleridge JJ. Where the evidence is admissible it is in their Lordships' judgment on the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy (per Patteson J. at p. 139). The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy: or the words written or spoken may in themselves be acts done in the course of the conspiracy. This being the principle, their Lordships think the words of s. 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships' judgment, the words "common intention" signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships' judgment s. 10 embodies this principle. That is the construction which has been rightly applied to s. 10 in decisions in India, for instance, in *Emperor v. Vaishampayan*<sup>1</sup>, *Emperor v. Abani Bhushan Chuckerbutty*.<sup>2</sup> In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of the conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past.

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<sup>1</sup> (1931) I. L. R. 55 Bom. 839,  
s. c. 33 Bom. L. R. 1159.

<sup>2</sup> (1910) I. L. R. 38 Cal. 169.

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In their Lordships' judgment the statement of Mst. Mehr Taja falls under the latter category, and was wrongly admitted.

But in truth the question of law is not really material in this case. The statement so far from admitting a conspiracy with the appellant, categorically denied it. While the woman stated that the appellant had threatened to kill her and her husband if she refused to marry him, she had, she said, refused his advances and stopped him coming to the house. Mr. Roberts, counsel for respondent, frankly admitted that apart from the legal question, he could not rely on the statement as evidence of the conspiracy, or indeed on any other ground.

In their Lordships' judgment, however, the admission of the statement (to which it should be repeated that the Judicial Commissioner did not attach very great weight) did not vitiate the proceedings. On the material before the Court, after the statement is excluded, there was evidence sufficient to justify the conviction. The terms of the letters are only consistent with a conspiracy between the prisoners to procure the death of Ali Askar. The vague suggestion that they related merely to a scheme to obtain a divorce and to raise money for that purpose is clearly untenable. The handwriting of the letters is clearly established. Under those circumstances their Lordships will follow the precedent established in *Pakala Narayana Swami v. The King-Emperor*<sup>1</sup> and hold that in this case as in that it is impossible to say that the proceedings which ended with the conviction resulted in a failure of justice.

They accordingly humbly advise His Majesty that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for appellant : *Nehra & Co.*

Solicitor for respondent : Solicitor, India Office.

#### FULL BENCH—APPELLATE CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice Macklin, and  
Mr. Justice Wassoodew.*

1940

GURAPPA GURUSHIDDAPPA NEELI

v.

September 6.

AMARANGJI VANICHAND.\*

*Decree—Charge created by decree—Failure to pay instalments under decree—Sale of charged property—Balance remaining due after such sale—Execution of decree—Attachment and sale of judgment-debtor's other property—Personal decree not necessary—Civil Procedure Code (Act V of 1908), O. XXXIV.*

<sup>1</sup> (1939) L. R. 66 I. A. 66,  
s. c. 41 Bom. L. R. 428.

\* First Appeal No. 151 of 1939,  
from the decision of M. S. Patil,

First Class Subordinate Judge of  
Dharwar, in Special Darkhast No. 212  
of 1936.



A money decree passed by consent directed the defendant to pay to the plaintiff the amount of Rs. 9,000 by yearly instalments of Rs. 2,000 each, and made the whole amount payable on default of payment of two instalments. It further gave a charge in favour of the plaintiff for the decretal amount on certain shares belonging to the defendant, and provided: "If defendant fails to pay money in time, the same should be recovered by sale of the said shares." The defendant having failed to pay two instalments on their due dates, the plaintiff had the shares sold and realised Rs. 4,350. The plaintiff next applied to execute the decree for the balance by attachment and sale of a house belonging to the defendant. The defendant contended, first, that the plaintiff having taken a charge on specific shares, had abandoned his right to recover the money by any other means, and alternatively, that even if he had such right, he should first of all proceed to get a personal decree for payment:—

*Held*, in construing the decree, that the plaintiff having failed to realise the whole amount of his debt by sale of the charged shares could proceed under the decree to attach any other property of the judgment-debtor which might be available:

*Janardan v. Krishnaji*,<sup>1</sup> disapproved and overruled;

*Raychand Jivaji v. Basappa Virappa*,<sup>2</sup> commented upon;

*Ambalal Babubhai v. Narayan Tatyaba*<sup>3</sup> and *Gurupadappa Mallappa v. Basappa Shiddappa*,<sup>4</sup> distinguished.

#### PROCEEDINGS in execution.

Suit to recover balance due on a khata.

On April 13, 1931, the plaintiff firm of Amarangji Vanichand sued to recover Rs. 10,392 on a khata passed by Gurappa Gurushiddappa (defendant). The case made out in the plaint was that the defendant had pledged certain shares belonging to him with the plaintiff by way of security and took a loan of Rs. 8,000 on September 16, 1928. The prayer in the plaint ran thus:—

"Plaintiff may be awarded from the defendant the amount of claim (viz.) Rs. 10,392 and all the Court costs and future interest according to the said stipulated rate from the date of the filing of the suit till payment. If the defendant does not pay the amount a decree may be passed to recover the amount by sale of the share certificates deposited with the plaintiff by the defendant as security for the loan (amount) and in case of deficit to recover the same from the defendant personally."

The suit ended on November 28, 1931, in a compromise-decree, which provided as follows:—

"It is ordered as follows: (1) The defendant do pay to the plaintiff a lump sum of Rs. 9,000 in respect of the amount of claim by yearly instalments of Rs. 2,000 (each). (2) The first instalment shall be paid on May 1, 1932, and the further instalments shall also be paid on May 1 of successive years. (3) If the defendant fails to pay to the plaintiff two instalments consecutively, the plaintiff shall have the right to recover the whole of the remaining amount at once. (4) Future interest on Rs. 9,000 at 0-6-0 six annas per cent. per month from the date of the decree till payment of the whole of the amount shall be paid to the plaintiff. (5) A charge of the plaintiff for the said decretal amount of Rs. 9,000 is kept upon the suit shares. (6) If the defendant fails to pay the monies in time, the same should be recovered by sale of the said shares. The said shares are with the plaintiff. On payment of the amount (the same) shall be forthwith returned to the defendant."

1 (1920) 22 Bom. L. R. 953.

s. c. 21 Bom. L. R. 698.

2 (1940) 42 Bom. E. R. 1113.

4 (1940) 42 Bom. L. R. 592.

3 (1918) I. L. R. 43 Bom. 631,

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F. B. . There was failure in payment of instalments. The plaintiff filed an application (No. 116 of 1934) to recover the decretal amount. He recovered Rs. 4,350 by sale of the shares under charge. The darkhast was disposed of on December 9, 1935.

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In 1936, the plaintiff filed another darkhast (No. 212 of 1936) to recover the balance of Rs. 4,241-6-0 and costs of execution by sale of a house of the defendant. The house was attached on June 29, 1937. An order for sale of the house was made on July 2, 1937.

On July 5, 1937, the defendant applied to the Court contending that the plaintiff had no right to proceed either against him personally or against his property other than the shares under charge, in execution of the decree.

The executing Court overruled the defendant's contention, observing as follows :—

"Reading the decree as a whole I feel no hesitation in coming to the conclusion that the defendant had undertaken to pay the decretal amount personally by the consent decree and that the plaintiff is within his rights in recovering the balance of the decretal amount by sale of the property now under attachment. The decree directs the defendant to pay the decretal amount by annual instalments, as seen from the first portion of the operative part of the consent decree. 'The defendant should pay plaintiff a lump sum of Rs. 9,000 by annual instalments etc.' There was an obligation on the part of the defendant to pay and a consequent authority in the plaintiff to recover the same from the defendant personally. The subsequent portion of the decree awarded additional relief to the plaintiff to recover at once the entire amount of the decree under certain circumstances. In case of need the plaintiff was further granted the right to sell the shares under charge for the recovery of the decretal amount. The submission of the learned pleader for the defendant that the sale of these aforesaid shares was the sole relief awarded to the plaintiff by the consent decree is unacceptable having regard to the meaning of the first portion of the operative part of the decree which has been already referred to above. If his interpretation were to be accepted this portion of the decree becomes redundant. He bases his argument relying mostly on the ruling in *Janardan v. Krishnaji* (22 Bom. L. R. 953). But that ruling is inapplicable in the present case. The consent decree in the reported case which was interpreted had been passed in a mortgage suit of immoveable property; and consequently the provisions of r. 6 of O. XXXIV, Civil Procedure Code, had to be applied in interpreting the several clauses in the decree to ascertain if the decree-holder in the course of the execution proceedings could at once apply to execute the decree personally against the judgment-debtor without getting the decree made final. It was held in that reported case that the plaintiff was not entitled to proceed against the other property of the defendant, since there must be a decree made personally against the defendant before it could be executed against property other than the mortgaged property. No such consideration can arise in this case as the property under charge is moveable property and further as the provisions of the rules under O. XXXIV, Civil Procedure Code, relating to mortgages apply merely to mortgages of immoveable properties as seen from the heading of that Order and the ruling in *Official Assignee, Bombay v. Chinnai Motilal*, 34 Bom. L. R. 1615, at pp. 1621 to 1623. As the provisions of r. 6 of O. XXXIV, Civil Procedure Code, are inapplicable in this case and further as there are no similar provisions applicable in the cases of pledge or charge of immoveables in the Civil Procedure Code, the mode of interpretation of the decree in the reported case cannot be taken as a guide to interpret the consent decree now in execution. The ruling relied on for the defendant is clearly distinguishable. It is inapplicable to the facts of the present case. The argument advanced for the defendant is thus untenable. Giving due importance to the plain and unambiguous language used in the decree I interpret it as making it obligatory on the defendant to pay the decretal amount per-

sonally and consequently authorising the plaintiff to recover the balance of the decretal amount by attachment and sale of the defendant's property other than that under charge."

The defendant appealed to the High Court.

The appeal was heard by Beaumont C. J. and Wassoodew J. on August 21 and 22, 1940, when their Lordships referred it to a full bench.

The reference was heard by a full bench consisting of Beaumont C. J., N. J. Wadia J. and Wassoodew J., on September 6, 1940.

S. A. Desai, with A. G. Desai, for the appellant.

S. R. Parulekar, for the respondent.

S. A. Desai. I submit that where in the course of a suit a charge is created, such charge negatives personal liability. Secondly, by expressly mentioning a particular remedy granted by a decree the other reliefs are denied : *expressio unius exclusio alterius*. Thirdly, you cannot divorce a decree from the plaint, for s. 11, expln. V, of the Civil Procedure Code, provides : "Any relief claimed in the plaint, which is not expressly granted by the decree, shall, . . . be deemed to have been refused." Fourthly, the principle of O. XXXIV of the Code applies to the present case where charge is created for the first time by the decree itself. On the last point there is a divergence of opinion among Judges of our Court. Further question is whether O. XXXIV applies to moveables in principle.

In his second edition of the Transfer of Property Act, 1882, Sir Dinshah Mulla says (p. 547) : "When a charge is created by act of parties the specification of the particular fund or property negatives a personal liability. The remedy of the holder of the charge is against the property charged only." The decree in the present case, being one passed in terms of a compromise, is on the footing of a contract between two parties. The judgment-debtor has made a concession by admitting the whole amount claimed and has therefore consented to the creation of a charge. Hence probably the creditor agreed to be content with the creation of the charge only. Even if the decree is so construed, the darkhast must be dismissed. The parties should be held to the contract.

The Allahabad High Court in *Raghukul Tilak v. Pitam Singh*<sup>1</sup> said (p. 904) : "It appears to us that the question whether a charge-holder has a personal remedy against the person over whose property he holds a charge is a matter of contract. In the case of a simple mortgage it has been recognized that in the absence of a contract to the contrary, a simple mortgage carries a personal liability. Where there is a simple mortgage, there is a presumption that there is a personal liability, and unless the personal liability is excluded by an express contract it will exist. No such rule applies to the case of a charge." See also *Posti Mal v. Radha Kishan Lalchand*.<sup>2</sup>

In the case of an ordinary money decree the principle of O. II, r. 2, will apply. That principle does not apply to mortgage decrees, which are governed by O. XXXIV, r. 14, in so far as a mortgagor may waive his right to the institution of the second suit. The latter provision should be confined to a charge created before the institution of a suit, and not to a charge which came

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<sup>1</sup> (1930) I. L. R. 52 All. 901.

<sup>2</sup> (1932) I. L. R. 54 All. 763.

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into existence during the progress of a suit. In every case, however, it must be a question of construction of the decree. It is laid down by Broomfield and Divatia JJ. in the recent case of *Raychand Jivaji v. Basappa Virappa*<sup>1</sup> (p. 1122) : "...the principles underlying O. XXXIV, although they may not strictly apply in the case of a charge, may be applied and ought to be applied by analogy to charges created by a decree, unless indeed the terms of the decree make it clear that the remedy of recovering the decretal amount from the property charged was not given in lieu of the personal remedy, but in addition to it." The learned Judges referred with approval to *Janardan v. Krishnaji*,<sup>2</sup> which has been followed over and over again not only in this High Court but in other High Courts also. It is recently followed by Kania J. in *Gurupadappa Mallappa v. Basappa Shiddappa*.<sup>3</sup> Ordinarily, when you create a charge, you prima facie exclude personal liability. The whole question is one of construction, and in the light of certain canons of interpretation the decree stands on the same footing as any other contract between parties thereof. It is open to parties to provide for various eventualities. If they do not, they take the consequences. The decree should be construed in the light of explanation V of s. 11, Civil Procedure Code, inasmuch as in the present case the plaintiff had prayed in the plaint for a personal decree which has not been expressly granted in the decree. Furthermore a charge excludes personal liability.

Shah J. in *Ambalal v. Narayan*<sup>4</sup> was of opinion (p. 705) : Order XXXIV, r. 14, meant "that the decree should relate to the payment of money in satisfaction of a claim arising under the mortgage, i.e., a mortgage independent of the decree. It can have no application where the charge or the mortgage is created by the decree and where the direction as to payment of money is in no sense in respect of a claim arising under the charge or the mortgage." This case can be distinguished on three grounds : (1) liberty to apply was reserved in that decree ; (2) decree was merely declaratory ; and (3) in the present case, the charge was created prior to the decree by a compromise.

I submit that either O. XXXIV applies or it does not apply. If it applies, then there must be a separate application for a personal decree. If it does not apply, then s. 11, expln. V, comes in in any event. The Order does not apply where the mortgage does not exist prior to the decree. Here, prior to the passing of the decree, the charge was created by the compromise. If O. XXXIV applies, in the present case no application for personal decree under r. 6 has been made and hence the darkhast must be dismissed.

The analogy from a decree for maintenance as in *Srinivasa Ayyar v. Lakshmi Ammal*,<sup>5</sup> as was pointed out in the case before Lokur J. in *Lakshmi Bai v. Shantaram*,<sup>6</sup> is irrelevant ; where you mention a particular relief in a decree you are confined to that relief only.

There also are cases which bear against my contention. The first one is *Gurupadappa v. Karveerappa*,<sup>7</sup> which emphasizes that O. XXXIV, r. 14, has no application to the execution of a decree which creates a charge for the first

1 (1940) 42 Bom. L. R. 1113.

2 (1920) 22 Bom. L. R. 953,  
957, 959.

3 (1940) 42 Bom. L. R. 592, 594.

4 (1919) 21 Bom. L. R. 696.

5 (1932) J. L. R. 56 Mad. 343.

6 (1938) 41 Bom. L. R. 420.

7 (1934) 36 Bom. L. R. 523.

time, there being no prior mortgage. The principle of O. XXXIV, however, applies only to immoveable property. It demands that if there is a deficit from sale of property mortgaged, the decree-holder should apply for a personal decree. If O. XXXIV does not apply, the decree-holder comes under s. 11, expln. V, or else he should file another suit. Where there is a money decree plus something else, that something else changes the character of the decree : *Gurupadappa v. Karveerappa*.<sup>1</sup> Where there is a complicated decree, you should read it as a whole. So read, it is clear that the personal relief is not expressly granted.

Secondly, there is the unreported judgment of Barlee J. in *The Automobile Sales Company, Ltd. v. Anant Subrao Yatgiri*,<sup>2</sup> which is directly against me.

In *Shibu Bera v. Chandra Mohan Jana*<sup>3</sup> a mortgagee first instituted a suit to enforce his security and took merely a money decree, but failed to obtain satisfaction of the decree. He then brought a second suit to realize the debt by the sale of the mortgaged property. In holding that the second suit was not competent Maclean C. J. said (p. 851) : "Apart from authority, I should have thought that, inasmuch as the plaintiff elected to take a decree in the form he did, in the former suit, and practically abandoned or waived his right, which he then undoubtedly had, to have the mortgaged property sold in the event of the money not being paid, he cannot now, having regard to the provisions of section 13 of the Code of Civil Procedure, successfully ask that the property should be sold in the present suit." Much more so in the present case. The principle of *res judicata* is not confined to the terms of s. 11, Civil Procedure Code, i.e., s. 11 is not exhaustive. It applies not only when the question arises in two suits but also in a darkhast, a suit or *vice versa* or in the continuation of the same suit : Mulla's Civil Procedure Code, 10th edn., p. 86.

The case of *Official Assignee, Bombay v. Chimmiram Motilal*<sup>4</sup> is against me. But it is an authority for r. 14 of O. XXXIV and not r. 6.

A decree passed by consent creates estoppel by judgment. Order XXXIV, r. 14, does not apply to consent decrees. If the principle of O. XXXIV is followed here, the decree-holder should first apply to the Court for a personal decree.

In *The Co-operative Hindusthan Bank, Ltd. v. Surendranath De*<sup>5</sup> the Calcutta High Court applied the rules of O. XXXIV to mortgages of moveables, and in *Mahamaya Debi v. Haridas Haldar*<sup>6</sup> it was held that foreclosure, as a remedy of the mortgagee, was not confined to mortgages of *land* ; it was equally applicable to mortgages of *chattels*.

Explanation V to s. 11 applies as much to consent decrees as to contested decrees. The rule applies not only to mortgages but also to charges (see Mulla's Civil Procedure Code, 10th edn., p. 1022). At any rate the principle of r. 6 of O. XXXIV should be applied to the present case of moveables because it is a rule of procedure based on equitable considerations.

S. R. Parulekar, was not called upon.

1 (1934) 36 Bom. L. R. 523, 525, per Barlee J.

2 (1935) First Appeal No. 61 of 1934, decided by Barlee J., on August 22, 1935 (Unrep.)

3 (1906) I. L. R. 33 Cal. 849.

4 (1932) 34 Bom. L. R. 1615.

5 (1931) I. L. R. 59 Cal. 667.

6 (1914) I. L. R. 42 Cal. 455.

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BEAUMONT C. J. This is an appeal from a decision of the First Class Subordinate Judge of Dharwar, and it raises a question in execution, which has caused some difference of opinion in this Court, and is of very common occurrence.

In 1928 the plaintiff made an advance of Rs. 8,000 to the defendant, and certain shares were charged to secure the amount. In 1931 the plaintiff sued to recover the amount due, and on November 28 there was a consent decree. The decree recites the plaint, and then (in cl. 1) directs the defendant to pay to the plaintiff a lump sum of Rs. 9,000 by yearly instalments of Rs. 2,000. Then there is a default clause making the whole amount payable on default of payment of two instalments. Then it is provided that a charge in favour of the plaintiff for the decretal amount of Rs. 9,000 is kept upon the suit shares, and then the decree goes on : " If defendant fails to pay the monies in time, the same should be recovered by sale of the said shares." The defendant failed to pay the instalments on the due dates, and in 1934 the shares were sold and realised Rs. 4,350. In 1936 the plaintiff took out the present dakhast to recover the balance of the debt by attachment and sale of a house belonging to the defendant. It is contended by the defendant that the plaintiff, having taken a charge on specific shares, has abandoned his right to recover the money by any other means. Alternatively, it is said that if he desires to recover the money by any other means, and has a right to do so, he must first of all proceed to get a personal decree for payment. The learned Subordinate Judge decided in favour of the plaintiff.

Now, taking the decree as it stands, and without reference to authorities in the first instance, I should have thought that its meaning was perfectly plain. It is very common to have a consent decree for payment of money making the amount payable by instalments ; but if the creditor agrees to instalments, he is, of course, abandoning his present right to execute the decree for the full amount due, and to compensate him for that it is very common for the debtor to give him a charge on property. In the present case, property, namely the shares, had been charged beforehand, but I think the same principle would apply if the charge had been created in the first instance by the decree. But in taking a charge it seems to me that what the creditor is looking to is his protection against the rights of intervening creditors, who may attach property of the judgment-debtor whilst the plaintiff's hands are tied by the time given for payment of instalments. That seems to me to be the object of a charge ; not to regulate the order in which the defendant's property is liable to be attached. Taking cl. (1) of this decree, it is perfectly plain that it amounts to an order for payment, and if such clause stood alone, it could be enforced by any of the methods authorized by the Civil Procedure Code, including attachment and sale of any of the defendant's property. There is nothing in the rest of the decree which expressly takes away or limits that right, and I can see no reason why it should be held that the plaintiff by implication has deprived himself of that right or delayed its enforcement, merely because he has protected himself against other creditors by taking a charge on part of the defendant's property. Therefore, if I had to construe the decree without reference to authorities, I should say that there was no doubt whatever that the plaintiff, having failed to realize the whole amount of his debt by sale of the

charged shares, can proceed under the decree to attach any other property of the judgment-debtor which may be available.

However, there are undoubtedly two cases of this Court, which are against that view. There is, first of all, a decision of an appellate bench in *Janardan v. Krishnaji*.<sup>1</sup> The learned trial Judge distinguished that case by pointing out that it was a mortgage suit, as no doubt it was, but in that mortgage suit there was a consent decree, very much in the same terms as the decree in the present suit. Mr. Justice Shah, in the Court of first instance, said this (p. 956) :—

"I see no reason to limit the plain meaning of the decree as to the payment of the full amount in instalments by the provision as to the realisation of the full amount by the sale of the mortgaged property in default of the payment of any two instalments. The decree directs the defendants to pay the full amount, and the obligation is not in my opinion limited by the provision relating to the sale of the mortgaged property."

I think that is right ; but in appeal Sir Norman Macleod, the Chief Justice, said (p. 958) :

"It seems clear to me that there must be a decree personally made against the mortgagor before it can be executed against property other than the mortgaged property. The decree in this case cannot be said to be a personal decree merely because it directs that the defendants should pay the amount."

With all respect to the learned Chief Justice, I do not follow the last proposition. A decree which directs payment of the amount is *prima facie* a personal decree. The Court in that case purported to act by analogy to O. XXXIV of the Civil Procedure Code. Now, O. XXXIV is a code, which regulates the enforcement by suit of mortgages, and the scheme of the Order is that in the preliminary decree there is a direction on the mortgagor to pay the amount found due into Court ; on payment there is to be redemption, and on failure to pay, the mortgaged property can be ordered to be sold ; and then there is liberty reserved to the mortgagee to apply for a personal decree against the mortgagor for any balance not realized. That is the general scheme of the Code, and where one is dealing with a decree in a mortgage suit relating to immoveable property, one must follow that scheme. I agree that one must read the decree as a whole, and if a preliminary mortgage decree provided, in the first instance, that the mortgagor should pay the amount, not into Court but to the mortgagee, the Court would not be justified in construing that as an executable decree for payment, because, taking the decree as a whole, it provides that there is not to be a personal decree for payment until the mortgaged property has been sold and a deficit has resulted. But I cannot see any reason why one should apply the analogy of a mortgage decree to a consent decree, which must be construed according to the terms of the language used. Mr. Desai contends that the principles of O. XXXIV should be applied. I do not quite know what is meant by the principles of O. XXXIV. It would have been quite easy to provide in the Code that in the preliminary decree there should be a personal judgment for the balance remaining due after sale of the mortgaged property. There is no principle of equity, which I know of, which would make such a provision improper ; but it happens that that is not

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<sup>1</sup> (1920) 22 Bom. L. R. 953.

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the scheme of the Code framed by the Legislature. There is, however, to my mind nothing inequitable in construing an agreement between parties so as to provide that the mortgagor shall pay to the mortgagee anything remaining due after sale of the mortgaged property, or that there shall be a personal decree for payment, which may be enforced before recourse is had to the mortgaged property. There is nothing inequitable in requiring that a debtor shall pay his debt immediately after the liability has been ascertained. In my opinion, the decision of Mr. Justice Shah in *Janardan v. Krishnaji* was right, and the decision of the appellate Court was wrong.

Then there is another case, to which we have been referred, a very recent decision of this Court in a Letters Patent Appeal from a decision of Mr. Justice N. J. Wadia (*Raychand Jivaji v. Basappa Virappa*<sup>1</sup>). In that case there was a consent decree under which the defendant was directed to pay a certain sum by instalments; there was no default clause, but certain immoveable property was charged for the amount. It may be that the absence of a default clause creates a distinction; the case has not yet been reported,<sup>1</sup> and I do not know the exact facts. But Mr. Justice Broomfield in giving the judgment of the Court refers to *Janardan v. Krishnaji* and to other cases, and he concludes in these words (p. 1122) :—

“In every case it must be essentially a question of construction of the decree, but unless the contrary appears, we think the ordinary rule should be that when a charge is created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the holder of the charge is against the property charged only or at any rate against the property charged in the first instance. In my opinion that is the way in which the decree in this case should be construed.”

I am unable to agree with that conclusion. To apply such a rule of construction to a consent decree for payment of money would seem to me to be wrong in principle, and inexpedient in practice. In arranging consent decrees of the nature in question, it is usually the creditor, and not the debtor, who is master of the situation, and I can see no justification for holding that, by taking a charge upon specific property, the primary object of which, as I have pointed out, is to secure him against other creditors, the creditor abandons his right to proceed against other property of the debtor. Such an abandonment should not be presumed in the absence of language making clear the intention to abandon. On the other hand, to hold that the creditor can only attach other property after obtaining a fresh order for payment is to ignore the fact that the decree already contains an order for payment. The only effect of the latter construction would be to impose further delay and additional expense upon the creditor. In this country experience shows that there are opportunities in plenty afforded to a judgment-debtor to delay his creditor, and I am not disposed to add to the number.

We were referred to other cases which can be distinguished. *Ambalal Babubhai v. Narayan Tatyaba*<sup>2</sup> which was followed in *Gurupadappa v. Karveerappa*<sup>3</sup> is rather in favour of the view which I take, but is no doubt distinguish-

1 (1940) 42 Bom. L. R. 1113,  
since reported.

2 (1918) I. L. R. 43 Bom. 631,

s. c. 21 Bom. L. R. 698.

3 (1934) 66 Bom. L. R. 523.



able. In both those cases there had been a decree and a charge created by the decree on immoveable property, and it was held that the charge could be enforced by execution of the decree without the necessity of filing a separate suit. The cases were both based on the view that the decree, which for practical purposes was in the same terms as the present decree, created a personal liability for payment of the amount due, and to that extent the cases are in favour of the view which I take. The decision of Mr. Justice Kania in *Gurupadappa Mallappa v. Basappa Shiddappa*<sup>1</sup> is again distinguishable. The learned Judge there held that the particular decree, with which he had to deal, was in the nature of a preliminary mortgage decree, and that being so, the provisions of O. XXXIV applied to it. It is not necessary to consider whether I should have come to the same conclusion as to the construction of that particular decree, but I agree that if once you find that the decree is in its nature a preliminary mortgage decree, the provisions of O. XXXIV apply, and there must be a further application for a personal decree. But, in my opinion, the decree with which we have to deal is quite plain in its meaning. It does not in terms restrict the right of the creditor to proceed against other property, and it does contain a decree for personal payment. It can therefore be executed against the house of the judgment-debtor.

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In my opinion, therefore, the decree appealed from was right. The appeal will be dismissed with costs.

MACKLIN J. I agree and have nothing to add.

WASSOODEW J. I agree.

*Appeal dismissed.*

#### APPEAL FROM ORIGINAL CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Kania.*

KHIMJI KUVIRJI SHAH

v.

LALJI KARAMSI RAGHAVJI.\*

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*Hindu law—Marriage—Contract of marriage—Betrothal—Agreement of betrothal entered into by mother of minor girl—Father entering into agreement on behalf of his major boy—Breach of contract—Right of minor girl to sue for damages—Contract of marriage conditional—Suitability of spouse.*

Amongst Hindus a contract of marriage entered into on behalf of a minor by the minor's legal guardian and shown to be for the minor's benefit is enforceable at the instance of the minor.

Where a contract of marriage was entered into between the mother of the plaintiff, who was a minor Hindu girl, acting as her guardian and on her behalf,

1 (1940) 42 Bom. L. R. 592.

\* O. C. J. Appeal No. 3 of 1940 :  
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and the father of the defendant on behalf of the defendant who was a Hindu and a major :—

*Held*, on consideration of the habits and customs prevailing amongst Hindus, that the contract being for the benefit of the minor girl could be enforced by her, and she could maintain a suit for damages for breach thereof by the defendant :

*Rose Fernandes v. Joseph Gonsalves*,<sup>1</sup> approved.

*Khwaja Muhammad Khan v. Husaini Begam*,<sup>2</sup> *Umed Kika v. Nagindas Narotamdas*,<sup>3</sup> *Mulji Thakersey v. Gombi and Kastur*,<sup>4</sup> *Purshotamdas Tribhovandas v. Purshottamdas Mangaldas*,<sup>5</sup> and *Abdul Razak v. Mahomed Hussein*,<sup>6</sup> referred to.

Under the Hindu law the contract of marriage is conditional on the husband being a suitable spouse at the time when the marriage is to be performed, and there being no more suitable husband available.

Mitakshara, Ch. II, sec. 11, verses 26 and 27 ; *Bahubhai Hiralal v. Nanabhai Bhagubhai*,<sup>7</sup> referred to.

#### BREACH of contract of marriage.

The plaintiff Manibai and defendant No. 1, Khimji Kuverji, defendant No. 2, Jethabhai Lakhamasi, and defendant No. 3, Shamji Chapsi, belonged to the Cutchi Dasha Oswal Jain Caste.

In 1926, defendant No. 1, who was nineteen years of age, was betrothed to the plaintiff, who was then four years of age. The betrothal was arranged between the plaintiff's mother as the natural guardian for and on behalf of the plaintiff and defendant No. 1's father for and on behalf of defendant No. 1, though defendant No. 1 was a major at the time.

On August 9, 1934, defendant No. 1 wrote to the plaintiff's mother who was her guardian calling upon her to get the plaintiff married to him. The plaintiff's mother replied on August 11, 1934, requesting defendant No. 1 to wait till the plaintiff attained marriageable age, the plaintiff being only twelve years old then.

The plaintiff alleged that her brother, Lalji Karamsi, repeatedly called upon defendant No. 1 since 1936 to fix a date for the performance of her marriage but defendant No. 1 failed to comply with his request, that defendant No. 1 wanted to back out of the betrothal arrangement and he had applied in 1935 to the Bombay Mahajan to get the betrothal cancelled ; and that defendant No. 1 got himself secretly married to the daughter of defendant No. 2 on March 19, 1938.

The plaintiff submitted that the betrothal agreement was entered into with her mother on her behalf and for her benefit by defendant No. 1's father on defendant No. 1's behalf and for his benefit, and the agreement was ratified by defendant No. 1 when he wrote a letter to her mother to perform her marriage in pursuance of the said agreement. She complained that although on her part she was ready and willing to have her marriage performed with defendant No. 1, defendant No. 1 committed a breach of the agreement by marrying the other girl, and she filed this suit through her eldest brother as

1 (1924) I. L. R. 48 Bom. 673,  
s.c. 26 Bom. L. R. 1035.

2 (1910) I. L. R. 32 All. 410,  
s.c. 12 Bom. L. R. 638, P.C.

3 (1870) 7 B. H. C. R. (O. C. J.)  
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4 (1887) I. L. R. 11 Bom. 412.

5 (1896) I. L. R. 21 Bom. 23.

6 (1916) I. L. R. 42 Bom. 499,  
s.c. 19 Bom. L. R. 164.

7 (1919) I. L. R. 44 Bom. 446,  
s.c. 22 Bom. L. R. 143.

her next friend to recover Rs. 10,001 as damages for the alleged breach. She made defendant No. 2, who was the father of the girl to whom defendant No. 1 was married, and defendant No. 3, who was the maternal grandfather of that girl and the father-in-law of defendant No. 2, parties to the suit as they, according to her, had conspired with defendant No. 1 and maliciously induced him to commit breach of the betrothal agreement.

Defendant No. 1 contended, *inter alia*, that as the betrothal agreement was arrived at between his father and the mother of the plaintiff when the plaintiff was a minor, the plaintiff was not entitled to maintain the suit; that the plaintiff's mother agreed to marry the plaintiff with him in consideration of his father agreeing to marry defendant No. 1's sister with the plaintiff's brother; that the plaintiff's mother demanded 2,500 korries (a coin) by way of further consideration and that was paid to her; that the consideration for his betrothal agreement was immoral and opposed to public policy and unlawful; that the agreement was, therefore, void and the plaintiff could not sue in respect of it.

Defendant No. 1 further contended that, in spite of his and his father's repeated requests, the plaintiff's mother neglected to perform the plaintiff's marriage with him; that the plaintiff's brother was convicted of theft and was not a suitable match for his sister; that he and his father had intimated to the plaintiff's mother that they were not going to marry his sister with the plaintiff's brother; that the plaintiff's mother intimated him and his father that unless his marriage with the plaintiff and the plaintiff's brother's marriage with his sister were performed simultaneously, she would not perform the marriage of the plaintiff with him; that he had, therefore, applied to the Bombay Mahajan in 1935 to cancel his betrothal; that he married the daughter of defendant No. 2 as there was no chance of his marriage with the plaintiff; that the breach of his betrothal agreement was committed by the plaintiff's mother and brother; and that the plaintiff was, therefore, not entitled to claim any damages.

Defendant No. 2 stated that he and defendant No. 3 did not conspire with defendant No. 1 or maliciously induce defendant No. 1 to commit a breach of the alleged betrothal agreement.

Defendant No. 3 contended similarly.

B. J. Wadia J., who heard the suit, held that the plaintiff was entitled to maintain the suit and passed a decree on December 19, 1939, in favour of the plaintiff for Rs. 1,000 against defendant No. 1, and dismissed the suit against defendant No. 3, defendant No. 2 being dead, holding that there was no conspiracy between defendant No. 1 and defendants Nos. 2 and 3 as alleged by the plaintiff. The following is the material portion of his Lordship's judgment :-

B. J. WADIA J. [After narrating the facts his Lordship proceeded :] It is alleged by the plaintiff's mother that defendant No. 1 was present at the betrothal, whereas according to defendant No. 1 and his father defendant No. 1 was not present at the time, but was studying at school in Palitana. His presence or absence at the time of the betrothal is immaterial. The betrothal was arranged between the plaintiff's mother on behalf of the plaintiff and defendant No. 1's father on behalf of defendant No. 1, though defendant

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No. 1 was of the age of majority at the time. I have already stated<sup>1</sup> before that the betrothal is not in dispute, and one of defendant No. 1's witnesses, Thakersi Hirji, at present the Vice-president of the Community to which the parties belong in Bombay, said that betrothals in their community were generally arranged by parents. It is nevertheless contended that the plaintiff cannot enforce the agreement made by her mother. Counsel relied on a passage in Mayne's Hindu Law, 10th edn., p. 146, where it is stated that "there can be no enforceable contract to marry on behalf of minor children", but no authority in support of this proposition has been cited. In *Rose Fernandes v. Joseph Gonsalves*,<sup>2</sup> where the parties were Goans, Mr. Justice Taraporewala, as he then was, held that it was a well recognised duty of parents among the Hindu and Mahomedan communities to make contracts of marriage for their daughters according to custom, and that there would also be a similar custom amongst parents belonging to the Goan community. No distinct custom prevalent among the Goans was alleged in the pleadings in that suit. The only custom referred to by the learned Judge was the general custom according to which amongst Indian communities such contracts are arranged by the parents. In *Bai Ugri v. Palel Purshottam Bhudar*,<sup>3</sup> Sargent C. J. observed at p. 406 that "the Hindu law leaves it entirely to the parents to marry their daughters, . . ." and in *Khwaja Muhammad Khan v. Husaini Begam*,<sup>4</sup> Mr. Ameer Ali, who delivered the judgment of their Lordships, observed as follows (p. 413):—

"Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common-law doctrine was applied to agreements or arrangements entered into in connection with such contracts."

The common-law doctrine there referred to is that a person who is not a party to an agreement is not entitled to enforce it. In that particular case the agreement of which the respondent wanted to take advantage specifically charged immoveable property for a certain allowance which she claimed, but the observation of Mr. Ameer Ali to which I have just referred is general, and it applies with equal force to the Hindus. Mr. Justice Taraporewala held that it was lawful for parents and guardians among the Hindu and Mahomedan and the Goan communities to make binding contracts of marriage on behalf of minor children, and that an agreement made by such parent or guardian on behalf of the minor where the parent or the guardian had the power to enter into an agreement binding on the minor, could, where the agreement was for the minor's benefit, be enforced by both parties to the agreement including the minor. I agree with the conclusion which the learned Judge arrived at. This decision was referred to by the Appeal Court in *Great American Insurance Company v. Madanlal Sonulal*,<sup>4</sup> in which it was laid down that though a minor's contract was void, a contract made on behalf of a minor by a person acting as his or her guardian and which was for the minor's benefit could be enforced by the minor. I do not think it

1 (1924) I. I. R. 48 Bom. 673,

s. c. 26 Bom. L. R. 1035,

2 (1892) I. L. R. 17 Bom. 400.

3 (1910) I. L. R. 32 All. 410,

s. c. 12 Bom. L. R. 638, P.C.

4 (1935) 37 Bom. L. R. 461.

is correct to say that the decision in *Rose Fernandes v. Joseph Gonsalves*<sup>1</sup> was not accepted by the Appeal Court. In *National Petroleum Company, Ltd. v. Popatlal*<sup>2</sup> the same Judges of the Appeal Court, differing from the judgment in *Kshirodebihari Datta v. Mangobinda Panda*,<sup>3</sup> held that an entire stranger to a contract cannot enforce or sue upon it. That was also held in an earlier decision in *Shankar Vishwanath v. Umabai*.<sup>4</sup> This rule of law is, however, subject to certain exceptions which have been set out in *National Petroleum Company, Ltd. v. Popatlal*,<sup>5</sup> namely, that a third person can sue if he claims through a party to the contract, or if he is in the position of a *cestui que trust*, or in the position of a principal suing through his agent, or if he claims under a family settlement. Counsel for defendant No. 1 argued that this particular case did not come under any one of those exceptions, but the rule of law to which there are these exceptions is a different rule. Shortly put, the rule is that when A and B enter into a contract under which A agreed to indemnify B against all his debts and liabilities, one of B's creditors cannot sue A upon the contract. That is a different proposition. Such a contract was not made for the creditor's benefit, even though he might subsequently come in and derive benefit under it. Similarly it was held by the Privy Council in *Nanku Prasad Singh v. Kamta Prasad Singh*<sup>6</sup> that a recital in a sale-deed executed by A in favour of B that B was to pay off a mortgage debt to the mortgagee would give no cause of action to the mortgagee to sue B. In *Krishna Lal Sadhu v. Pramila Bala Dasi*<sup>7</sup> Rankin C. J. observed at p. 1327 that there might be special rules of law applicable to communities among whom marriages are contracted for minors by parents and guardians which may form an exception to the general rule that persons who are not parties to the contract cannot enforce it, but he expressed no definite opinion on the point. This case was referred to in *Subbu Chetti v. Arunachalam Chettiar*.<sup>8</sup> In the latter case also the ordinary rule of law applied that where there was a contract between A and B under which B agreed to pay a sum of money to C and no more circumstances appeared, C as a stranger to the contract could not sue B. In England a contract of apprenticeship made by a father for his minor son is good and is enforceable not only by the father but also by the minor as being a contract made for the minor's benefit. Similarly a contract of marriage made by a natural guardian in India for the benefit of the minor is binding upon the minor and can be enforced by both parties. Where therefore according to the well recognised custom and practice of the community marriages are arranged by parents and guardians, it would, as Mr. Ameer Ali pointed out in the passage from *Khwaja Muhammad Khan v. Husaini Begam*,<sup>9</sup> which I have already cited, "occasion serious injustice" and hardship if the minor was to be deprived of any relief under an agreement made by the guardian, having the power to make the

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1 (1924) I. L. R. 48 Bom. 673;  
s. c. 26 Bom. L. R. 1035.

2 (1936) 38 Bom. L. R. 610.

3 (1934) I. L. R. 61 Cal. 841.

4 (1913) I. L. R. 37 Bom. 471,  
s. c. 15 Bom. L. R. 320.

5 (1936) 38 Bom. L. R. 610.

6 (1922) 26 C. W. N. 771.

7 (1928) I. L. R. 55 Cal. 1315.

8 (1929) I. L. R. 53 Mad. 270,  
283-284.

9 (1910) I. L. R. 32 All. 410,  
s. c. 12 Bom. L. R. 638, P.C.

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agreement, on the minor's behalf and for the minor's benefit. If a minor girl for whom a contract of marriage was made could not sue for its breach, she would have no relief at all, for the guardian cannot sue for damages, having sustained none. The party who is aggrieved by the breach is the minor boy or the girl, and if the minor boy can sue, as in *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas*,<sup>1</sup> whether after attaining majority as in that case, or by a next friend while still a minor, I see no reason why a minor girl under similar circumstances cannot sue for breach of the agreement.

Defendant No. 1 further contends that even if the agreement is enforceable, it is void and not binding for the reasons stated in paragraphs 3 and 4 of his written statement. The first reason is that the betrothal of the plaintiff to defendant No. 1 was arranged as an exchange for and was therefore in consideration of a betrothal of defendant No. 1's sister Jethbai to plaintiff's brother Padamsi. The second reason is that the plaintiff's mother consented to plaintiff's betrothal in consideration of the payment to her of 2,500 'korris' by defendant No. 1's father. For both these reasons it is contended that the consideration for the agreement was immoral and opposed to public policy and therefore unlawful, and that the betrothal agreement was therefore void.

Defendant No. 1 was not present at the betrothal according to him and his father, nor was the plaintiff's brother Lalji present. According to the plaintiff's mother her brother Kanji and his son Naranji were present. Kanji is dead; Naranji is alive, but has not been called. According to defendant No. 1's father his brother Jetha Shamji, one Sonbai and one Maya Mansi were present at the betrothal. None of them has been called, nor examined on commission. There is therefore the word of the plaintiff's mother as against that of defendant No. 1's father as to what happened at the time of the betrothal. According to her the talk about the plaintiff's betrothal took place at Suthri about ten to fifteen days after her son Padamsi was betrothed to defendant No. 1's sister at Ranpur about fourteen miles away from Suthri. The two betrothals were separately recorded, one with the Mahajan of Ranpur and the other with the Mahajan of Suthri. She said that there was no talk about the two betrothals at the same time, whereas according to defendant No. 1's father there was. He said that his daughter Jethbai's betrothal was settled at the same time as the plaintiff's betrothal to his son, and that such betrothals were called 'adodiyun', or as he put it, 'adana', which were common in the Cutchi Dasa Oswal Jain community. Plaintiff's brother Lalji also stated that this sort of betrothal known as 'adodiyun' in Cutch was common in the community. He made certain statements in answer to his counsel's question. The question was whether plaintiff's betrothal to defendant No. 1 was in exchange for defendant No. 1's sister's betrothal to Padamsi. His answer was that it was in exchange. He was then asked whether the one was in consideration of the other, and there was considerable difficulty to make him understand in Gujarati the correct import of the question "whether the one betrothal was made in consideration of the other," but he answered it in the affirmative. He was asked whether he could say

that but for the betrothal of Jethbai to Padamsi plaintiff would not have been betrothed to defendant No. 1, and he answered yes. That was the only way in which the expression as to the one betrothal being in consideration of the other could be explained to him, and I am not sure whether he really understood the correct import of the question. He began by saying that these were not cross betrothals, which according to defendant No. 1's contention they were. He admitted that the betrothals were known as 'adodiyun' in Cutch, but he said that in Bombay there was no special word for it, that some called it 'adodiyun' and others said it meant one betrothal taking place after another. I do not think that it can be said that there is any admission on his part which is binding upon the plaintiff. His statement is a mixed statement of law and fact, and assuming even that he understood what he was saying, I cannot hold that the statement he made as the next friend, who is in the same position as a guardian, is binding upon the plaintiff or her mother. The real question to my mind is whether this transaction, which, according to defendant No. 1's father, was one single transaction, made the two girls, namely, the plaintiff and defendant No. 1's sister Jethbai, objects of barter or objects of value, one to be set off against the other. It is true that a marriage by exchange or a 'sata' marriage is prohibited by the Hindu Shastras and is not known to the strict Hindu law, though a custom allowing one marriage to be conditional upon the performance of another was recognised by this Court as being according to a custom in the Kudwa Kunbi caste in *Bai Ugri v. Patel Purshottam Bhudar*.<sup>1</sup> There is, however, a case decided by Mr. Justice Jardine in *Mulji Thakersey v. Gombi and Kastur*,<sup>2</sup> in which there was a written agreement of betrothal. One of the clauses of the written agreement was that at the time when the two marriages were to take place the marriages of the two girls were to be performed together. The words that follow were "When you shall give (your daughter) in marriage, I also am at the same time to give (my daughter) in marriage." Mr. Justice Jardine held that in spite of this clause the transactions did not amount to a reciprocal contingent contract, the substance of which could be said to be a bargain of the girls as objects of barter or exchange. It sometimes does happen that family arrangements are made between two families by which the family of A gives a girl to be taken as a wife in the family of B, and a girl in the family of B is at the same time given as a wife in the family of A. Such betrothals and the marriages consequent thereupon often take place, probably for reasons of convenience and economy, but in order to make the transaction invalid according to the Hindu law there must be a contract making the one betrothal strictly conditional upon the other betrothal, so as to make it, in the words of Mr. Justice Jardine, a real bargain or set-off of the girls as two objects of value. Here the two betrothals took place separately and were separately registered with two different Mahajans, and even if the preliminary talk about the two betrothals took place at one and the same time which the plaintiff's mother denied, it has nowhere been stated by defendant No. 1 or his father in evidence that one betrothal was in consideration of the other, so as to make the whole transaction a reciprocal contingent agreement amounting to a barter or exchange.

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[After discussing the evidence his Lordship proceeded :] In my opinion the evidence shows that plaintiff's mother and brother were negotiating for the marriage and were ready and willing up to the date of defendant No. 1's marriage to have it performed, and that it was defendant No. 1 who committed a breach of the agreement when his betrothal was still subsisting and not cancelled.

A betrothal in Hindu law is a promise to give a girl in marriage, and its form is that of a promise by the father or guardian of the girl in favour of the bridegroom and/or the bridegroom's father or guardian. No ceremonies are essential to the validity of a betrothal as they are in the case of a marriage. There are certain texts of the Hindu law according to which it used to be understood that a betrothal agreement was irrevocable, but the more correct view is the one which regards a betrothal as a revocable promise of marriage, though such revocation would be improper without a just cause, such as where a better suitor is forthcoming for the girl. A betrothal can also be broken off if either party was found to be of a lower caste or to have an incurable disease, or the intended husband was found to be unfit, or the girl was found to be unchaste, or for other reasons. It was held by this Court as far back as 1870 in *Umed Kika v. Nagindas Narotamdas*<sup>1</sup> that a betrothal agreement cannot be specifically enforced, and it was pointed out that a case of a breach of a contract of marriage had never been considered one in which anything more than a money award could be decreed. This case was followed in 1875 in *In the matter of Gumpat Narain Singh*<sup>2</sup>. The point, however, has since been settled by the Legislature, and it has now been laid down by the Specific Relief Act (I of 1877), s. 21, cl. (b), as explained by the illustration to that clause, that a contract of betrothal cannot be specifically enforced. The party injured by the breach is entitled to recover compensation for any pecuniary damages that may have been sustained and also for any injury to character or prospects in life which may naturally arise in the normal course of the breach. It was held in *Abdul Razak v. Mahomed Hussein*<sup>3</sup> by Mr. Justice Kemp, where the parties were Mahomedans, that in a suit for damages for breach of promise of marriage plaintiff was not entitled to damages as in an action for breach of promise of marriage which is a peculiarity of the English common law, but to a return merely of the ornaments, clothes and other things given at the time or after the betrothal. A breach of a betrothal agreement, however, stands on the same footing as the breach of any other contract, and under s. 73 of the Indian Contract Act the legal consequence of a breach would follow. In a breach of promise of marriage case the damages are really to be given as and by way of compensation, though in England juries have been known to award exemplary damages. Apart, however, from the question of damages, the policy of the law requires that a betrothal agreement should not be lightly broken. The breach of a betrothal agreement furnishes a good cause of action in England and in India, if it is proved, and it is immaterial if so far there has been no known case filed by a Hindu girl for damages for breach of a betrothal

1 (1870) 7 B. H. C. R. (O.C.J.)  
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3 (1916) I. L. R. 42 Bom. 499,  
s.c. 19 Bom. L. R. 164.

2 (1875) I. L. R. 1 Cal. 74.



agreement. If there is a breach, it is as much a breach against the intended wife as against the intended husband under the betrothal agreement.

The only remaining issue is that of conspiracy. The plaintiff's case is that the original defendants Nos. 2 and 3 maliciously conspired with defendant No. 1 and induced defendant No. 1 to commit a breach of the betrothal agreement. Both defendants Nos. 1 and 3 deny maliciously conspiring to induce a breach of the agreement. In an action for conspiracy the plaintiff has to prove conspiracy or a combination of two or more persons, and also to prove malice in the sense of ill-will or an improper motive to injure the plaintiff, which motive excludes the legitimate motive of advancing the defendant's interests. The essentials of the tort consist in the combination of two or more persons to injure the plaintiff and to exercise power over other persons for the purpose of compelling them to injure the plaintiff. The modern doctrine of actionable conspiracy has been differently explained by various Judges, but taking the authorities as they stand, the last word on the subject has not yet been written. It must, however, be a combination of two or more persons maliciously to injure a person in his trade, business or employment or in any other matter of interest to the plaintiff which results in damage to him. The leading cases on the subject are *Mogul Steamship Company v. McGregor Gow & Co.*<sup>1</sup>, *Allen v. Flood*<sup>2</sup> and *Quinn v. Leathem*.<sup>3</sup> These three cases have been called by Viscount Cave L. C. as "the famous trilogy" in *Sorrell v. Smith*.<sup>4</sup> The attempt to reconcile these cases has caused the Courts endless difficulties. Scrutton L. J. observed in *Ware and De Freville, Ltd. v. Motor Trade Association*<sup>5</sup> that it was quite impossible to harmonise the cases, or to use Viscount Cave's own words in the case just cited, this attempt to harmonise would be "an endless talk". In *Sorrell v. Smith* it was laid down (a) that a combination of two or more persons wilfully to injure a man in his trade or business was unlawful, and if damages resulted, the combination was actionable; (b) if the purpose of the combination was not to injure the plaintiff but to further the defendant's trade interests, it was not an actionable wrong though damages followed, provided the means adopted were not unlawful. This case still leaves various questions unsolved. One thing, however, has been decided that in the case of an actionable conspiracy malice is an essential ingredient, and by malice is meant ill-will or improper motive to injure the plaintiff. That was held by Beaman J. in *Khimji Vassonji v. Narsi Dhanji*.<sup>6</sup> That case was referred to by the same Judge sitting in appeal in *Jekisondas Harkisondas v. Ranchoddas Bhagvandas*,<sup>7</sup> but as in the Appeal Court the question of malice or want of it did not specifically arise, there was no decision on the point. The onus is on the plaintiff to prove malice, and not for the defendants to show that they had a just cause. That was pointed out in the same case, *Sorrell v. Smith*,<sup>8</sup> by Lord Buckmaster.

In an action for procuring a breach of contract plaintiff must show that

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1 [1892] A. C. 25.

2 [1898] A. C. 1.

3 [1901] A. C. 495.

4 [1925] A. C. 700, 711, 712.

5 [1921] 3 K. B. 40, 66.

6 (1914) I. L. R. 39 Bom. 682,

s. c. 17 Bom. L. R. 225.

7 (1916) I. L. R. 41 Bom. 137,

s. c. 19 Bom. L. R. 12.

8 [1925] A. C. 700, 748.

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the defendant knowingly and wilfully procured the breach without just cause or excuse. As Lord Macnaghten in *Quinn v. Leatham*<sup>1</sup> observed, this rule of law is only an illustration of the wider principle that a violation of a legal right knowingly committed is a cause of action. It is clear that no action will lie for inducing a breach of contract which is null and void. If any lawful justification is pleaded, it is for the defendant to prove it, because knowingly to procure a breach of contract is prima facie wrong. It is a violation of a legal right which prohibits interference with contracts and contractual relations, provided there is no lawful justification for the interference. What is sufficient or lawful justification is a point which has not yet been finally settled, but this much has been settled that malice in the sense of improper motive is not the just or essential element of an action to procure a breach of contract. That was also pointed out in *Irene Fanny Colquhoun v. Fanny Smither*.<sup>2</sup> I may point out that merely advising a breach of contract does not, as the authorities stand today, appear to be actionable.

Defendant No. 1 appealed.

N. P. Engineer, with M. M. Desai, for the appellant.

M. J. Mehta, with H. H. Dalal, for the respondents.

BEAUMONT C. J. This is an appeal from a decision of Mr. Justice B. J. Wadia. The plaintiff sued for damages for breach of a contract of marriage. There was also a claim against defendants Nos. 2 and 3 for conspiracy, but as that claim was dismissed and as there is no appeal against that part of the decision, I need not refer to defendants Nos. 2 and 3. Defendant No. 1 is the person who was to marry the plaintiff, and I will allude to him merely as "the defendant."

The contract as pleaded was made in 1926 by the mother of the plaintiff on behalf of the plaintiff with the defendant's father on behalf of the defendant, and is alleged to have been ratified by the defendant. At the time of the contract the plaintiff was aged four years, and the defendant was nineteen. It is important to note that the defendant was of age at the time of the contract, because it is well settled that a guardian cannot enter into a personal contract imposing liability on a minor. (See *Waghela Rajasariji v. Sheikh Mashudin*.<sup>3</sup>) If the defendant had been a minor, it would have been necessary to show that he had entered into a contract after attaining majority adopting the contract in suit. However, as he was a major, he could ratify the contract, and there is no doubt that he did ratify the contract; the letter written by him in 1934, exhibit A, shows this. The contract sued on is not pleaded as specifically as it should have been. No implied terms are pleaded, and clearly there must have been implied terms. To begin with, there is the question as to the date when the marriage was to be performed. The plaintiff being only four years of age at the time of the contract, it is not suggested that the marriage was to be performed for some years. Since 1929, by virtue of the Sarda Act, it is an offence to celebrate the marriage of a girl under fourteen years of age. It is admitted that it was an implied term of this contract that the marriage should be performed within

1 [1901] A. C. 495, 510.

3. (1887) L. R. 14 I. A. 89.

2 (1909) I. L. R. 33 Mad. 417.

a reasonable time after the plaintiff attained marriageable age. There is also in Hindu law an implied term in a contract of this sort that when the time arrives for the solemnization of the marriage, the husband, at any rate, shall be suitable as a spouse. The texts on the subject are verses 26 and 27 of section XI of chapter II. of the Mitakshara, which were quoted by this Court in *Balubhai Hiralal v. Nanabhai Bhagubhai*.<sup>1</sup> Verse 26 says :—

"For detaining a damsel, after affiancing her, the offender should be fined, and should also make good the expenditure together with interest."

Verse 27 says :—

"If there be good cause, he shall not be fined, since retraction is authorized in such a case. The damsel, though betrothed, may be withheld, if a preferable suitor present himself."

So that if good cause is shown, the contract may be retracted, and in the case of the bride, she may be withheld, if a preferable suitor presents himself. There may be various grounds justifying the cancellation of the contract, for instance, illness of a serious character, or a defective moral character in one of the parties to the marriage. However, nothing of that sort is suggested in this case. It is admitted that the defendant was at all times a suitable person with whom the plaintiff could contract a marriage.

The first question, which calls for decision, is whether a suit of this sort lies. There have been a good many cases in this Court in which claims for breach of promise of a contract of marriage entered into on behalf of minor children have been entertained. In *Umed Kika v. Nagindas Narotamdas*<sup>2</sup> damages were given to the bridegroom against the father of the bride for breach of promise, though specific performance of the contract of marriage was refused. *Mulji Thakersey v. Gomti and Kastur*<sup>3</sup> was a suit by the bridegroom and his father against the bride and her mother, and damages were given against the mother, but were refused against the bride who was a minor. In *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas*<sup>4</sup> the bridegroom sued the girl's father for damages for breach of promise, the contract having been made by the plaintiff's father when he was a minor, and it was held that he was entitled to recover damages, and that the fact that the girl declined to enter into the marriage did not excuse her father from carrying out his contract. In *Abdul Razak v. Mahomed Hussein*<sup>5</sup> a Muslim father of the bridegroom sued the father of the bride for damages for breach of his contract to give his daughter in marriage. That was a case of a contract between the two parents, and Mr. Justice Kemp decreed the suit, but held that the measure of damage must be based on the damage suffered by the plaintiff's father, and not on the damage suffered by the prospective bridegroom in the loss of a wife; and if such a suit lies, I agree with the view of Mr. Justice Kemp as to the measure of damage. In this case the bride herself is the plaintiff, so we need not consider the question whether a suit for damages lies by one father against the other for breach of a contract made between them for the marriage of their minor children.

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1 (1919) I.L.R. 44 Bom. 446, 449,  
s.c. 22 Bom. L. R. 143.

2 (1870) 7 B. H. & C. R. (O.C.J.)  
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3 (1887) I. L. R. 11 Bom. 412.

4 (1896) I. L. R. 21 Bom. 23.

5 (1916) I. L. R. 42 Bom. 499,  
s. c. 19 Bom. L. R. 164.

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In none of those cases was the exact nature of the action considered, but in *Rose Fernandes v. Joseph Gonsalves*,<sup>1</sup> which was a suit by the bride, who was a minor at the date of the contract made by her father, against the bridegroom who was a major, the bride claimed damages for breach of the contract, and in that case the nature of the suit was discussed, because it was alleged that if the contract was to be regarded as a contract made by the minor plaintiff, it was void under the decision of the Privy Council in *Mohori Bibee v. Dharmodas Ghose*,<sup>2</sup> and that if the contract was to be regarded as a contract between the parents, the bride not being a party, could not sue upon it. The same questions arise in this case, and we have to consider whether the decision in *Rose Fernandes v. Joseph Gonsalves* is right. Now, the learned Judge in that case pointed out that it is customary amongst most of the communities in India for parents to arrange marriages between their minor children, often when the children are of very tender age. Amongst Hindus marriage is usually confined to members of the same caste, and sometimes sub-caste, and it may happen that at the date when a husband or wife is required, there may be very few suitable boys or girls available; therefore, a prudent parent makes arrangements for the marriage of his child in plenty of time. Of course, in England different customs prevail. It could not be suggested that in England a parent is entitled to enter into a contract to marry his child, still less to carry the marriage into effect, and I think that in England a suit like the present one would not lie. But the law must adapt itself to the habits and customs of the people governed by such law, unless, of course, those habits or customs are held to be opposed to principles of justice, equity and good conscience. I think it would be wrong in India to hold that this practice, which is so common, of arranging marriages between children who are under age, is contrary to principles of justice, equity and good conscience. It is according to the habits and customs of the people. I should, therefore, be very reluctant to hold that the decision in *Rose Fernandes v. Joseph Gonsalves* is wrong.

The technical rule established in *Tweddle v. Atkinson*,<sup>3</sup> that a stranger to a contract cannot sue upon it, is subject to certain well recognized exceptions, one exception being in favour of a *cestui que trust*. Where a contract is made by a trustee on behalf of a *cestui que trust*, it can be enforced in equity by the *cestui que trust*, and in this country all Courts administer equity. In *National Petroleum Company, Ltd. v. Popatlal*,<sup>4</sup> which was referred to by the learned trial Judge, this Court applied that exception to the case of a contract made by a guardian on behalf of a minor. The contract there was a contract to insure against fire the minor's property, which was subsequently burnt down, and it was held that the minor could sue on the contract and recover the insurance money. No doubt, a parent entering into a contract of betrothal of marriage on behalf of his minor child cannot be said, strictly speaking, to be acting as a trustee, and I think the exception to the rule in *Tweddle v. Atkinson*, which was acted upon, and perhaps established, in *Rose Fernandes v. Joseph Gonsalves*, is an exception, which,

1 (1924) I. L. R. 48 Bom. 673,

s. c. 26 Bom. L. R. 1035.

2 (1903) I. L. R. 30 Cal. 539,

s. c. 5 Bom. L. R. 421, P.C.

3 (1861) 1 B. &amp; S. 393.

4 (1936) 38 Bom. L. R. 610.

it may well be, would not be recognized in any other country than India, but I see no reason why it should not be recognized in India, where it is in conformity with the habits and customs of the people.

In *Khwaja Muhammad Khan v. Husaini Begam*<sup>1</sup> there are observations of their Lordships of the Privy Council, which are very pertinent to the present question. In that case a contract had been entered into by the father of the bride with the bridegroom's father, under which certain moneys were payable to the bride and were made a charge on property, and the Privy Council in considering the application of *Tweddle v. Atkinson* held that this was a case in which moneys payable to the plaintiff were charged on specific property, and she could in equity enforce the charge. But then their Lordships observed as follows (p. 413) :—

"Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common-law doctrine was applied to agreements or arrangements entered into in connection with such contracts."

The learned trial Judge in *Rose Fernandes v. Joseph Gonsalves* relied strongly on that observation, and I think rightly so, and in my view *Rose Fernandes v. Joseph Gonsalves* was correctly decided. It has stood for fourteen years, and I see no reason why we should not follow it.

It is an essential condition of the enforceability of such a contract as this that it should be for the benefit of the minor, and I have felt some difficulty as to whether a contract to give in marriage a girl of four years of age must be considered as for her benefit. If one had nothing but the bare contract pleaded, I should say that it could not be so regarded, because it would be a chance whether in ten years' time the choice of the particular husband would prove a wise one. But, then, as I have pointed out, under Hindu law the contract is conditional on the other party being a suitable spouse at the time when the marriage is to be performed, and there being no more suitable husband available. If that is so, and having regard to the importance attached by the Hindu community to marriage, and to the fact that except amongst a very small minority of the educated community very few girls amongst the Hindus remain unmarried, I think that one must hold that a contract to get a girl married, however young she may be at the time of the contract, is, at any rate prima facie, for her benefit. In *Rose Fernandes v. Joseph Gonsalves* the case was an easier one from that point of view, because the plaintiff was about thirteen years of age at the time of the contract, and the contract was to be performed within two years, so that it was easier to hold that it was for her benefit. On the other hand, there was the difficulty in that case that the parties were not Hindus, but Goan Christians, amongst whom customs may not be the same.

In my opinion this suit lies at the instance of the plaintiff. I may mention that since the decree, and since the appeal was filed, the plaintiff has died, and the appeal is prosecuted by her legal representatives; but as she died only after the decree, it does not, in my opinion, affect the cause of action.

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Beaumont C.J.

O. C. J.      The defence of the defendant on the merits is this. Shortly before his  
 1940 contract of betrothal, it is admitted that the plaintiff's brother Padamsi had  
 been betrothed to the defendant's sister Jethbai then aged about two years.  
 KHIMJI In 1932 Padamsi had some trouble in a criminal Court, and in the result  
 KUMERJI the defendant and his father declined to marry Jethbai to Padamsi, and after  
 v. that date the defendant ceased to visit the plaintiff's family and ceased to  
 LALJI see the plaintiff, their families being estranged. In 1934, according to exhibit  
 KARANSI A, the defendant was ready and willing to marry the plaintiff, but the plaintiff's  
 mother said that the plaintiff was too young, as no doubt she was. But in 1936  
 she was of a suitable age to marry, and the defendant's case is that he was  
 ready and willing to marry her from 1936 down to 1938, but that the plaintiff's  
 mother declined to perform the marriage, unless he would agree to his sister  
 marrying Padamsi, and that he declined to do that because he considered that  
 Padamsi was not a suitable husband for his sister. There is a suggestion also  
 that the mother said in the alternative that he must pay a substantial sum of  
 money to avoid the contract of betrothal. The defendant's case is that this  
 was an unreasonable and improper refusal on the part of the plaintiff's mother,  
 and justified him in repudiating the contract.

Beaumont C.J.

The breach of contract relied on in the plaint is that the defendant in 1938 married another girl. It may be observed that that is not necessarily a breach, because under Hindu law a man may marry as many wives as he likes, and there is no plea that the contract was that the plaintiff should be the senior or the only wife. However, that objection is not taken by the defendant; no issue was raised as to whether he broke the contract. I think he in effect admitted that he broke the contract if subsisting by remarriage. If he had denied the breach and pleaded that he was ready and willing to perform the contract, he might have been saddled with two wives, and he may have thought that it would be cheaper to pay damages; or it may be that there is a custom in this caste against a second marriage. However, the point has not been made, and the defendant does not dispute that in 1938 by his marriage to another girl he repudiated this contract if then subsisting; his case is that he was justified in doing so by the behaviour of the mother. On the other hand, the mother and her witnesses say that from 1936 onwards, when the girl was of suitable age, they were pressing the defendant to carry out the marriage, and he always put them off, and that there was no justification for his breach of the contract.

I may say at once that I think the learned Judge was clearly right in holding that these two betrothals were not dependent one on the other. They were made on different dates and the girls were of different ages, which would mean that the marriages would be performed normally on different dates, and I can see no justification for holding that the one contract was to be terminated by the collapse of the other.

The question whether the defendant repudiated the contract, or the plaintiff's mother repudiated it, is a question depending on the oral evidence. We have been through the whole of the notes of evidence, and I must confess that if I had to decide the question as a Court of first instance on the depositions of the witnesses, I should be disposed to say that the defendant's story seems to me a more likely one than the plaintiff's. On the plaintiff's

story there seems to be no explanation why the defendant did not carry out the marriage between 1936 and 1938 ; there is the mere allegation that he would not do so. On the other hand, girls in this community seem to be rare, and it seems to me not improbable that the plaintiff's mother having got a son she was finding it difficult to marry, tried to take advantage of the hold she had over the defendant for the purpose of getting herself out of the difficulty. The defendant called a good deal of evidence, which seems to have been independent, and which certainly supports his case. But the learned Judge, who saw the witnesses in the box, preferred the story of the plaintiff's witnesses to that of the defendant's. In my opinion, it would be contrary to the settled principles on which this Court acts that we should substitute our opinion on the facts based on the written depositions for the opinion of the learned Judge who saw the witnesses in the box. It may be that if we had seen the witnesses in the box, we should have arrived at the same conclusion as he did. A Court of Appeal always attaches a great weight to the opinion of the trial Judge on the credibility of the witnesses called before him. This is not a case in which there are any relevant documents, so that it is not open to us to say that the learned Judge's view of the credibility of the oral evidence is not consistent with the documents. It seems to me impossible for this Court to say that the learned Judge was wrong in the view he took of the oral evidence.

That being so, I think that the appeal fails and must be dismissed with costs. One counsel in this Court.

KANIA J. As the first contention about the maintainability of the suit is important, I desire to state my grounds for the conclusion of this Court.

The contract in suit was made by the original plaintiff's mother for the betrothal of the plaintiff to defendant No. 1. The contracting party on the defendant's side actually present at the time was defendant No. 1's father. The plaintiff was admittedly of tender age, while defendant No. 1 was about nineteen years old. It was argued on behalf of the appellant that this contract cannot be enforced on behalf of the plaintiff, and the suit was, therefore, not maintainable. Four points appear to arise for consideration. (1) Between whom was this contract made? (2) Are the minors parties to the contract? If not, (3) can they enforce it? (4) Can the contract be enforced against them?

Having regard to the decision in *Mohori Bibee v. Dharmodas Ghose*,<sup>1</sup> if any of the contracting parties is a minor, under s. 11 of the Indian Contract Act, the contract is void. It is not voidable as was thought at one time. The facts established are that the contracting parties in this case were clearly the original plaintiff's mother and defendant No. 1 acting through his agent, his father. I say that, because defendant No. 1 had admittedly attained the age of majority. He has accepted the contract, and in 1934 asked for carrying out the same. The authority of his father, therefore, to enter into this contract on his behalf is not disputed. The original plaintiff was not a contracting party. These facts take the contract out of the defect which may attach to it and avoid it under s. 11 of the Indian Contract Act.

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1 (1903) 1 L. R. 30 Cal. 539, s. c. 5 Bom. L. R. 421, p. c.

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The next question is whether the minors can enforce it. The decisions of this Court in *Umed Kika v. Nagindas Nanotamdas*,<sup>1</sup> *Mulji Thakersey v. Gomti and Kastur*<sup>2</sup> and *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas*<sup>3</sup> show that a contract of betrothal made by the guardian of a minor Hindu was not questioned as enforceable. When the minor brought a suit against the other contracting party to get his rights declared and enforced, the Court assisted him in doing so. The principle on which it appears that contracts of this kind are considered enforceable at the instance of the minor is that the contract was made on behalf of the minor by his guardian, and if the Court found that it was for his benefit, the Court enforced it. The question whether contracts made between two persons could be enforced at the instance of a third party, who was not a contracting party, has come to be considered both in England and in India. *Tweddle v. Atkinson* is the recognized authority for holding that a third party to a contract cannot enforce it. Exceptions to this rule have also been recognized in favour of beneficiaries, persons claiming interest through the contracting parties, and principals on the footing that the contracts were made on their behalf by their agents. In *Khwaja Muhammad Khan v. Husaini Begam*<sup>4</sup> an agreement made on behalf of a minor Mahomedan girl by her father, for her marriage with the boy's father, was sought to be enforced by the girl after her marriage and after she had attained majority. One of the terms of the contract was that the father-in-law of the girl was to give her a certain amount after her marriage every month. That was made a charge on the property of the father-in-law. In dealing with the question whether this contract could be enforced at the instance of the girl, who was not a contracting party, their Lordships of the Privy Council held that as there was a charge created on the immoveable property, and the sole beneficiary was the plaintiff, the rule in *Tweddle v. Atkinson* did not come in her way. They further observed as follows (p. 413):—

"Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common-law doctrine was applied to agreements or arrangements entered into in connection with such contracts."

Those observations clearly recognize that in India ancillary contracts to the contracts of betrothal are outside the rule in *Tweddle v. Atkinson* so far as Mahomedans and, I believe, communities similarly situated are concerned. All the more so the rule is inapplicable to the contract of betrothal itself, and stands outside that principle. That view was taken by Mr. Justice Taraporewala in *Rose Fernandes v. Joseph Gonsalves*,<sup>5</sup> after a review of all the authorities then brought to his notice and having regard to the customs of the different communities in India. In that case this principle which was recognised as applicable to Hindus and Mahomedans was extended and applied to Goan Christians. That judgment has stood unshaken for fourteen

1 (1870) 7 B. H. C. R. (O.C.J.) 122

2 (1887) I. L. R. 11 Bom. 412.

3 (1896) I. L. R. 21 Bom. 23.

4 (1910) I. L. R. 32 All. 410, s. c. 12 Bom. L. R. 638, P.C.

5 (1924) I. L. R. 48 Bom. 673, s. c. 26 Bom. L. R. 1035.



years. The observations of their Lordships of the Privy Council quoted above indicate that the same view had been taken so far back as 1910. I, therefore, think that contracts of betrothal entered into on behalf of minors by their guardians and shown to be for their benefit, are enforceable at the instance of the minors.

This is the first case brought to our notice in which a girl had sought to enforce her right against the boy himself. But when an attempt was made to enforce the right against a minor defendant, the claim was rejected. That is shown by the decision in *Mulji Thakersy v. Gombi and Kastur*. That is, again, in consonance with the recognized rule that a guardian has no right to enter into a personal covenant which could be enforced against the minor. In *Waghela Rajsanji v. Sheikh Masuldin*<sup>1</sup> and in *Maharaja Shri Ramnarsingji v. Vadilal Vakhatchand*<sup>2</sup> this was recognized. It, therefore, appears that while the contract could be enforced against the other contracting party at the instance of the minor, it cannot be enforced against the minor.

It was further argued that this contract is not binding, because the mother was not the legal guardian for the purpose of entering into the contract of betrothal. In support of that contention the appellant relied on *Shridhar v. Hiralal Vithal*<sup>3</sup> and on *Bai Ramkore v. Jamnadas Mulchand*.<sup>4</sup> In my opinion this contention is unsound. If the father is alive, he is the legal guardian of his minor children. If he is dead, the mother is the legal guardian. She has, therefore, the right to enter into a contract of betrothal on behalf of her minor children. If acting under the authority given to her by law, she attempts to abuse the same, a person otherwise interested in the minor may bring her action to the notice of the Court, and the Court may restrain her from abusing her authority. That, however, does not go against the root principle of the mother having the authority to enter into a contract of this type. The decisions relied upon by the appellant, in my opinion, do not support his contention. *Bai Ramkore v. Jamnadas Mulchand* clearly indicates that the authority to give in marriage referred to in those decisions is merely confined to the physical act of giving in marriage as a part of the marriage ceremony. Mr. Justice Chandavarkar has in terms stated that the words "the authority to give in marriage" are only confined to the act of giving in marriage as a part of the marriage ceremony which is called *kanyadana*. Therefore, the authority of the mother to enter into the contract, provided it is shown that it is for the benefit of the minor, cannot be disputed. For these reasons, I think the contract is binding on the parties and enforceable by the plaintiff against the defendant.

I do not propose to go into the details of the evidence on the question whether the defendant was ready and willing to perform his part of the contract. In his written statement he contended that by reason of the plaintiff's mother failing to celebrate the marriage, in spite of his repeated demands, he treated the contract of betrothal as abandoned on behalf of the plaintiff and married the second girl. He had not contended in his written statement that he had committed no breach of the contract by his second marriage and

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1 (1887) L. R. 14 I. A. 89.

2 (1894) I. L. R. 20 Bom. 61.

3 (1887) I. L. R. 12 Bom. 480.

4 (1912) I. L. R. 37 Bom. 18,

s. c. 14 Bom. L. R. 766.

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was ready and willing to stand by the contract of betrothal. As regards the party's readiness and willingness to carry out the contract of betrothal, the learned Judge had the advantage of seeing the witnesses, and in his judgment he has in terms stated that having watched the demeanour of the witnesses he preferred to accept the evidence led on behalf of the plaintiff. The duty of a Court of Appeal in matters of this kind is very clearly pointed out by Lord Wright in *Powell and Wife v. Streatham Manor Nursing Home*,<sup>1</sup> where he quotes the words of Lord Kingsdown in *Bland v. Ross : The Julia*<sup>2</sup> at page 265:—

"First it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.'"

Lord Wright in *Powell and Wife v. Streatham Manor Nursing Home*<sup>1</sup> further observed as follows (p. 267):—

"The problem in truth only arises in cases where the Judge has found crucial facts on his impression of the witnesses: many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: in all such cases the appellate Court is in as good a position to decide as the trial judge. But where the evidence is conflicting and the issue is one of fact depending on evidence, any judge who has had experience of trying cases with witnesses cannot fail to realize the truth of what Lord Sumner says: as the evidence proceeds through examination, cross-examination and re-examination the judge is gradually imbibing almost instinctively, but in fact as a result of close attention and of long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse."

A decision arrived at on a consideration of the oral evidence in this way cannot be lightly differed from, and it is not open to this Court to consider the evidence in print before it and find out whether it would have come to the same conclusion as the learned trial Judge had. In view of the clear and emphatic opinion of the learned Judge about the credibility of the witnesses, I see no reason to differ from his conclusion.

I agree that the appeal should be dismissed with costs.

*Appeal dismissed.*

Attorneys for appellant: *Ambubhai & Diwanji.*

Attorneys for respondent: *Jhaveri & Co.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Kania.*

SREE MEENAKSHI MILLS, LTD.

*v.*

RATILAL TRIBHOVANDAS THAKAR.\*

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September 24.

*Contract—Guarantee—Liability of guarantor—Construction of guarantee—Proof of debt against principal debtor—Nature of proof.*

A guarantor is entitled to have the debt of the principal debtor proved as against him, before he is made liable for the debt. The fact that the principal debtor has admitted the debt, or that a judgment or award has been given against him for the debt, does not bind the guarantor, unless he was a party to the admission of the principal debtor, or was party to the proceedings in which the judgment or the award was given.

The liability of a guarantor must depend on the true construction of the guarantee which he has given. If the guarantor merely guarantees payment of the debt of the principal debtor, then he is entitled to require the debt to be proved as against him in accordance with the ordinary law. If, on the other hand, the principal debtor has agreed that as against him the debt shall be proved in a particular way, and the guarantor has guaranteed the debt so to be proved, then there can be no doubt that the guarantor would be bound by the particular method of proof agreed to by the principal debtor and accepted by himself.

Ex parte *Young* : In re *Kitchin*<sup>1</sup> and *Guardians, Abbeyleix Union v. Sutcliffe*,<sup>2</sup> referred to.

*Hodgson et. al. v. Rupchand Hazarimal*,<sup>3</sup> *Smith v. Blakey*,<sup>4</sup> *Mayen v. Alston*,<sup>5</sup> and *Barlow v. Chuni Lal Neoghi*,<sup>6</sup> distinguished.

**SUIT against guarantor.**

The plaintiff carried on business in Bombay as cotton commission agent under the name of Ratilal & Co.

Defendant No. 1 was a joint stock company registered under the Indian Companies Act, 1913, under the name of Sree Sundareswarar Company Ltd., and had its registered office at Madura.

Defendant No. 2 was also a joint stock company registered under the Indian Companies Act, 1913, under the name of Sree Meenakshi Mills, Ltd., and had its registered office at Madura.

Defendant No. 3, Karumuttu Thiagarajan Chettiar, was the sole proprietor of the firm of Thiagarajan Chetty & Co. and was the managing director of defendant No. 1. He was also a director of defendant No. 2 and his firm was the managing agent of defendant No. 2.

The plaintiff stated that in February, 1935, defendant No. 3, as managing director of defendant No. 1, employed him as commission agent to enter into forward transactions in American cotton for October, 1935, delivery. Defendant No. 3 gave him Rs. 7,500 as margin money against the forward business.

The plaintiff purchased on February 25, 1935, 300 bales of American cotton

\* O. C. J. Appeal No. 8 of 1940 :  
Suit No. 10 of 1937.

1 (1881) 17 Ch. D. 668.

2 (1890) L. R. I. 26 Q. B. & Ex.

D. 332.

3 (1869) 6 B. H. C. R. (O. C. J.)  
39.

4 (1867) L. R. 2 Q. B. 326.

5 (1893) I. L. R. 16 Mad. 238.

6 (1901) I. L. R. 28 Cal. 209.

O. C. J. for October, 1935, delivery at 12.39 c. per lb. in New York market on behalf  
 1940 of defendant No. 1 and gave due intimation thereof to defendant No. 1 and  
 sent in due course the contract note to defendant No. 1.

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On March 5, 1935, the plaintiff purchased, under instructions from defendant No. 1, 200 bales of American cotton for October, 1935, delivery at 12.35 c. per lb.

On March 6, 1935, the plaintiff purchased, under instructions from defendant No. 1, 100 bales of American cotton for October, 1935, delivery at 12.30 c. per lb.

On March 11, 1935, in view of the fluctuations in the New York market, the plaintiff demanded from defendant No. 1 Rs. 4,000 by way of further margin money and intimated to defendant No. 1 that in the event of the failure to remit the amount, he would close the transactions.

Defendant No. 1 failed to remit the margin money, and the plaintiff closed the transactions and sent the contract note in respect thereof to defendant No. 1.

After giving credit to defendant No. 1 for the margin already received a sum of Rs. 7,229 was found due to the plaintiff.

The plaintiff filed this suit against defendants Nos. 1 to 3, alleging that he repeatedly called upon defendant No. 1 to pay the amount but defendant No. 1 had failed to do so; that defendant No. 3 as the managing agent of defendant No. 2 for and on behalf of defendant No. 2 had guaranteed payment of the amount due by defendant No. 1 to him in respect of the said transactions; that the plaintiff became personally liable in respect of those transactions and had paid the amount due in respect thereof; that the plaintiff was entitled to be indemnified in respect of the liability incurred and payments made by him; and that he was entitled to claim the amount due from defendant No. 2.

Defendant No. 1 went into voluntary liquidation after the suit was filed and did not appear at the hearing of the suit.

Defendant No. 2 contended, *inter alia*, that defendant No. 3 did not possess any authority to bind defendant No. 2; that defendant No. 3 as managing agent of defendant No. 2 did not guarantee payment of the amount due by defendant No. 1; that defendant No. 2 was not given any intimation about the transactions entered into by the plaintiff or the demand of the margin money; that no guarantee was given to the plaintiff on behalf of defendant No. 2; that defendant No. 3 was not entitled in law and had no authority to give any such guarantee; that even if such guarantee was given it was invalid and was not binding on defendant No. 2; that the plaintiff was not entitled to recover the amount claimed from defendant No. 2 unless and until he proved his claim against defendant No. 1.

Defendant No. 3 contended, *inter alia*, that he had no such wide powers in respect of the affairs of defendants Nos. 1 and 2 as alleged by the plaintiff; that as managing agent of defendant No. 2 he did not guarantee payment of any amount due by defendant No. 1 to the plaintiff in respect of any transactions of defendant No. 1; that he had no authority and was not entitled in law to give any such guarantee; that the plaintiff was not entitled to be indemnified in respect of any liability incurred or payment made on

behalf of defendant No. 1; that in any event the plaintiff was not entitled to any relief against him unless the plaintiff proved his claim against defendant No. 1.

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B. J. Wadia J., who heard the suit passed a decree on February 16, 1940, in favour of the plaintiff against defendants Nos. 1 and 2 for Rs. 7,229. The suit against defendant No. 3 was dismissed.

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The following is his Lordship's judgment :—

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B. J. WADIA J. The plaintiff carries on business in Bombay as cotton-commission agent in the name and style of Ratilal & Co. of which he is the sole proprietor. Defendant No. 3 was the managing director of the 1st defendant company until that company went into voluntary liquidation in 1939. He is also a director of the 2nd defendant company and at the same time the sole proprietor of the firm of Thiagaraja Chetty & Co., who are the managing agents of the 2nd defendant company. The 1st defendant company carried on, and the 2nd defendant company still carries on, business at Madura. The suit is in respect of certain forward transactions in American cotton for the October, 1935, delivery which the plaintiff was instructed to put through on behalf of and for the 1st defendant company. The terms of business on which the plaintiff was prepared to do business were sent to the 1st defendant company by his letter dated November 9, 1934; according to those terms the business might be either local or what is called "New York business". In addition to the terms contained in that letter there are certain terms at the back of the plaintiff's printed contract form under which the New York business was to be executed by the plaintiff in accordance with the instructions given on behalf of the 1st defendant company and subject to the rules, regulations and by-laws of the New York Cotton Exchange, and also subject to the office terms and conditions of the plaintiff. According to the plaintiff the transactions were done for the 1st defendant company, and the 2nd defendant company agreed to stand guarantee to him for any loss that might arise out of the transactions. The guarantee is thus stated in para. 4 of the plaint, namely, that defendant No. 3 as the managing agent of the 2nd defendant company for and on behalf of the 2nd defendant company guaranteed payment of the amount due by the 1st defendant company to the plaintiff in respect of the transactions of the 1st defendant company effected through the plaintiff. In the alternative the plaintiff contends that the transactions were really the transactions of the 2nd defendant company, though done in the name of the 1st defendant company, and that they were so done at the instance of defendant No. 3. The transactions were of the purchase of 600 bales of American cotton for October, 1935, delivery. Defendant No. 3 on behalf of the 1st defendant company deposited with the plaintiff a sum of Rs. 7,500 as margin against the transactions on February 25, 1935. The plaintiff demanded a further margin about March 11, 1935, as the American market in cotton went down, but the 1st defendant company failed to send any further margin, and after due intimation the transactions were closed by sale of the 600 bales in accordance with the term as to margin contained in the terms of business. This resulted in a loss which, after giving credit to the 1st defendant company for Rs. 7,500 deposited with the plaintiff, amounted

O. C. J. to Rs. 7,229. There were also certain other separate dealings in cotton between the plaintiff and the 2nd defendant company in respect of which a sum of Rs. 5,870-3-6 was due and payable by the plaintiff to that company.

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The 1st defendant company went into voluntary liquidation on or about April 26, 1939, i.e., after the suit was filed. Section 205 of the Indian Companies Act deals with the effect of a voluntary liquidation upon the status of the company, and it is provided that though the company could not do any fresh business, its corporate powers still continued until the company was dissolved. The 1st defendant company was not represented at the hearing. The 2nd defendant company and defendant No. 3 appeared, and have put in almost similar defences. They say that defendant No. 3 had no authority to guarantee any loss on behalf of the 2nd defendant company to the plaintiff. They deny that in fact any guarantee was given by defendant No. 3. They also deny that the transactions were really of the 2nd defendant company though done in the name of the 1st defendant company. Defendant No. 3 in addition contends that the plaintiff must prove that the transactions were carried out by the plaintiff in the New York market. The 2nd defendant company in their written statement say that they are not concerned with the transactions in suit. The 2nd defendant company has counterclaimed against the plaintiff for payment of the sum of Rs. 5,870-3-6, which I have referred to before.

Negotiations for doing business for the 1st defendant company started some time in October, 1934. The 2nd defendant company had dealings with the plaintiff long before that, and there was a separate account between plaintiff and that company in respect of those dealings. It was defendant No. 3 who always acted and gave instructions on behalf of both the companies. He used to come to Bombay from time to time and meet the plaintiff. On October 20, 1934, the 2nd defendant company through their managing agents wrote to the plaintiff to transfer the contracts and the account of the separate transactions done for the 2nd defendant company into the name of the 1st defendant company which was described as "a sister concern", meaning thereby a sister concern of the 2nd defendant company. Plaintiff by his reply of October 23 refused to do so. Thereafter the request was repeated both by the 2nd defendant company and the newly formed 1st defendant company on November 5, 1934. Both these letters are signed by defendant No. 3. The letter of the 2nd defendant company is signed by him on behalf of the managing agency firm. The letter of the 1st defendant company is signed by him as its director. Plaintiff still refused to transfer the contracts and account, but he sent his terms of business to the 1st defendant company on November 9, 1934. Thereafter defendant No. 3 personally came to Bombay and saw the plaintiff at his 'pedhi' at Marwadi Bazar on February 25, 1935, and again repeated his request to the plaintiff to transfer the old account of the 2nd defendant company to the name of the 1st defendant company. Again the plaintiff refused. Defendant No. 3 persisted in his request, but plaintiff said he did not want to deal with the 1st defendant company and thereby get mixed up with any complications that may arise between the two companies. Defendant No. 3 thought that the plaintiff did not understand what "a sister concern" meant, and plaintiff asked his clerk

Chhaganlal Raghani who was then a law student as to what that expression meant. Even after he received an explanation of what it meant plaintiff was unwilling and was not satisfied that the two companies were really one. Thereupon defendant No. 3 on behalf of 2nd defendant company agreed to stand guarantee for the amount of loss that might be incurred in the business done for the 1st defendant company, and on that guarantee plaintiff agreed to do business for the 1st defendant company. He stated in his evidence that but for that guarantee he would not have agreed to do the business. His clerk Chhaganlal corroborated him about the guarantee as he was present during that part of the interview between the plaintiff and defendant No. 3 at which the guarantee was discussed and agreed to. According also to Chhaganlal defendant No. 3 guaranteed on behalf of the 2nd defendant company payment of any moneys that might remain unpaid by the 1st defendant company, and he further stated that thereupon the plaintiff agreed to do the business.

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On the same day defendant No. 3 gave instructions on behalf of the 1st defendant company for purchase of 600 bales of American cotton for October 1935 delivery at varying rates, and deposited Rs. 7,500 by way of margin. Plaintiff stated that defendant No. 3 told him at the time of the deposit that the moneys so deposited belonged to the 2nd defendant company. How the moneys were credited and debited in the books either of the 1st defendant company or the 2nd defendant company is not known, as not a single book of account of either of the two companies has been produced; ordinarily entries would be made at the time when the deposit was given. Thereafter the plaintiff got the transactions put through in the New York market through his New York friends, Messrs. Harriss & Vose, who are cotton brokers working on the New York Cotton Exchange. Defendant No. 3 knew or must have known that the plaintiff could not personally put the transactions through in New York, as the plaintiff is an "alien member" of the New York Cotton Exchange who could not according to its rules effect transactions himself in the ring of the Exchange. 300 bales were purchased on February 25, 1935, 200 on March 5, and 100 on March 6, through Harriss & Vose, according to the instructions which were received by the plaintiff from defendant No. 3 and which in turn were transmitted by him to Harriss & Vose. After he heard from New York plaintiff duly intimated the purchase to the 1st defendant company and also sent his contracts, one of which, namely, the first for the purchase of 300 bales was duly returned signed by the 1st defendant company. The other two for 200 and 100 bales respectively were not signed and returned, but there is no dispute that the contracts were accepted by the 1st defendant company. Several wires, letters, intimation notes and two statements of account of the loss sent by Harriss & Vose to the plaintiff in Bombay were objected to by counsel for defendants Nos. 2 and 3 on the ground that the contents of those documents could not be evidence against them until Harriss & Vose who purported to send them were examined as to their contents. In the first place therefore these documents were marked merely as purporting to come from Harriss & Vose but subject to any arguments that counsel may advance as to the admissibility of their contents. Ordinarily a party cannot make the contents of a document written by a third

O. C. J. party evidence against the other side unless the party writing the document is  
 1940 called and examined. In this case, however, the entire evidence of the facts  
 SREE and circumstances of the case is important to determine the admissibility of  
 MEENAKSHI the documents objected to. The wires were sent from Bombay to New  
 MILLS, LTD. York and received from New York in Bombay under a special arrange-  
 v. ment between the plaintiff and Harriss & Vose. Shortly speaking it  
 RATILAL was so arranged that the wires sent from Bombay by the plaintiff were  
 TRIBHOVAN- sent to a telegraphic address which was meant to indicate that the wires  
 DAS were sent by the plaintiff to Harriss & Vose and no one else, and the  
 B. J. Wadia J. wires from Harriss & Vose were sent to Bombay under a similar arrange-  
 ——— ment which indicated that they came from Harriss & Vose and were  
 to be delivered only to the plaintiff in Bombay and no one else. According  
 to the plaintiff this was the method of doing business with his New York  
 friends which he had been following for years. The signature on behalf of  
 Harriss & Vose is the same on all the documents. The intimation notes  
 confirmed the purchases about which wires had been previously sent. The  
 plaintiff duly followed up all the information received from New York by  
 sending his own contracts immediately to the 1st defendant company, inti-  
 mating the purchase of cotton at the very rates at which defendant No. 3  
 had instructed him to purchase. The contracts which have not been disputed  
 state that the business was done in New York according to the rules, regula-  
 tions and by-laws of the New York Cotton Exchange. On considering the  
 routine of business and the course of conduct followed by the plaintiff for  
 years, and followed in this case immediately on receipt of information about  
 the transactions from New York by sending his own contracts, letters, wires,  
 and statements of account which were accepted by the 1st defendant com-  
 pany, I hold that the documents are admissible in evidence. Defendant No. 3  
 had opportunities to object to the contracts, letters, wires, and statements of  
 account sent to the 1st defendant company as and when they were received,  
 but neither he nor any one else on behalf of the company raised any objection  
 at all.

Subsequently the market in American Cotton declined and by the first  
 wire of March 10 plaintiff asked for Rs. 4,000 as further margin. As none  
 was sent he wrote to the 1st defendant company on March 11 that he  
 would have to write to his New York friends to liquidate the purchases.  
 Thereafter on March 12 the plaintiff asked for a sum of Rs. 10,000 from  
 the 1st defendant company as the market went lower and lower. The 1st defen-  
 dant company wired on March 12 that they could not send the moneys  
 immediately owing to difficulties but would do so within a few days. Plaintiff  
 according to his terms of business wrote to the 1st defendant company that he  
 was obliged to liquidate the purchases. He accordingly informed Messrs.  
 Harriss & Vose, and in turn was informed by them of the sale of 600 bales  
 on March 12. Immediately he informed the 1st defendant company of the  
 sale and sent the relative contract to them. There was a loss of 5144.72 dollars  
 or Rs. 14,715-5-9. A statement of account was sent by the plaintiff with  
 his letter of March 19 showing a loss of Rs. 7,232-0-6 which was subsequently  
 corrected to Rs. 7,229. Intimation of the correction was given to the 1st  
 defendant company on April 9, 1935.



Defendant No. 3 came to Bombay about the middle of April, 1935, and saw the plaintiff when the plaintiff again demanded the moneys due in respect of the loss, but the plaintiff said that defendant No. 3 asked him to wait and not to proceed further. It seems that there was a suit pending between the plaintiff and the 2nd defendant company, being suit No. 595 of 1935, for the recovery of about Rs. 16,000 from the 2nd defendant company in respect of other transactions. A consent decree in that suit was taken in Bombay in July, 1935, and it was about that time that defendant No. 3 again came to Bombay and saw the plaintiff. The plaintiff repeated his demand for the moneys, but was again asked by defendant No. 3 to wait. Thereafter the plaintiff wrote his letter to defendant No. 3 on November 9, 1935, referring to his interview in April at which he was asked to wait and not to proceed further. The next interview between the plaintiff and defendant No. 3 in Bombay was early in January, 1936. Again the plaintiff made his demand and again he was asked to wait. Probably the interview was about January 3, 1936, for on that day defendant No. 3 arranged a scheme with the plaintiff for doing new business in the name of the 1st defendant company under which the 2nd defendant company would be able to pay off gradually the sum of Rs. 7,229 due by the 1st defendant company to the plaintiff. I will refer to the scheme later. Plaintiff wrote again to defendant No. 3 on October 22, 1936, about his moneys. To both these letters, namely of November, 1935, and October, 1936, there was no reply. The 1st defendant company was the principal debtor, and therefore the communications were first addressed to them, as the primary liability to the creditor is that of the principal debtor. When moneys were not paid the plaintiff wrote to defendant No. 2 on December 5, 1936, about his claim for Rs. 7,229, and repeated all that he had said in his previous letters. On December 9 the 2nd defendant company wrote back through its secretary that the company had nothing to do with the amount claimed from the 1st defendant company. The other allegations in the letter were neither referred to nor denied. Plaintiff wrote two letters on December 12 the second of which was a reply to the 2nd defendant company's letter of December 9, in which he referred to the old correspondence of October-November, 1934, when he was unwilling to transfer the account of the old contracts and transactions between him and the 2nd defendant company to the 1st defendant company, but had agreed to do so only on the guarantee he got from defendant No. 3 on behalf of the 2nd defendant company. The 2nd defendant company replied by a wire on December 15 that it would be a breach of trust if the account of the 1st defendant company was transferred to the account with the 2nd defendant company, but the guarantee was not denied. The fact that the account of the 1st defendant company was separate from the account of the 2nd defendant company is by no means inconsistent with the case of the guarantee, for payment of any loss arising under the account of the 1st defendant company. Plaintiff, however, replied that he would not transfer the one account to the other, and threatened to file a suit against both the companies for recovery of his money. Thereafter this suit was filed on January 7, 1937.

The plaintiff seeks to recover from defendants Nos. 1 and 2 the balance

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O. C. J. due to him after giving credit for the sum of Rs. 5,870-3-6 due by him to  
 • • 1940 the 2nd defendant company, either on the ground of the guarantee, or on the  
 — ground that the transactions of the 1st defendant company were really those  
 SREE of the 2nd defendant company. It is clear that the plaintiff as an agent has  
 MEENAKSHI to prove, if the transactions are disputed, that in pursuance of his instructions  
 • MILLS, LTD. he has put through the relative transactions in the New York market, that  
 v. he has suffered damage to the extent of Rs. 7,229 against the transactions and  
 • RATILAL has paid the same, and is therefore entitled to be indemnified by his principal.  
 TRIBHOVAN- It is a well-known principle that every contract of agency imposes on the  
 DAS agent the duty of rendering a true and complete account regarding the sub-  
 — B. J. Wadia J. ject-matter of the agency. In his written statement defendant No. 3 has, as  
 I have said before, contended that the plaintiff had to prove that the transac-  
 tions were put through in the New York market. The 2nd defendant com-  
 pany stated in para. 3 of their written statement that they were not concerned  
 with the transactions. They merely denied the guarantee and defendant No.  
 3's authority to guarantee. Nevertheless an issue has been raised on behalf  
 of both the 2nd defendant company and defendant No. 3 as to the proof  
 of the transactions. With regard to the 1st defendant company the transac-  
 tions were never disputed. The copy of the balance-sheet prepared as of  
 April 26, 1939, and sent to the plaintiff with their letter of May 27, 1939,  
 shows that the amount due to the plaintiff was Rs. 7,229. That is an admis-  
 sion of liability on behalf of the 1st defendant company. Counsel for defend-  
 ants Nos. 2 and 3, however, argued that any admission of liability by the  
 principal debtor is not binding on the guarantor or the surety, and that before  
 the 2nd defendant company could be held liable on the guarantee that com-  
 pany was entitled to call upon the plaintiff to prove not only that the trans-  
 actions were duly entered into but that they resulted in a loss of Rs. 7,229.  
 Counsel referred to *Ex parte Young* : In re *Kitchin*<sup>1</sup>, in which it was held that  
 in the absence of a special agreement, a judgment or an award against a  
 principal debtor was not binding on the surety, for it was no evidence against  
 the surety in an action against him by the creditor, and that the surety was  
 entitled to have the liability proved as against him in the same way as against  
 the principal debtor. As was pointed out by James L. J. at p. 671, "it is  
 perfectly clear that in an action against a surety the amount of the damage  
 cannot be proved by any admissions of the principal", and as pointed out  
 by Lush L. J. at p. 673, the surety is only bound to pay the amount which  
 shall be proved against him. In *Guardians, Abbeyeleix Union v. Sutcliffe*,<sup>2</sup>  
 it was held by the majority of Judges that the entries in a rate-collector's  
 books as to the amount collected were admissible in evidence against the  
 surety, probably on the ground that the faithful discharge of his duties by  
 the debtor was guaranteed by the surety, but O'Brien J. held that as against  
 the surety everything must be strictly proved. The point as to the admissi-  
 bility in evidence of any statement or admission made by the principal debtor  
 as against the surety is, as Lord Kenyon pointed out in *Perchard and Ham-  
 merton Sheriffs of London v Tindall*,<sup>3</sup> not free from doubt. It might be dan-

1 (1881) 17 Ch. D. 668.

Ex. D. 332.

2 (1890) L. R. I. 26 Q. B. &amp;

3 (1795) 1 Esp. 394.

gerous to make such an admission binding upon the surety, as it might well have been due to collusion between the creditor and the debtor. In my opinion the admission of the 1st defendant company as to the actual amount of the loss could not be binding on the 2nd defendant company, but I do not think that an agent owes the same duty to the guarantor which he owes to the principal in the matter of proving the transactions. I do not therefore think that the agent is bound to prove the transactions to the guarantors, but he has got to prove the amount of the liability for which the surety stood guarantee.

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The plaintiff seeks to rely on the duplicate copy of the scheme dated January 3, 1936, as an admission of liability on the part of the 2nd defendant company that Rs. 7,229 are due and payable by the 2nd defendant company to the plaintiff. This scheme was discussed between defendant No. 3 and the plaintiff when defendant No. 3 came to Bombay and saw the plaintiff early in January, 1936, and certain terms of business that was to be done in future between the plaintiff and the 2nd defendant company were discussed. The heading of the document is that an arrangement was made between the Sree Meenakshi Mills, Limited, of Madura and Messrs. Ratilal & Co. of Bombay, i.e., between the 2nd defendant company and the plaintiff, for doing business in cotton for and on behalf of defendant No. 2 mills in the name of the 1st defendant company according to the terms of the document. The plaintiff and his witness Chhaganlal stated that the original document was taken away by defendant No. 3 to Madura for being signed but was not returned to the plaintiff. The document left with the plaintiff was the duplicate. Counsel for defendant No. 3 argued that the duplicate was a bogus document, and that there was no such original document at all. The original has not been produced, and there is nothing on my record to show that defendant No. 3, who has chosen not to come to Bombay to give evidence, was even asked whether the original of this document was given to him or not. There is an alteration in the figure of the year 1936 in the document. Originally it was 1935 and the figure '5' has been turned into '6'. The year 1935 was obviously a mistake, because the transactions in respect of which Rs. 7,229 became due had not even commenced in January, 1935. It is provided by para. 4 of the scheme that two-thirds of the net profit in the new business that will be done will go to defendant No. 2 Mills, and the remaining one-third will go to the plaintiff in payment of the amount due to him from the 1st defendant company until the whole amount was recovered. A line has been added, namely, "the amount due is Rs. 7,229 and interest". It was argued on the appearance of the type that this was a subsequent interpolation, but both plaintiff and Chhaganlal said that it was added after he had typed the rest at the instance of the plaintiff and in the presence of defendant No. 3. Can this clause be construed as containing an admission of liability on the part of the 2nd defendant company to pay Rs. 7,229 and interest to the plaintiff? I do not think so. In the first place the scheme for one reason or the other was not acted upon, and, secondly, it may have been equally part of the consideration for the plaintiff to do new business for the 2nd defendant company that his old claim against the 1st defendant company should be paid off by the 2nd defendant com-

O. C. J. pany in the manner suggested. It is, however, significant that though the  
 1940 scheme has been subsequently referred to in the correspondence, there has  
 been no denial on the part of defendant No. 3 that such a scheme was  
 SRBB proposed and discussed. On the other hand the plaintiff by his letter of  
 MEENAKSHI December 5, 1936, has stated that the scheme was to be approved of by  
 MILLS, LTD. 2nd defendant Mills. As it was not signed and returned, the fair inference  
 v. would be that it was not finally approved of. I do not agree that this  
 RATILAL document is by any means a bogus document. At the same time I do not  
 TRIBHOVAN- think that this clause is a clear admission of liability. The clause is, however,  
 DAS important to show that the 2nd defendant company through defendant No. 3  
 B. J. Wadia J. knew at least on January 3, 1936, that the amount of the loss which the plaintiff  
 claimed from the 1st defendant company, and which amount according to  
 the plaintiff was guaranteed by the 2nd defendant company, amounted to  
 Rs. 7,229.

Counsel argued that in order to succeed against the 2nd defendant company plaintiff must prove that the transactions were put through in the New York market, that the transactions resulted in a loss of Rs. 7,229, and that payment of the loss was guaranteed by the 2nd defendant company. There is also the question of the authority of defendant No. 3 to give such guarantee. I have already stated before that the creditor has to prove the amount of the loss as against the surety, for it is really the amount of the loss which he has guaranteed to pay. I will, however, deal with the question of the putting through of the transactions as it has been discussed at length and about which an issue was raised.

It is in evidence that instructions were given by defendant No. 3 to the plaintiff on February 25 to purchase the 600 bales of cotton within different limits of price. The plaintiff has said, and there is no contradiction, that the instructions were given to him by defendant No. 3 both as a director of the 1st defendant company and as representing the managing agency firm of the 2nd defendant company. On the very day on which the instructions were given and the deposit of Rs. 7,500 was made, plaintiff wired to his friends in New York, Harriss & Vose, under their registered telegraphic address 'Ratihar' to effect the purchase. On the same day plaintiff received a wire from New York at his telegraphic address in Bombay 'Harisrati' that 300 bales had been purchased at 12.39 c. per lb. of cotton, the limit given in the instructions. The account of the 1st defendant company was given the number, 40. The cable address 'Ratihar' was registered in New York. The cable address 'Harisrati' has been registered in Bombay. The two words are made up of the plaintiff's name Ratilal and the name of Harriss, of the firm of Harriss & Vose. The object of the registration was that wires sent by plaintiff to 'Ratihar' could only be delivered to Harriss & Vose in New York as coming from the plaintiff, and wires sent by Harriss & Vose to 'Harisrati' could be delivered only to plaintiff in Bombay as coming from Harriss & Vose. Plaintiff's general telegraphic address is 'Çabin', that of the managing agency firm is "Karumuttu", and that of the 1st defendant company was "Pearl". On March 1 the plaintiff wrote to Harriss & Vose at New York confirming the exchange of wires or radiograms regarding the purchase of 300 bales for October delivery in the account No. 40. Plaintiff also stated

that the signature of Harriss & Vose on all the communications received from them was uniform. On receipt of the wire from New York plaintiff wrote on February 26 to the 1st defendant company, enclosing contract No. 249 for the purchase of 300 bales. On March 2 the counter-part was duly signed by or on behalf of the 1st defendant company and returned to the plaintiff. Defendant No. 1 company also confirmed the purchase of the 300 bales in accordance with the instructions given for the purpose. The same procedure was followed regarding the purchase of the 200 bales on March 5 at 12.35 c. per lb. of cotton. On receipt of two wires from New York under the address 'Hariharati' in reply to the plaintiff's wire sent under the address 'Ratihar', plaintiff wired to the 1st defendant company and wrote to them on March 6 intimating the purchase of the 200 bales and sent his contract No. 252 to the 1st defendant company. A similar procedure was followed in respect of the purchase of the 100 bales, and the plaintiff sent his contract No. 254 to the 1st defendant company. These last two contracts have not been signed and returned to the plaintiff. A similar procedure was also followed in respect of the sale of the 600 bales for closing the purchases, and plaintiff sent his contract No. 262 to the 1st defendant company which was also not returned. The plaintiff got a statement of the loss in the transactions from Harriss & Vose. The plaintiff also sent a statement of the loss to the 1st defendant company to which no objection was ever raised.

Counsel for defendants Nos. 2 and 3 argued that in order to prove that the transactions were put through in the New York market it was necessary for the plaintiff to have produced the contracts entered into between the New York brokers, or that they should have called Harriss & Vose and the other brokers here in Bombay, or that they should have got them examined on commission in New York. It was also argued that the mere sending of the wires, letters and confirmation notes did not prove the transactions, and that merely following the usual routine of business between the plaintiff and his New York friends on the one hand and the plaintiff and the 1st defendant company on the other was also not sufficient proof of the transactions. In my opinion the entire evidence and the course of conduct of the plaintiff must be considered together. The contracts he sent to the 1st defendant company were sent immediately after intimation was received from New York. It is stated in the contracts that the transactions were effected according to the rules, regulations and by-laws of the New York Cotton Exchange. By accepting the contracts the 1st defendant company confirmed to the plaintiff that the transactions were so effected in New York. What is more, Harris & Vose sent the statement of loss to the plaintiff in dollars, and the plaintiff's books of account which are kept in the regular course of business and were not challenged, and the memo. of the National City Bank of New York, all show that the plaintiff duly paid the loss to Harriss & Vose which he now seeks to recover from the 1st defendant company on his indemnity, and from the 2nd defendant company on their guarantee. As far back as 1869, in the case of *Hodgson et. al. v. Rupchand Hazarimal*,<sup>1</sup> which was a suit to recover the deficiency of a sale of cotton consigned by the defendant

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<sup>1</sup> (1869); 6 B. H. C. R. (O.C.J.) 39.

O. C. J. to the plaintiffs' firm in Liverpool, Couch C. J., observed as follows (p. 41) :—

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"The law as to account-sales is, that where an account between merchants in different countries has been transmitted from one to the other, and no objection is made after several opportunities of writing have occurred, the account is deemed in a Court of Equity a stated account, only to be opened when some cause is shown for the interposition of the Court; and when the goods are consigned to be disposed of in a foreign market, I think it must be considered that the consignor impliedly agrees that the account-sales furnished by the correspondents abroad shall be taken as *prima facie* evidence of what the goods realised. It would cause great expense and inconvenience if the debtor, by merely objecting to the account, could compel the procuring of evidence from abroad; and, seeing that in practice merchants are satisfied with the truth of the account-sales, and ask for no further evidence, I think there is a good ground for considering that there is such an implied agreement."

In *Mayen v. Alston*<sup>1</sup> it was also held that account-sales were *prima facie* proof of the transactions to which they related. In that case the Appeal Court in Madras referred with approval to *Hodgson et. al. v. Rupchand Hazarimal*. It also referred to a dictum of Mr. Justice Blackburn in *Smith v. Blakey*<sup>2</sup> that account-sales are *prima facie* evidence, subject to the right on the other side to surcharge or falsify. At p. 246 Muttusami Ayyar J. observed "seeing that the procuring of the evidence of correspondence at the several foreign markets would occasion considerable delay and expense and tend to paralyze trade, I am of opinion that account-sales were properly admitted as *prima facie* proof." Both these cases were referred to in argument in *Barlow v. Chuni Lall Neoghi*<sup>3</sup>. In that case the defendants in Calcutta consigned mica through the plaintiffs for sale by the plaintiffs' London firm in London. The mica so consigned was sold at a loss. The plaintiffs thereupon instituted this suit in Calcutta to recover the loss, and desired to prove the amount of the loss on the London sales. They tendered the London account sales which their witnesses proved were received in the ordinary course of business in Calcutta from London together with the accounts-current. Press copies of the said account-sales had been previously sent to the defendants and not objected to by them. But none of the witnesses could prove the signature of the London brokers on the original account-sales. It was held by Stanley J. that account-sales are *prima facie* evidence of the amount realised in the foreign market by the sale of the goods and that if it were not so, it would be impossible to carry on mercantile transactions with merchants in distant parts. Similarly in this case the statement of loss on the transactions of the 600 bales was duly transmitted by the New York correspondents of the plaintiff to the plaintiff in Bombay. That statement has been put in as exhibit A-6. It shows that 300 bales were purchased on February 25, 200 on March 5, and 100 on March 6, 1935. It shows the price at which they were respectively purchased. It shows also that on March 12, 300 bales were sold at one price and 300 bales were sold at another price under the account numbered 40. It further shows that the amount of the loss in that account came to 5144.72 dollars. A further statement which is exhibit A-9 in respect of all the dealings between the plaintiff and Harriss & Vose was also sent to the plaintiff. That statement shows that in respect of the transaction of 600 bales for October delivery

1 (1893) I. L. R. 16 Mad. 238.

3 (1901) I. L. R. 28 Cal. 209.

2 (1867) L. R. 2 Q. B. 326.

there was a debit to the plaintiff of 5144-72 dollars with Harriss & Vose on March 13, 1935. These statements are in my opinion prima facie proof of the amount of the loss, and the plaintiff sent his statement of account to the 1st defendant company accordingly. It was open to the company and defendant No. 3 who represented both companies to object to the statements from New York on which the plaintiff's statement of account was based, or to call for inspection of those statements after due inquiry, or to meet this prima facie evidence by better evidence than what was given; but no evidence was led on their side, nor any objections raised at any time. In addition plaintiff has produced his local ledger as well as his foreign ledger to show what was due in American dollars and what he had to pay in rupees to his New York friends. He also produced the memo. of the National City Bank of New York showing that the moneys were duly remitted. None of these has been challenged by the other side. It was argued that plaintiff might only have believed that Harriss & Vose had put through the transactions, though they might not have. It would be indeed strange for a man who had done business in Bombay for years if he made large payments merely on the belief that he had to pay.

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There is one further point to be mentioned in this connection. Defendant No. 3 is the common director of the two companies. It has been held in *In re Hampshire Land Company*<sup>1</sup> that where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies, and that the knowledge which he has acquired as officer of the one company will not be imputed to the other company, unless he has some duty imposed upon him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed upon him by that company to receive the notice. If therefore the 2nd defendant company were in fact guarantors, it was clearly a duty imposed upon defendant No. 3 to communicate to that company his knowledge of the loss incurred in the transactions of the 1st defendant company of which he was a director, as he was not only a director but the owner of the managing agency firm of the 2nd defendant company. Defendant No. 3 was really the moving spirit of both the companies until the 1st defendant company went into liquidation. This case was cited with approval by our Appeal Court in *Pratt (Bombay) Limited v. Sassoon & Co., Limited*.<sup>2</sup> Apart from the fact that the 2nd defendant company knew or must have known the amount of the loss incurred by the 1st defendant company through defendant No. 3 as the common officer of the two companies, the plaintiff has, by producing all the necessary documents and the statements of loss that he received from New York, and the entries in his books showing payment, the memo. of the National City Bank of New York showing despatch of the moneys due to Harris & Vose, proved satisfactorily that the amount of loss incurred by the 1st defendant company was Rs. 7,229. All these documents are in my opinion sufficient to dispense with any further proof of the transactions by calling evidence from New York or taking evidence there on commission. It would

1 [1896] 2 Ch. 743.

2 (1935) 37 Bom. L. R. 978,  
1007-8.

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indeed be a great hardship on a commission agent in Bombay whose claim is honest, and who has produced all the important and necessary documents, the genuineness of which has not been challenged, that he should have to go to New York for further evidence in proof of his claim. A belated application was made to me after the plaintiff's case was closed to call defendant No. 3 from Madura on the alleged ground that he was lying ill. That application was not in my opinion a bona fide application. A day after the hearing of this suit commenced counsel for defendant No. 3 intimated to the Court that if the case remained part-heard over the week end defendant No. 3 would be able to come to Bombay. For two days, namely, February 5 and 6, after the week end I was engaged in the Parsi Chief Matrimonial Court. It was on February 7 that this application was made, merely to gain time, when it was felt that the case of guarantee made out by the plaintiff stood uncontradicted on the record.

I have already dealt with the interview of February 25 at which the plaintiff and his witness Chhaganlal said that defendant No. 3 on behalf of the 2nd defendant company agreed to stand guarantee for the amount of the loss in the transactions of the 1st defendant company, namely the transactions in suit. The first question is whether in fact he gave such guarantee. I have also dealt with the correspondence up to the filing of the suit. It was argued by counsel that the guarantee was alleged for the first time in the letter of December 12, 1936, because the plaintiff by that time must have come to know that he had no chance of recovering anything from the 1st defendant company, and also because by that time the plaintiff also knew that Rs. 5,870 odd were due by him to the 2nd defendant company in respect of their separate business. It was argued that the case of guarantee was put forward in order to prevent the 2nd defendant company from recovering the amount of that loss from the plaintiff. This to my mind is not correct. Firstly, the moneys had become due by the plaintiff to defendant No. 2 by September, 1936. Secondly, repeated demands had been made from defendant No. 3 to pay the amount due by the 1st defendant company at the several interviews which I have referred to. Thirdly, in his letters of November 9, 1935, and October 22, 1936, plaintiff wrote that he had often spoken to defendant No. 3 that he wanted to file a suit against both defendants Nos. 1 and 2, but that his hands were stayed by defendant No. 3. Plaintiff could only sue both the companies if one was the principal debtor and the other was the guarantor. If it was merely an account of the one company in the name of the other, plaintiff would have to sue the 2nd defendant company only. Fourthly, this guarantee has not been denied, neither in correspondence, nor by any evidence in Court. Both the plaintiff and his witness Chhaganlal impressed me as honest and respectable witnesses, and I believe the plaintiff when he said that but for the guarantee of the 2nd defendant company he would never have agreed to do business for the newly formed 1st defendant company. Neither defendant No. 3 nor any one else has come to give any contrary evidence on behalf of the 2nd defendant company. I entirely believe the plaintiff's evidence and rely on it.

The next question is whether defendant No. 3 had authority to give the guarantee and whether his guarantee is binding on the 2nd defendant company.



Counsel argued that one limited company could not stand guarantee for the contracts of another limited company without an express power given to the company either in so many words or to be inferred from the general language used. The memorandum and some of the articles of association of the 2nd defendant company together with Schedule A containing the articles of the managing agency agreement have been put in collectively as exhibit A-18. Among the objects for which that company was established cl. III(14) of the memorandum of association provides that the company can enter into partnership or arrangements for sharing profits, amalgamation, etc., with any person, firm or company carrying on or about to carry on similar business, and to lend money to, guarantee the contracts of or otherwise assist any such other company. It was argued that on a proper construction of this clause the 2nd defendant company could only guarantee the contracts of another company, in this case the 1st defendant company, if it entered into a partnership or arrangements or amalgamation as stated in the first part of that clause. In my opinion that construction is not correct. If it was correct, it would mean, for instance, that the 2nd defendant company guaranteed the contracts of its partner the 1st defendant company, if it had to enter into such a partnership. No guarantee in such a case could be required, as one partner is the agent of the other for the purpose of the partnership business. I think that the words such company in the second part of the clause merely describe the company's business, namely, business similar to the business of the company that gave the guarantee. Plaintiff's counsel referred me to article 135 of the articles of association which describes the general powers of the managing agents, namely that they might exercise all such powers and do all such acts and things as might be exercised or done by the company and not thereby or by law expressly directed or required to be done by the directors. Counsel for the 2nd defendant company referred me to art. 127, sub-clauses 13 and 21. This article describes the express powers of the board of directors of the company but without prejudice to the rights and powers of the managing agents by virtue of certain articles, including art. 135, and by virtue of any agreement entered into with the company and without prejudice to the general powers of the directors conferred by art. 126. It is provided by art. 127(21) that the directors could *inter alia* enter into all such contracts as they consider expedient. But this power is subject to the general power of the managing agents who under their agency agreement have power to enter into contracts and make all necessary arrangements and vary the contracts on behalf of the company. Reading all these articles and the clause of the memorandum of association and the agency agreement together, I find that the words giving the authority to defendant No. 3 as the proprietor of his managing agency firm are sufficiently wide to enable him to enter into a contract of guarantee.

The alternative case that the transactions in suit were really, those of the 2nd defendant company but had been done benami or in the name of the 1st defendant company has not been substantiated, though in the beginning of the negotiations defendant No. 3 himself wrote that the accounts of the two companies were to be one and the same. It is true that the plaintiff in his evidence could not properly distinguish between an account of the

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O. C. J. 2nd defendant company kept benami in the name of, the 1st defendant company and an account of the 1st defendant company the loss in which was guaranteed by the 2nd defendant company. To his lay mind as he put it the two meant the same thing. In his cross-examination he said as follows :—  
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Strictly speaking this is not correct, because the two companies are not the same. Even though there was a common management and a common director, the two are in law separate entities with different memoranda and articles of association. It is difficult to understand what exactly defendant No. 3 meant by calling the 1st defendant company "a sister concern" of the 2nd defendant company, but mere nomenclature of that kind cannot establish the identity of the two. The contracts were sent to the 1st defendant company, margin was demanded from the 1st defendant company, the loss was in the first instance demanded from the 1st defendant company, and all this clearly shows that the 1st defendant company was the principal debtor and that the 2nd defendant company were really the guarantors. In my opinion the case of guarantee has been established by the plaintiff, and he is entitled to succeed both against the 1st defendant company as his debtor and against the 2nd defendant company as guarantor. The suit against defendant No. 3 must be dismissed, because it was sought to hold him personally liable only for breach of warranty of authority to give the guarantee, if the guarantee was not proved.

I do not think that the plaintiff can ask in this suit to set-off the decretal amount payable by defendants Nos. 1 and 2 against the amount which is admitted due by him to defendant No. 2 alone. Moreover, the 2nd defendant company themselves do not want that set-off. There must therefore be a decree for the plaintiff against defendants Nos. 1 and 2 and a counter-claim in favour of defendant No. 2 as against the plaintiff. It may be that in execution under O. XXI, r. 18(4), of the Civil Procedure Code, the two amounts may be set-off, the smaller against the larger, but the Court is not here concerned with the question of execution.

[After recording findings on issues his Lordship concluded :]

In the result there will be a decree for the plaintiff against defendants Nos. 1 and 2 for Rs. 7,229 with interest thereon at six per cent. per annum from January 7, 1937, till judgment, costs and interest on judgment at six per cent. per annum till payment.

Suit against defendant No. 3 dismissed. I make no order as to his costs, as he is principally responsible for this litigation.

There will be a decree on the counter-claim in favour of the 2nd defendant company against the plaintiff for Rs. 5,870-3-6 with interest thereon at six per cent. per annum from December 18, 1936, till judgment, costs of and incidental to the counter-claim, but no costs to be allowed for any hearing

of the counter-claim as the amount had been admitted. Interest will run on the amount of the counter-claim at six per cent. per annum from judgment till payment.

Defendants Nos. 2 and 3 appealed.

*F. J. Coltman*, with *N. H. Bhagwati*, for the appellants.

*Sir Jamshedji Kanga*, with *M. P. Amin*, for the respondents.

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BEAUMONT C. J. This is an appeal from a decision of Mr. Justice B. J. Wadia. The plaintiff, who is a broker in Bombay, sued the three defendants for the amount of losses incurred in dealings in cotton on the New York Exchange during the year 1935. He sued defendant No. 1 as the principal debtor, defendant No. 2 as a surety, and defendant No. 3 apparently as having entered into the contract of suretyship on behalf of defendant No. 2. Defendant No. 2 is a company, which has existed for some time, and defendant No. 3 is the sole proprietor of the firm of the managing agents of defendant No. 2. Defendant No. 1 is a company, which had been formed shortly before the date of the present transactions, and defendant No. 3 was one of its directors. In 1935 the plaintiff, who had previously known defendant No. 3 and had done business for defendant No. 2, was asked to transfer defendant No. 2's account to defendant No. 1, and that he declined to do. He was distrustful of a new company of which he knew nothing. However, the evidence is that in February, 1935, defendant No. 3 came down to Bombay and persuaded the plaintiff to do business for defendant No. 1, and it was at that interview that defendant No. 3 is said to have given a guarantee on behalf of defendant No. 2 of the liabilities incurred by defendant No. 1 to the plaintiff. Pursuant to the arrangements then made, the plaintiff, through his ordinary brokers in New York, put through transactions for the purchase of 600 bales of cotton for the October settlement at specified prices. Subsequently the market went down, and as the plaintiff had not sufficient margin, he closed the transactions by instructing his New York brokers to sell 600 bales for October. Evidence as to these transactions was given by the plaintiff. He stated in the witness-box that he had employed Messrs. Harriss & Vose, his usual agents in New York, to carry out these transactions. He produced copies of the telegrams he had sent and the telegrams and letters which he had received in reply, purporting to show that these transactions of purchase and sale had been carried out. The signature on the telegrams is naturally not proved. Harriss & Vose eventually sent a statement of account, which is exhibit A-6. There is a printed signature on it of Harriss & Vose, and it is initialled "Per J. D. F.," the initials being typewritten. That statement was sent on to defendant No. 1, who never disputed it. Defendant No. 2 must have known about the account, because defendant No. 3 is a director of defendant No. 1 and also the managing agent of defendant No. 2. It is, however, clear that there is no legal evidence of the transactions having taken place on the New York Exchange. The actual contracts entered into on the New York Exchange are not produced, and there is no evidence of the signature of Harriss & Vose. The 2nd defendant company, which is the principal appellant, contends that it was not bound by the evidence adduced by the plaintiff. Defendant No. 1 has gone into

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 1940 defendant No. 2, in the first instance, disputes the fact of the guarantee having  
 been given, and, in the second place, contends that if it did guarantee the  
 debt, it is entitled to have the debt strictly proved as against it, and that  
 it is not bound by any admission made by defendant No. 1.

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With regard to the factum of the guarantee, we have the evidence of the plaintiff and of his clerk that defendant No. 3 in February, 1935, did guarantee on behalf of defendant No. 2 the liability of defendant No. 1 to the plaintiff. There is nothing in writing, and the plaintiff himself, who is a layman, frankly admitted that he did not really know the difference between obtaining a guarantee and a transaction being entered into by an agent. He was very anxious that the transactions, which he was to enter into on behalf of defendant No. 1, should be regarded in substance as transactions of defendant No. 2, and he did not mind whether that result was brought about by defendant No. 2 being regarded as a principal or a guarantor. His evidence as to the terms of the alleged guarantee cannot be regarded as very accurate. But his clerk Chhaganlal was called, and he is an LL.B., and, therefore, may be taken to know something about general principles of law. He says that he was present at the interview, and that defendant No. 3 said that it was the 2nd defendant company's business and the moneys were of the 2nd defendant company, but still if the plaintiff wanted a guarantee, he would stand guarantee on behalf of the 2nd defendant company, and if any moneys remained unpaid, the 2nd defendant company would pay. That is clear evidence of a guarantee having been given. Defendant No. 3 did not go into the witness-box and did not, therefore, deny the account of this interview given by the plaintiff and his clerk, and the learned Judge accepted the plaintiff's evidence. No doubt one would have expected a guarantee of this sort to be put into writing, and it is true that no reference was made to the guarantee until the plaintiff's letter of December 12, 1936; but still the learned Judge having accepted the evidence of these two witnesses, relying naturally on the fact that defendant No. 3 did not choose to go into the witness-box to deny the account of the interview, there is no reason, in my opinion, why we should differ from the learned Judge on that question. I, therefore, accept the finding that defendant No. 2 did guarantee payment of any moneys remaining unpaid by defendant No. 1 to the plaintiff.

The question, then, arises whether on the evidence adduced defendant No. 2 is liable on the guarantee. It is well established that a guarantor is prima facie entitled to have the debt proved as against him. The fact that the principal debtor has admitted the debt, or that a judgment or award has been given against him for the debt, does not bind the guarantor, unless he was a party to the proceedings in which the judgment or the award was given, or was party to the admission of the principal debtor (see *Ex parte Young*; *In re Kitchen*.<sup>1</sup>) But the way the learned Judge puts the case against defendant No. 2 is this. He says, first, that it was an implied term of the dealings between defendant No. 1 and the plaintiff that defendant No. 1 should accept the accounts submitted in the ordinary course of business by

the New York brokers ; and, secondly, that the debt which defendant No. 2 guaranteed was the debt as proved in accordance with this implied agreement.

With regard to the first proposition of the learned Judge, namely, that defendant No. 1 must be taken to have agreed to accept as evidence of the transactions on the New York Exchange the accounts sent by the brokers, the learned Judge relied on cases, which are generally referred to as the account-sale cases. The learned Judge set out a passage from the judgment of Couch C. J. in *Hodgson et. al. v. Rupchand Hazarimal*<sup>1</sup> which is in these terms (p. 41) :—

"The law as to account-sales is, that where an account between merchants in different countries has been transmitted from one to the other, and no objection is made after several opportunities of writing have occurred, the account is deemed in a Court of Equity a stated account, only to be opened when some cause is shown for the interposition of the Court; and when the goods are consigned to be disposed of in a foreign market, I think it must be considered that the consignor impliedly agrees that the account-sales furnished by the correspondents abroad shall be taken as *prima facie* evidence of what the goods realized. It would cause great expense and inconvenience if the debtor, by merely objecting to the account, could compel the procuring of evidence from abroad ; and, seeing that in practice merchants are satisfied with the truth of the account-sales, and ask for no further evidence, I think there is a good ground for considering that there is such an implied agreement."

I certainly do not desire to challenge the principle there laid down, which was founded on a dictum in *Smith v. Blakey*<sup>2</sup> and has been followed in *Mayen v. Alston*<sup>3</sup> and in *Barlow v. Chuni Lall Neoghi*.<sup>4</sup> But so far as I know, the principle of those cases has never been extended to the case of forward contracts. In all the cases referred to actual goods had been consigned, and the actual sale of the goods in a foreign country was not disputed, and the Court held that the account sent in by the foreign agent must be treated as *prima facie* evidence, subject to the right of the client to surcharge and falsify. Mr. Coltman relied on an unreported decision of this Court in *Shree Meenakshi Mills, Ltd. v. Maurice Stern*,<sup>5</sup> in which the question which arose was to some extent the same as the question in this case. There were in that case other points which had to be determined, but the question as to the proof of contracts entered into on the Liverpool Market came up for decision, and it appears to have been admitted in that case that the evidence, which was similar to that tendered in this case, was not sufficient. However, these account-sale cases were not cited, and, therefore, I do not regard the decision in *Shree Meenakshi Mills, Ltd. v. Maurice Stern* as being an authority on the question whether the principle of those cases should be applied to contracts of the character with which we have to deal.

I am very doubtful myself whether we should be justified in extending the principle of those cases to forward contracts. It is much easier to check the sale of actual goods consigned, and to verify details of such a sale, than to check the mere making of contracts upon a foreign exchange. However, assuming that it can be said as against defendant No. 1 that there was an implied agreement to accept the accounts submitted by the New York brokers

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1 (1869) 6 B.H.C.R. (O.C.J.) 39.

2 (1867) L. R. 2 Q. B. 326.

3 (1893) I. L. R. 16 Mad. 238.

4 (1901) I. L. R. 28 Cal. 209.

5 (1935) O. C. J. Appeal No. 50 of 1934, decided by Beaumont C. J. and Blackwell J., on September 5, 1935, (Unrep.)

O. C. J. as accurate, although such an agreement is not pleaded, I cannot accept the  
 1940 second proposition of the learned Judge, and I am of opinion that it is impos-  
 SREE must depend on the true construction of the guarantee which he has given.  
 MEENAKSHI If the guarantor merely guarantees payment of the debt of the principal  
 MILLS, LTD. debtor, then he is entitled to require the debt to be proved as against him  
 v. in accordance with the ordinary law, that is in this case under the Indian  
 RATILAL Evidence Act. If, on the other hand, the principal debtor has agreed that as  
 TRIBHOVAN- against him the debt shall be proved in a particular way, and the guarantor  
 DAS has guaranteed the debt so to be proved, then I apprehend that there can be  
 ——— no doubt that the guarantor would be bound by the particular method of  
 ——— proof agreed to by the principal debtor and accepted by himself.

The two cases cited by Mr. Coltman illustrate the distinction. In *Ex parte Young* : In *re Kitchen* (*supra*) an agreement had been entered into between a creditor and a principal debtor for the sale of certain wines, and the surety had guaranteed payment for the wines and had also guaranteed that all the terms of the agreement would be duly carried out. One of the terms of the agreement was that there should be an arbitration in respect of any dispute arising between the parties, and upon an arbitration, damages had been awarded as against the principal debtor, and the question which the Court had to determine was whether the surety was bound to pay the amount of those damages, or whether he could claim that the amount of damage suffered by the creditor must be proved strictly as against him. The Court there held that the real question was what was the true intent and meaning of the guarantee? James L. J. says (p. 671) :—

"There are a great number of things which by the agreement they [principal debtors] are bound to do; he [the surety] guarantees that they will do these things, and if they fail to do them, then he is liable in an action against him by Messrs. *Cantor* [the creditors] for any damages which can be shewn by legal evidence to have been caused to them by default. That is what he has agreed."

So that on the construction of the agreement in that case the Court held that the surety had merely agreed to discharge the debts and liabilities of the principal debtor, and that there was no agreement by him to accept anything less than legal proof.

In the other case referred to, which is an Irish case, *Guardians, Abbeylax Union v. Sutcliffe*<sup>1</sup>, a bond had been given to secure the due performance of the duties of a rent-collector, and the conditions of the bond executed by the rent-collector and the surety were *inter alia* that the collector should collect the whole of the rates lawfully recoverable and pay the amount of the rates so collected to the treasurer whenever the sum exceeded £50, and also that he should deliver to the person or persons authorized to require the same true and perfect accounts in writing under his hand of all moneys received by him as collector, and when required to do so should deliver up his books, and so forth. The rent-collector collected money and made default, and the question was whether his books, in which he had recorded the amount of his collections, could be used in evidence against the surety. The Court differed, the learned Chief Justice thinking that the entries in the books were inadmiss-

ible as evidence against the surety. Mr. Justice Gibson and Mr. Justice Holmes took the opposite view, and, as I understand it, the view they took was that in substance the surety had guaranteed the debt of the rent-collector to be proved by means of these books. Mr. Justice Gibson says (p. 336):—

“Dealing with the matter as depending on principle only, the reception of the evidence must be rested on one of three grounds :—“1. that the bond is joint bond ;” (that does not apply here ; ) “2. that the books are part of the *res gestae*, 3, that the contract, from its nature and effect, makes the books evidence.”

He decided it primarily on the third ground, that is to say, that the actual debt guaranteed was the debt shown in the books.

Now, here, what the learned Judge has really held is that what defendant No. 2 guaranteed is the debt of defendant No. 1 to the plaintiff to be proved under the implied agreement arising from the account-sale cases. Even if one accepts the implied agreement, it seems to me quite impossible to hold that the guarantor agreed to guarantee the debt to be proved by this special method. No such guarantee is pleaded ; there is no evidence whatever that such a guarantee was given. To stretch a verbal guarantee so as to cover methods of proof of debt which there is no reason for supposing were in the consideration of the parties when the guarantee was given, would not, I think, be right or fair. The plaintiff was very unwise in not having the guarantee put into writing, and it would be unfair to let him take advantage of his omission, and to hold that, having no very definite evidence as to the terms of the guarantee, it should be treated as extending to the method of proof of the debt guaranteed. I find it impossible on the evidence before the Court to say that the plaintiff agreed that he would guarantee a debt to be proved by something less than ordinary legal evidence, and on that ground I think the appeal of defendant No. 2 must succeed.

Defendant No. 3 has appealed against the only part of the judgment against him, namely that he was given no costs. The learned Judge thought that he was principally responsible for the litigation, and I do not think there is any ground on which we should differ from the discretion which the learned Judge exercised as to the costs of defendant No. 3. So his appeal fails.

KANIA J. The relevant facts and documents have been referred to in the judgment delivered by the learned Chief Justice.

The plaintiff filed this suit claiming to act as a commission agent in respect of the transactions he was instructed to put through for the 1st defendant company. In paragraph 4 of the plaint he alleged that in or about February, 1935, defendant No. 3 as the managing director of the 1st defendant company employed the plaintiff as a commission agent for and on behalf of the 1st defendant company to effect forward transactions in American Cotton for October, 1935 delivery, on the terms and conditions mentioned in the contract form, copy whereof is annexed and marked “A”, and in the correspondence. The last sentence in that paragraph deals with the guarantee and runs as follows :—

“Defendant No. 3 as the Managing Agent of the 2nd defendant company for and on behalf of the 2nd defendant company guaranteed payment of the amount due by the 1st defendant company to the plaintiff in respect of the transactions of the 1st defendant company effected through the plaintiff as aforesaid.”

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The plaintiff then goes on to recite that the plaintiff effected purchases of 300, 200 and 100 bales on receipt of instructions from the 1st defendant company, and as margin was not paid, those outstanding purchases were closed by a sale. In paragraph 12 he states :—

“The plaintiff became personally liable in respect of the said transactions in the market and paid the amount due in respect thereof. The plaintiff submits that he is entitled to be indemnified in respect of the liability incurred and the payments made by the plaintiff on behalf of and on account of the 1st defendant company in respect of the said transactions.”

His case, therefore, on his plaint is that he was an agent employed for and on behalf of the 1st defendant company by defendant No. 3 and, therefore, entitled to the agent's indemnity. The terms of employment as between him and the 1st defendant company are, according to paragraph 4 of the plaint, stated in the contract note sent by him to the 1st defendant company and the correspondence which is annexed. In respect of the guarantee, his allegation is that defendant No. 2 stood guarantee for the amount due in respect of the transactions effected through the plaintiff as aforesaid. The fact of guarantee rests on oral evidence. The learned trial Judge on hearing evidence found it in favour of the plaintiff, and for the reasons given in the judgment of the learned Chief Justice, I see no reason to differ from that conclusion.

That raises the question of the extent of the liability of defendant No. 2. The learned Judge in the trial Court has stated as follows :—

“But I do not think that an agent owes the same duty to the guarantor which he owes to the principal in the matter of proving the transactions. I do not, therefore, think that the agent is bound to prove the transactions to the guarantors, but he has got to prove the amount of the liability for which the surety stood guarantee.”

Stated as it is, I am afraid I cannot agree with the opinion of the learned trial Judge. The question in fact is whether, according to the terms of the guarantee, defendant No. 2 is liable. In the normal course, what has to be proved against the principal debtor has to be proved against the guarantor. He may ask for, if at all, a larger amount of proof. By the terms of his guarantee he may however give up his right. In the present case the question of proof of the transactions against defendant No. 1 has not become material, because no defence was put in on his behalf, and according to the rules of pleading the plaintiff's allegations contained in paragraphs 5, 6 and 7 of the plaint were deemed to be admitted by that company. Defendant No. 2 has filed a written statement, in which that company stated that it had no knowledge of the allegations contained in the aforesaid paras, and it did not admit its liability. The company further alleged that it was not given any intimation about the said transactions and the said demand of margin money. Reading paragraph 3 of defendant No. 2's written statement, I am unable to hold that there was any admission of the allegations found in paragraphs 5, 6 and 7 of the plaint.

“No act of the principal can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable to pay.” (p. 671).

Those observations in the judgment of James L. J. in *Ex parte Young* : *In re Kitchen*<sup>1</sup> are worthy to be borne in mind for deciding the liability of



the 2nd defendant company. Those observations, read along with s. 133 of the Indian Contract Act, refute the contentions urged on behalf of the plaintiff, that if on receipt of intimation from New York and conveying the same to the 1st defendant company, they did not challenge the transaction, it was not open to the surety thereafter to challenge the same. The question, therefore, resolves itself here into finding what guarantee was given by the 2nd defendant company. Nowhere in the pleading it was suggested that the statements or communications received from New York were to be considered as evidence, much less conclusive evidence, of the facts stated therein as against the 1st defendant company itself. As I have pointed out, the allegation in the plaint is that the terms of employment are contained in the contract note sent to the 1st defendant company and in the correspondence which is on record. Nowhere throughout those documents such a term is mentioned, nor suggested. The guarantee, according to paragraph 4 of the plaint, is for losses arising in respect of transactions effected through the plaintiff as aforesaid. I believe it means in accordance with the terms mentioned before. If so, on the pleading itself the case now put forward is not suggested and, in my opinion, is not warranted by the evidence on record.

An argument was based on what are compendiously described as account-sale cases, namely, *Hodgson et al. v. Rupchand Hazarimal*,<sup>1</sup> *Mayen v. Alston*<sup>2</sup> and *Barlow v. Chuni Lall Neoghi*.<sup>3</sup> Those were cases of actual sales of goods. The facts noticed in the reports do not show that the party disputed the sale itself. The disputes were in respect of what was realised, and whether the sale proceeds were properly accounted for. The wisdom of extending that principle to forward contracts may be disputed. The point is not here before us, in this appeal, and, therefore, I do not propose to discuss the question whether the principles underlying those cases should be extended and made applicable to forward contracts. But, as I have pointed out, the liability of the guarantor must be judged by his contract of guarantee and not by a contract between the principal debtor and the creditor. It would be importing a dangerous principle of law to widen the terms of the guarantee, when on the pleadings and on the evidence no justification can be found for including a term alleged in the course of argument. I, therefore, think that in the present case the terms of guarantee, as pleaded, and, as established, do not cover the stipulation that the 2nd defendant company as guarantor would be bound to accept even as prima facie evidence documents received from New York by the plaintiff. On that ground I think the appeal of defendant No. 2 should be allowed.

PER CURIAM. We dismiss the suit against defendant No. 2 and direct the plaintiff to pay three-fourths of his costs of the suit in the Court below, where he failed on the issue as to the fact of guarantee, and the whole of his costs of the appeal. We think there were no costs on the hearing of the counter-claim. One counsel in this Court allowed. Appeal of defendant No. 3 is dismissed with costs.

*Appeal allowed.*

Attorneys for appellants : *Dayalji & Dipchand.*

Attorneys for respondent : *Motichand & Devidas.*

1 (1869) 6 B. H. C. R. (O. C. J.) 39.

2 (1893) I. L. R. 16 Mad. 238.

3 (1901) I. L. R. 28 Cal. 209.

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—  
SREE  
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—

Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Kania.

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CHITNIS & KANGA

v.

September 25.

WAMANRAO S. MANTRI.\*

*Rules of the Bombay High Court, 1936, rr. 534 and 895†—Ex parte order for taxation of bill of costs passed by Prothonotary—Order included work done by attorneys on appellate side and in mofussil—Validity of such order—Jurisdiction of Court to pass such order—Power of Taxing Master to tax bills for work done in mofussil.*

Under r. 534 of the Rules of the High Court of Bombay, 1936, an order for taxation on the original side cannot be made in respect of costs incurred on the appellate side of the High Court. A Judge has discretion under that rule to direct attorney's bills to be so taxed in any other case.

The taxation of a bill of costs does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under r. 895 after taxation has taken place.

Since the power of a Judge to direct taxation under r. 534 is discretionary, when an application is made *ex parte* for a common form order for taxation under that rule, the Court may direct the solicitor to issue a summons, and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employment of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit; and in that suit the solicitor's right to recover can be first determined, and the amount to be recovered can be determined subsequently by taxation.

The Taxing Master of the High Court has power to tax the bill of costs of an attorney on the original side scale in relation to work done in the mofussil.

*Nowroji v. Kanga and Sayani*<sup>1</sup>, followed.

#### TAXATION of bill of costs.

The appellants, Chitnis & Kanga, solicitors, obtained from the Prothonotary and Senior Master of the High Court an *ex parte* order, under r. 534 of the Rules of the High Court, 1936, directing the Taxing Master of the High Court to tax their bill of costs relating to (1) suit No. 1447 of 1929 filed on the original side of the High Court, (2) a petition for probate in the District Court at Satara, (3) an appeal in the High Court on its appellate side, and (4) certain miscellaneous work done in the mofussil.

\* O. C. J. Appeal No. 16 of 1940.

† The rules run as under:—

534. The Taxing Master shall tax the bills of costs on every side of the Court (except the Appellate Side) and in the Insolvency Court. All other bills of costs of Attorneys shall also be taxed by him when he is directed to do so by a Judge's order.

895. An Attorney, when he has taxed his bill of costs against his client, may apply in Chambers on

Summons for an order against his client or the legal representatives of such client, for payment of the sum allowed on taxation on such sum as may then remain due. The Judge on hearing the summons may make such order or refer the parties to a suit. Such order if made may be executed under Order XXI of the Code of Civil Procedure as a decree for money.

<sup>1</sup> (1925) 28 Bom. L. R. 384.

The respondent, Wamanrao S. Mantri, for whom the above work was done, contended before the Taxing Master that the order passed by the Prothonotary was *ultra vires* and not binding upon him so far as it related to items Nos. (2), (3), and (4).

The Taxing Master took the view that so long as the *ex parte* order stood he was bound to tax the costs relating to the work mentioned in that order, and directed the respondent to obtain an order from the Court if he wanted the Taxing Master not to proceed with items Nos. (2), (3) and (4).

The respondent thereupon took out a chamber summons submitting—

"It is not competent to the said attorneys to take advantage of the procedure that applies to taxation of solicitors' costs on the Original Side of this Hon'ble Court in respect of costs in the mofussil and on the Appellate Side of this Hon'ble Court. I further submit the matter is governed by the Bombay Pleaders Act 17 of 1920. I further submit the *ex parte* order made without notice to me and without giving me an opportunity of being heard is of no effect and is in any event against equity, justice and good conscience and that I am entitled to have the same set aside."

Somjee J., before whom the chamber summons was argued on March 11, 1940, set aside the *ex parte* order of the Prothonotary and Senior Master.

Chitnis & Kanga appealed.

Sir Jamshedji Kanga and N. H. C. Coyajee, for the appellants.

F. J. Coltman, for the respondent.

V. F. Taraporewala, (with leave of the Court), for the Law Society.

BEAUMONT C. J. This is an appeal from a decision of Mr. Justice Somjee setting aside an order made by the Prothonotary for taxation. The learned Judge gave no judgment and therefore we do not know on what view his decision was based.

The order made by the Prothonotary was the common form order for taxation of a bill of costs of Messrs. Chitnis & Kanga in relation to certain matters, one of which was an appeal on the appellate side of the High Court. An order for taxation on the original side cannot be made in respect of costs incurred on the appellate side of the High Court, and as to this item, admittedly the order to tax was wrong.

The solicitors' case is that they were employed by the client and his father in connection with probate proceedings in the Satara District Court, and in those proceedings they filed a formal retainer. They did a certain amount of work in that case partly as attorneys and partly as pleaders, although a pleader was employed to argue the case. They also allege that they did miscellaneous work in the mofussil. The order made by the Prothonotary was under r. 534 which provides that—

"the Taxing Master shall tax the bills of costs on every side of the Court (except the Appellate Side) and in the Insolvency Court. All other bills of costs of attorneys shall also be taxed by him when he is directed to do so by a Judge's order."

So that a Judge has discretion to direct attorneys' bills to be taxed in any case, and where a bill is taxed, the attorney can apply by summary process for payment under r. 895.

It is argued by Mr. Coltman in the first place that the fact of employment of the solicitors, and the terms of employment are disputed, and it is unreasonable to put parties to the expense of taxing a bill when ultimately

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nothing may be payable. The taxation of a bill does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under r. 895 after taxation has taken place. As I have pointed out the power of a Judge to direct taxation under r. 534 is discretionary. When an application is made *ex parte* for a common form order for taxation, the Court may direct the solicitor to issue a summons, and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employment of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit; and in that suit the solicitor's right to recover can be first determined, and the amount to be recovered can be determined subsequently by taxation. In the present case, on the affidavits, I do not think there is such serious doubt as to the client's liability to pay as to justify us in refusing to make an order for taxation.

Then it is said that the costs of proceedings in the mofussil cannot be taxed by the Taxing Master of the High Court, who will tax the bill on the ordinary original side scale. With regard to that there is a direct authority in the decision of this Court in *Nowroji v. Kanga and Sayani*,<sup>1</sup> where the Court of Appeal held that an attorney of this Court was entitled to have his bill taxed on the original side although it related to work done in the mofussil. That case, as is noted in the judgment, related to costs incurred before the Pleaders Act of 1920 came into operation, but in my view that Act has no effect on the present question. The Act provides in s. 17, which has been replaced by s. 3 of the Legal Practitioners' Fees Act of 1926, that a legal practitioner (which includes an attorney) may enter into a special agreement as to the terms of his remuneration. But there is no question of special remuneration here. Section 18, which was also relied upon, deals merely with the amount of pleader's fees which can be recovered against the opposing party. That again has nothing to do with the present matter. In my opinion we are bound by the decision in *Nowroji v. Kanga and Sayani* to hold that the Taxing Master is entitled to tax the bill in relation to work done in the mofussil. In my opinion therefore the appeal must be allowed with costs.

KANIA J. The jurisdiction of the Court to make the order for taxation under r. 534 in connection with matters sought to be taxed here (excluding the work done on the appellate side) cannot be disputed. Rule 534 in terms is applicable. It is therefore improper to contend that the order made by the Prothonotary was *ultra vires*. Such orders are ordinarily made *ex parte*, and on the footing that the attorney is employed as such. The client's liability to pay the taxed costs can be disputed when the attorney takes out a summons for payment under r. 895. Even before that it does not appear to be out of place for a client to take out a summons to set aside the *ex parte* order, and on the hearing of that summons the Court may direct either that the enquiry sought to be made in connection with the employment of the attorney by the client may be made at that stage, or having regard to the disputes raised by the client the attorneys should be referred to a separate suit. If however there is *prima facie* evidence or the Court is satisfied on the affidavits

that no such order revoking the previous order should be made, the taxation under the order obtained *ex parte* may proceed and the client can still, when an order is sought for enforcing payment, raise the contentions permitted to him. In the present case it appears that the learned Judge set aside the *ex parte* order passed by the Prothonotary on the footing that it was *ultra vires*. I am led to this conclusion from the statement found in the affidavit of the respondent. The learned Judge does not appear to have decided that there was no employment of the appellants by the respondent or his father or that there was no satisfactory evidence to lead to that conclusion and therefore left the appellants to their ordinary remedy of filing the suit. On that footing I agree that the appeal should be allowed.

O. C. J.

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Kania J.

PER CURIAM. Appeal allowed with costs ; chamber summons dated February 7, 1940, dismissed with costs, Rs. 135.

*Appeal allowed.*Attorneys for appellants : *Payne & Co.*Attorneys for respondents : *Kamdar & Co.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice B. J. Wadia.*

SARASWATIBAI SHRIPAD VED

v.

SHRIPAD VASANJI VED.\*

1940

October 11.

*Guardians and Wards Act (VIII of 1890), Sec. 17—Minor—Custody—Child of tender years—Natural mother preferable to father as guardian—Interest of minor.*

In the matter of the custody of a minor child, the paramount consideration is the interest of the child rather than the rights of the parents. In the case of a minor child of tender years, the proper person to whom the custody of the child should be given is the natural mother and she should be preferred to the father, as it is impossible to find any adequate substitute for the love and care of the natural mother.

*Bai Tara v. Mohanlal*,<sup>1</sup> referred to.

All orders made as to the custody of a child are of a temporary nature, and those interested in the minor are always at liberty to apply to the Court for a change in the custody.

CUSTODY of minor.

The petitioner Shripad was married to the respondent Saraswatibai on February 8, 1936, according to Hindu rites. On October 24, 1938, the respondent gave birth to a son, Vinodchandra.

Soon afterwards it was discovered that the respondent was suffering from tuberculosis. The child was therefore kept with the father in Bombay, and the respondent went first to Kirkee on November 13, 1938, for treatment and change. Next, she went to the Miraj Hospital for treatment on December 4, 1938. She was discharged from the Miraj Hospital as cured on July 30, 1939. She then went to Poona first and Khandala afterwards for change. Ultimately she returned to Bombay by the end of May, 1940.

\* O. C. J. Appeal No. 28 of 1940 :  
Miscellaneous No. 95 of 1940.

1 (1922) 24 Bom. L. R. 779.

O. C. J.      Meanwhile the petitioner took a second wife by name Bayabai.

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Soon after her return to Bombay, that is on May 29, 1940, the child was taken possession of by her and was not allowed to go back to his father.

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On July 16, 1940, the father filed a petition to re-gain the custody of the child.

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The petition was heard by Kania J.

On September 12, 1940, his Lordship passed an order entrusting the custody of the child to the father, and delivered the following judgment.

KANIA J. This is a petition for obtaining the custody of the minor son of the petitioner from his wife the respondent. They were married in February, 1936, and the minor was born to them on October 24, 1938. Ten days after the birth the child was taken to the petitioner's house and remained in the care of the petitioner till about the end of May, 1940. The respondent was suffering from T.B. and was advised to go out of Bombay. She first went to Kirkee in November, 1938, and from there to Miraj. Some operations were performed on her and she was discharged from the Miraj Hospital at the end of July, 1939. According to her she was advised to go to some hill station to recoup her health, and accordingly she went to Poona and Khandala. She returned to Bombay towards the end of May, 1940. On May 29, 1940, the minor was sent out with a servant to Chowpatty for an airing and did not return to the petitioner's house. On May 31, 1940, the petitioner's attorneys addressed a letter to the respondent alleging that the minor was wrongfully removed, at the instance of the respondent, to her parents' house. The petition was filed on July 16, 1940.

It is not disputed that in law the father is the natural guardian of the minor and as such is entitled to the custody of the minor. The only ground urged on behalf of the respondent is that having regard to the tender age of the minor he should have the benefit of the maternal care of the respondent which he is not likely to get in the house of the petitioner. The petitioner has married another wife and it is contended that in the house of the petitioner the minor will not get the same care as he will have if he is permitted to stay with the respondent. Two decisions of this Court have been relied on to show that the welfare of the minor is considered an important factor to decide the question of custody. The facts of each case led to the particular decision in those cases and the facts there were distinctly different as in those cases the minor was permitted to stay with the mother and a third party for several years before the petition was made. In the present case since the birth of the child the minor has stayed with the petitioner. There is some force in the contention of the petitioner that the minor was removed without his knowledge. The point however is not material. The respondent's health from the time of the birth of the minor was not good and there appears to be no reason why a change in the normal life of this minor, which he lived till May, 1940, is required. The respondent is not driven away from the house of the petitioner. She has chosen to stay away from her husband, and I do not think that the interest of the society justifies the petitioner from being deprived of the custody of the minor on the vague ground of the welfare of the minor under the

circumstances of this case. In my opinion, the respondent is not justified in retaining the child, and the interest of the minor does not require that he should under the circumstances of this case be kept with the respondent. Nothing is proved against the petitioner personally, and in my opinion the petitioner is entitled to the custody of the minor. I accordingly order that the respondent do return the minor abovenamed to the custody of the petitioner. In default the order may be executed by the minor being taken charge of and delivered over to the custody of the petitioner. Having regard to the relationship between the parties I make no order as to costs.

Q. C. J.

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Kania J.

The wife appealed.

*K. M. Munshi*, for the appellant.

*Sir Jamshedji Kanga*, for the respondent.

BEAUMONT C. J. This is an appeal from a decision of Mr. Justice Kania on a petition presented by the father of a minor, under s. 25 of the Guardians and Wards Act. Under that section the Court can return the custody of the minor to his father, who is his natural guardian, if it is of opinion that to do so will be for the welfare of the minor ward.

The parents of the minor were married in February, 1936, and the minor, a boy, was born in October, 1938. After the birth the mother unfortunately contracted tuberculosis, and she had to go away for treatment, and the child was taken by the father and kept at his mother's house. The mother of the minor was discharged from the sanatorium at the end of July, 1939, but she was advised to remain at hill stations for a time in order to complete her cure, and she came back to Bombay, considering herself to be cured, at the end of May, 1940. On May 29 the child was out with a servant in attendance, and was taken round to the house of the mother and her parents, and it has been retained by the mother ever since. The circumstances in which the child was taken by the mother are in dispute. The father says that it was virtually kidnapped by an uncle of the wife. The uncle, however, has put in an affidavit denying that he kidnapped the child, and saying that it was taken by the servant to the mother's house. As the servant, in charge of the child when it is alleged to have been kidnapped, has not put in an affidavit, it is probable that the mother's story is true. However, that is not very material. The fact is that from the end of May, 1940, the child has been in the custody of the mother, and the father now asks to have it returned to him. As I have said, under the Act we have to consider what will be in the best interests of the minor.

I think the law on questions of this sort is the same in this country as in England, though, of course, social habits may be different. The modern view of Judges in England is that it is impossible, in the case of a young child, to find any adequate substitute for the love and care of the natural mother. If the natural mother is a suitable person, the Courts in England will as a general rule hand over the custody of a child of tender years to the mother. The mother's position is regarded as of much more importance in modern times than it was in former days, when a wife was regarded as little more than the chattel of her husband. The view of society in India as to the position of women may not have advanced so far or so fast as in

O. C. J. 1940 England, but at the same time the right of the mother to the custody of her young children is undoubtedly recognized in this country, see for example *Bai Tara v. Mohanlal*.<sup>1</sup> However the paramount consideration is the interest of the child, rather than the rights of the parents. Human nature is much the same all the world over, and in my opinion if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years.

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It is suggested here that the mother's health has not recovered. It might be dangerous to send a child to live in the custody of a woman suffering from tuberculosis. But the evidence before the Court is that the mother has recovered. She was discharged from the sanatorium about a year and a half ago, and the doctor says in his letter, exhibit No. 1, that she was discharged as an arrested case. The subsequent examination of her sputum has not shown any change, and Dr. Billimoria in exhibit No. 3 reported on June 13, 1940, that no T. B. was detected. On the evidence before the Court there is no reason for supposing that the health of the child will suffer if its custody is handed over to the mother. Orders as to the custody of a child are always of a temporary nature. Those interested in the minor are at liberty to apply to the Court. In this case the father can apply to the Court at any time; and if he thinks that the health of his child is suffering, he can ask the Court to appoint a doctor to examine the child. I do not think that on the evidence before us there is at the moment any necessity to appoint a doctor to examine the state of the mother's health, but if at any time there is any reason for supposing that her ailment has returned, the father can apply to the Court to get her examined by an independent doctor, and submission to such an examination could be made a condition to her retention of the custody of the child.

There is no question here of removing the child from the guardianship of the father. The father is the natural guardian, and there is no application to remove him from that position. He remains the natural guardian, but in the interests of the child itself we are satisfied that its custody ought, for the present, to be with the mother.

The parents unfortunately are not living together, and probably will not live together, because the father has contracted marriage with another woman. That under Hindu law he is entitled to do, but it is difficult to suppose that a step-mother, whose age we are told is about seventeen, is likely to be a good substitute for the natural mother; whilst the father himself will have other occupations and will have to entrust the actual upbringing and charge of a child of this age to somebody else. In my opinion, there is not the slightest doubt that the natural mother is the proper person to have the custody of the child, and there is no evidence before the Court to justify us in thinking that she is not a proper person to have that custody. Her parents appear to have adequate means to maintain her and the child. The father is, of course, entitled to access to his child. Probably there will be no difficulty in arranging that. If there is, he will have to apply to the Court to arrange the circumstances in which he can see his child.



I think the learned Judge in the Court below went wrong in the exercise of his discretion, because he did not recognise that the paramount consideration in a case of this sort is the interest of the minor. He refers to the interest of the minor as being a vague ground for exercising his discretion. That is the paramount ground, and prima facie it is in the interest of the child that it should be brought up by the mother. We, therefore, direct that the custody of the child, until further order, be with the mother. The appeal is allowed.

O. C. J.

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B. J. WADIA J. I agree with the order proposed by the learned Chief Justice.

No doubt it is laid down by their Lordships of the Privy Council in *Basant v. Narayaniah*,<sup>1</sup> that among Hindus, as in England, the father is the natural guardian of his children during their minorities and that the guardianship is in the nature of a sacred trust. That natural right of the father has received statutory recognition in s. 19 (b) of the Guardians and Wards Act, VIII of 1890. But s. 19 is in my opinion controlled by s. 17 of the same Act, according to which the paramount consideration is the welfare of the minor.

The father of the minor has married again. That in itself may not be a ground for depriving him of the custody of his minor child. But the Court has got to consider all the circumstances of the case, and taking human nature as the same here as elsewhere, a step-mother cannot be expected to be very much interested in the welfare of a minor step-son, nor likely to give him the attention, love and sympathy which the child naturally requires. It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration; and I agree with Shah J. in *Bai Tara v. Mohanlal*<sup>2</sup> where he observed as follows (p. 782):—

“The boy is of tender age and I think that at present the personal care of the mother is a paramount consideration.”

In that case the boy was seven years old. In this case the boy is just about two years of age, and what was urged in *Bai Tara v. Mohanlal* can be applied with even greater force to the case of a boy who is two years old.

Taking all these circumstances into consideration, I think that at present the custody of the child should be with the mother. But that will not, as has been pointed out by the learned Chief Justice, prevent the father from making a further application to the Court at any later date, under the liberty reserved to him to apply, when he may be able to satisfy the Court that it will then be in the interest and for the welfare of the minor child on account of the mother's health or the child's health, or on account of want of means for maintenance, or on any other just and reasonable ground, that it should leave the mother's custody and instead live with the father.

For these reasons I agree that the appeal should be allowed, and I agree with the order proposed.

PER CURIAM. As the wife is not asking for costs, there will be no order as to costs throughout. The notice of motion is discharged. The mother

1 (1914) L. R. 41 I. A. 314,  
S. C. 15 Bom. L. R. 625, P.C.

2 (1922) 24 Bom. L. R. 779.

O. C. J. should not remove the child from the jurisdiction of the Court without an order of the Court. The mother should send the child to the father's house twice a week at times convenient to the mother for a couple of hours on each occasion, subject to the consideration of the child's health, the father undertaking to make arrangements for conveying the child back to the mother. Liberty to both parties to apply to the Chamber Judge for further directions.

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*Appeal allowed.*

Attorneys for appellant : *Divecha & Thakore.*

Attorneys for respondent : *Kanga & Co.*

### INCOME-TAX REFERENCE.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Kania.*

1940

*In the matter of THE PATIALA STATE BANK.\**

October 8. Government Trading Taxation Act (III of 1926)—Government of India Act, 1919 (9 & 10 Geo. V, c. 101), Sec. 65—Act III of 1926 *whether ultra vires legislature—Patiala State—Banking business of Indian State—Business carried on only in Indian State—Income derived from securities in British India—Whether such income liable to tax in British India—Applicability of Act III of 1926—Definition of "company" whether includes Dominion Government—Indian Income-tax Act (XI of 1922).*

The Government Trading Taxation Act, 1926, is *intra vires* the Government of India.

*In the matter of Ram Prasad,*<sup>1</sup> approved.

A tax on income accruing or arising or received in British India by a person resident outside British India is legislation relating to something i.e. certain income in British India and it falls within the words of s. 65 of the Government of India Act, 1919.

*In the matter of Ram Prasad,*<sup>1</sup> dissented from on that point.

The Government Trading Taxation Act, 1926, applies wherever a Government of the nature specified in the Act carries on a business anywhere, and is not confined to business carried on in British India.

*In the matter of Ram Prasad,*<sup>1</sup> dissented from.

Where a Dominion Government, as specified in the Government Trading Taxation Act, 1926, is carrying on a business anywhere, it is liable to British Indian income-tax in respect of the income, profits and gains of that business which accrue or arise or are received in British India, as though such Government were a company.

The definition of "company" in s. 2(6) of the Indian Income-tax Act, 1922, includes a Dominion Government deemed to be a company under the Government Trading Taxation Act, 1926.

The income derived by an Indian State Bank from its investments of surplus funds in the Government of India securities in British India are profits from

\* Income-tax Reference No. 1 of 1940 (with No. 2 of 1940). 1 (1929) I. L. R. 52 All. 419.

the business of the bank received in British India, and as such liable to be assessed to income-tax, by the combined operation of s. 2 of the Government Trading Taxation Act, 1926, and the Indian Income-tax Act, 1922.

A property, situate within British India, taken over by an Indian State Bank from its debtor, a subject of the Indian State, in part satisfaction of the loan advanced to him, is not property occupied in British India for the purposes of the business, but the income derived from such business is income arising in connection with such business and is liable to be assessed to income-tax under the Indian Income-tax Act, 1922.

The profits made by an Indian State Bank on the sale of investments made by it in the Government of India securities—such profits being the excess realised over the cost price of the investments, if not appropriated as accretions to capital, are assessable to income-tax under the Indian Income-tax Act, 1922.

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REFERENCE under s. 66(2) of the Indian Income-tax Act, 1922.

The Patiala State Bank (assessee) was owned wholly by the Patiala State and carried on banking business. It was not a separate legal entity but was only a department of the Patiala State Government. The Bank had its head office at Patiala and had several branches in the State, but had no branches outside it. In British India it collected interest on Government securities held by it through the Imperial Bank of India and the Central Bank of India, and at times through brokers.

The Bank was assessed by the Income-tax Officer, Bombay, on a total income of Rs. 1,26,026 which had accrued to it in British India for the financial year 1935-36 ended on March 31, 1936. This income was mainly derived from interest on Government of India securities. The Bank submitted a return of its income but claimed exemption from tax on the ground that the income was that of an Indian State.

The Income-tax Officer, however, disallowed the claim and made the assessment. The Bank appealed to the Assistant Commissioner, but the appeal was dismissed as it was out of time. The Bank then applied to the Commissioner in revision under s. 33 of the Indian Income-tax Act, 1922, and claimed deductions on its income from Government securities. The Commissioner rejected the Bank's contentions and on the materials before him altered the figure of assessment to Rs. 1,18,813. The Bank thereupon applied to the Commissioner to refer the case to the High Court under s. 66(2) of the Act.

The Commissioner referred the following questions for the opinion of the High Court :—

(1) Whether the Government Trading Taxation Act (III of 1926) is applicable to the Patiala State Bank rendering it liable to taxation under the Indian Income-tax Act, 1922?

(2) Whether the investment by the Patiala State Bank of a part of its surplus funds in the Government of India Securities constitutes trading or business in British India within the meaning of s. 2 of the Government Trading Taxation Act?

(3) Whether the property situate at Mussoorie taken over by the Patiala State Bank from its debtor, a subject of the Patiala State, in part satisfaction of a loan advanced to him, is property occupied in British India for the purposes of its trade or business in British India within the meaning of s. 2 of the Government Trading Taxation Act and whether all income arising from such property is liable to assessment by virtue of the provisions of the said Act?

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- (4) Whether the sum of Rs. 66,720 received by the Patiala State Bank on the sale of its investments during the year 1934-35 being the excess realized by it over the cost price of such investments, which has been included under the heading of profits in the relative profit and loss accounts and balance sheet, is assessable to Income-tax?
- (5) Whether the income received by the Patiala State Bank from its investments in British India constitutes income arising in connection with a trade or business carried on in British India within the meaning of s. 2 of the Government Trading Taxation Act and is therefore liable to assessment to income-tax?
- (6) Whether if the Patiala State Bank is assessable under s. 2 of the Government Trading Taxation Act to income-tax under the Indian Income-tax Act, 1922, the said Bank is entitled to be allowed a proportionate part of its expenses of the nature mentioned in sub-s. (2) of s. 10 of the Indian Income-tax Act (XI of 1922) incurred by it in carrying on the business and for earning their profits or gains before their profits or gains assessable to tax are computed?
- (7) Whether the assessment to Income-tax and Super-tax for the year 1935-36 on the Patiala State Bank is a legal and valid assessment?

The opinion of the Commissioner, which he submitted with the statement of the case, was as follows :—

“From the above section [s. 2 of the Government Trading Taxation Act, 1926], it will be clear that when an Indian State carries on a trade or business of any kind it (the State) is liable to tax in respect of the trade or business and of all operations connected therewith and all property occupied in British India and all goods owned in British India for the purposes thereof and all income arising in connection therewith are to be taxed to income-tax and super-tax to the same extent and in the same manner as a company would be taxed. In this case, the finding of fact is that the Patiala State is doing banking business through the Patiala State Bank. This cannot be disputed and the contents of the printed Profit and Loss accounts and Balance Sheets which it issues, (exhibit A), are convincing evidence of this fact. All the investments made in British India by the Bank are undoubtedly in connection with its banking business. Hence under the aforesaid s. 2 of the Government Trading Taxation Act, the State is to be held liable to the extent a company doing such business would be liable. The liability of a company would be to the extent defined in s. 4 of the Act viz., on all income accruing, arising or received in British India or deemed to accrue, arise or to have been received in British India in connection with the said business and all property occupied for its purposes and all goods owned in connection therewith.

As to the question (1) it is respectfully submitted that the answer should be in the affirmative as the Patiala State is an Indian State doing banking business. As regards question (2), it does not state the facts correctly when it refers to investments of “a part of its surplus funds”. The finding of fact is that the investments in British India are made out of the total money held by the Bank for its banking business and not only from surplus funds. Section 2 of Act III of 1926 does not refer to “trade or business in British India” but to “the trade or business” viz. the trade or business carried on by the State and to “all operations connected therewith.” The answer to the question should therefore be that the investment in British India in Government securities of a part of the money held for the purposes of the banking business constitutes an operation connected with the banking business carried on by the State within the meaning of s. 2 of the said Act.

As regards question (3), it does not properly arise as no income from any such property is included in the assessment. However, it is submitted that the answer to this question should also be in the affirmative for the following reasons :—

The Government Trading Taxation Act does not require that the State should carry on business in British India. If the State carries on a business anywhere then all income arising in connection with that business shall be liable under the Indian

Income-tax Act in the same manner and to the same extent as in the like case a company would be liable. The State acquired this property in the course of its business operations and holds it as part of its assets. The income from the property arises therefore in connection with the business and as it arises in British India it is taxable in the same way as other property income in British India.

As regards question (4), the item in question will be liable to tax if it is an item of profit made in the course of the banking business. Whether it is an item of such profit or otherwise is a question of fact and the finding of fact being that it is so, the answer to the question must be in the affirmative. In its printed Profit and Loss accounts for the year 1934-35 (exhibit A), the item is described by the Bank itself as "profit on the sale of investments" and "difference on sale of investments" under the head "Income" and is included in the gross receipts along with income from interest, exchange, commission etc. The same has been done as regards the two succeeding years. Thus in the Profit and Loss account for the half year ended March 31, 1935 (exhibit A) on the Credit Side, under the head "Income" are mentioned,

Rs. as. ps.

|                                                                                                    |               |
|----------------------------------------------------------------------------------------------------|---------------|
| "Interest, Exchange, Commission, profit on sale of investments<br>and other Miscellaneous earnings | 2,96,842-4-10 |
|----------------------------------------------------------------------------------------------------|---------------|

This had been done year after year and leads to the inference that the Bank was regularly dealing in investments with a view to earn profit. Also as noted in the order under s. 33 (exhibit D) the transactions which resulted in this profit were of sufficient frequency to lead to the inference that they were part of the business of the Bank.

In this connection, I would refer to the case of the *Westminster Bank*, 17 Tax Cases 381, and in particular, to the opening sentences of Lord Buckmaster's judgment at page 401.

As regards question (5), the answer must, it is submitted, be in the affirmative in view of the answer suggested to question (2) above.

Question (6) has been withdrawn as the claim has since been allowed and the net income reduced accordingly (exhibit E).

As regards question (7), the answer has it is submitted to be in the affirmative in view of answers to questions (1) to (5) above."

This reference was heard with Reference No. 2 of 1940, in which the assessee was the same and the same questions were involved, but the year of assessment was 1936-37.

*Sir Jamshedji Kanga*, for the assessee. The Patiala State Bank is a department of the Patiala State. The Bank has no branch in British India and does not carry on business in British India. In British India the Bank merely holds investments in Government securities of the Government of India and Treasury Bills. The Indian Income-tax Act, 1922, does not apply. The Government Trading Taxation Act, 1926, which is sought to be applied, is *ultra vires* the Government of India. Section 65 of the Government of India Act, 1919, provides: "The Indian Legislature has power to make laws for all persons, for all courts, and for all places and things, within British India". A foreign state is not a person and there can be no legislation in respect of a foreign state. Income-tax law is personal and is not in respect of a thing. Patiala State is not a dominion within the scope of the Government Trading Taxation Act, 1926. It is a vassal State with treaty obligations with the British Government, but is not created by Parliament: Aitchison's "Treaties, Agreements and Sanads", Vol. I, p. 160. Sanad dated May 5, 1860, cls. 5, 10. The British power is paramount. There is reciprocity but no protection. Even

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O. C. J. if the Act applies there is no machinery of taxation to tax the Bank as a  
 1940 : company under the Indian Income-tax Act, 1922, except s. 43. The status of a  
*in re* Maharaja under British suzerainty appears stated in *Statham v. Statham and*  
*the Gaekwar of Baroda*<sup>1</sup>.  
 PATIALA  
 STATE BANK *M. C. Setalvad*, Advocate General, with *G. N. Joshi*, for the Commissioner.  
 — The Government Trading Taxation Act, 1926, is not in respect of a person  
 outside British India but of things in British India. The former Act extends  
 the definition of "company" to include foreign Governments of the character  
 mentioned in s. 2 of the Act. Income-tax is a tax on income which is within  
 the territory. Income may be profits of business or dividends on shares or in-  
 terest on securities. Merely because taxation involves an assessee, it is not  
 therefore in respect of a person. The tax is on something within the realm.  
 The Act is against a person outside the territory for a thing inside the territory :  
*Whitney v. Inland Revenue Commissioners*<sup>2</sup>. The taxing Act attaches itself to  
 "income profits and gains". "Income profits and gains" are the subject-  
 matter of legislation. Assessment in respect of income in British India is  
 legislation in respect of income in British India and if a non-resident foreigner  
 is liable for income accruing or arising in British India, the tax is still on a  
 thing and not a person. The Bank is therefore liable to tax. The effect of Act  
 III of 1926 is to bring foreign governments carrying on business within the  
 operation of the Income-tax Act of 1922, as a company. Public property of  
 a foreign state is not liable to taxation under International law. Act III of  
 1926 was passed to make this property liable and enables the public property  
 of the State to be taxed in British India when it carries on business. The Act  
 of 1926 has to be read with the Indian Income-tax Act, 1922. It extends the  
 definition of company contained in the latter Act. The Income-tax Act not  
 only relates to income in British India but it is directed to get at income  
 accruing in British India. The income-tax levy is territorial : Maxwell on the  
 Interpretation of Statutes, 8th ed., p. 126. The Act of 1926 is also based on  
 this principle. The absence of machinery to tax does not affect the liability to  
 tax. The absence of such machinery is irrelevant as the liability to tax  
 subsists. *Whitney v. Inland Revenue Commissioners*<sup>3</sup> at page 57 ; *Chief Com-*  
*missioner of Income-tax v. Bhanjee Ramjee & Co.*<sup>4</sup> ; *Commissioner of Income-*  
*tax, Bombay v. National Mutual Association of Australia, Ltd.*<sup>5</sup> Patiala State  
 is a dominion Government within the meaning of the Act of 1926. Indian  
 States are protected States. They are under the paramountcy or suzerainty  
 of His Majesty's Government and suzerainty imports protection. Patiala State  
 is a protected State within the meaning of the Act. Aitchison's "Treaties,  
 Agreements and Sanads", Vol. I, pp. 116-117, Sanads 3 and 4 of 1815 (p.  
 158), which deals with the Patiala State. These sanads make it clear that the  
 Patiala State is a protected State.

*Sir Jamshedji Kanga*, in reply. It is fallacious to say that the Acts are in  
 respect of things. Legislation of Income-tax Act is personal. It is a tax on  
 a person in respect of his income. *In the matter of Ram Prasad*.<sup>6</sup> Sections

1 [1912] P. 92.

2 [1926] A. C. 37.

3 [1926] A. C. 37.

4 (1921) I. L. R. 44 Mad. 773.

5 (1933) I. L. R. 57 Bom. 519,

s.c. 35 Bom. L. R. 896.

6 (1929) I. L. R. 52 All. 419.

1 (2), 2 (2), (6), 3, 4, 6, 18 (7), 19 and 51 of the Indian Income-tax Act. Both the Acts are personal Acts i.e. Acts dealing with a person. The Act of 1926 converts a person into a company and it is suggested that the tax in respect of it is on a thing. If the Act of 1926 is *intra vires*, its effect must be that the trading must be in British India though the Act is in very wide terms. The treaty between the Patiala State and the British Government is a treaty of mutual help. This is not a case of protection.

BEAUMONT C. J. This is a reference made by the Income-tax Commissioner under s. 66(2) of the Indian Income-tax Act, 1922, and the substantial question, which arises, is whether the Patiala State Bank is liable to be assessed to income-tax under the Government Trading Taxation Act (III of 1926).

The facts found are that the Patiala State Bank is owned wholly by the Patiala State and carries on banking business. It has no separate entity, and I take it that when the Commissioner says "it is owned wholly by the Patiala State," he means that it is owned and controlled by the Ruler of the Patiala State, that is the Maharaja, who constitutes the government of the State. The questions raised relate to the assessments for two years, 1935-36 and 1936-37, and in respect of each of those years I gather that a notice was sent to the principal officer of the Patiala State Bank, and he made a return on which the assessments are based. We are not, therefore, concerned to consider whether the Patiala State Bank was bound to comply with the notices, and to make the required returns, nor are we concerned to consider what would have happened, if the Patiala State Bank had adopted a different course. It is possible that in that event the machinery for taxing a foreign company through its agent would have been applicable, but that is not a matter which calls for our decision.

The principal point, which has been argued, and the only question of substance is whether the Government Trading Taxation Act of 1926 is a valid Act. The argument of the assessee is that it is *ultra vires* the Government of India. Before determining whether or not it is *ultra vires* the Government of India, it is necessary to consider what the Act actually means and purports to effect. The title is :

"An Act to determine the liability of certain Governments to taxation in British India in respect of trading operations."

Then the preamble is :

"Whereas it is expedient to determine the liability to taxation for the time being in force in British India of the Government of any part of His Majesty's Dominions, exclusive of British India, in respect of any trade or business carried on by or on behalf of such Government."

Then in s. 2 it is enacted as follows :

"(1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable

(a) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable."

O. C. J. Sub-section (2) provides :

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(2) "For the purposes of the levy and collection of income-tax under the Indian Income-tax Act, 1922, in accordance with the provisions of sub-section (1), any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly."

Then sub-s. (3) enacts that the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection. Having regard to the Sanads, to which we have been referred, of 1815, 1847 and 1860, I feel no doubt that the Patiala State is a State under His Majesty's protection, and, therefore, comes within the expression "His Majesty's Dominions" in Act III of 1926.

It is to be noticed that the Act applies wherever a Government of the nature specified in the Act, which for simplicity I will refer to as "Dominion Government," carries on a business anywhere. I can see no justification for the view, which appears to have prevailed in the only case to which we have been referred in which this Act has been considered by a High Court in India, namely, *In the matter of Ram Prasad*,<sup>1</sup> that the Act is confined to business carried on in British India. It seems to me that the title, the preamble and the operative part of s. 2 make it perfectly clear that it applies to every case in which the Dominion Government is carrying on a business, and when that happens, the Dominion Government is liable to Indian income-tax, as though it were a company.

Turning to the Indian Income-tax Act of 1922, which is the Act applicable in this case, "company" is defined in s. 2(6) as meaning a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession, and includes any foreign association carrying on business in British India, and which is certified as therein mentioned. I think the effect of Act III of 1926 is to add to that definition so as to include a Dominion Government deemed to be a company under Act III of 1926. The effect of the charging sections, ss. 3 and 4, is to render the income, profits and gains of a company liable to British Indian Income-tax Act, if such income, profits and gains accrue or arise or are received in British India. So that Act III of 1926 comes to this : that where a Dominion Government is carrying on a business anywhere, it is liable to British Indian Income-tax Act in respect of the income, profits and gains of that business which accrue or arise or are received in British India. The Act was, I understand, passed in pursuance of reciprocal arrangements with Great Britain and Dominion Governments, and it is to be noticed that it is in very similar terms to s. 25 of the Finance Act of 1925, which applies to Great Britain.

The contention of the assessee is that this Act is *ultra vires* the Indian Legislature, since it does not fall within the legislative powers conferred by s. 65 of the Government of India Act, 1919. That section, so far as material, provides : "The Indian legislature has power to make laws for all persons, for all courts, and for all places and things, within British India." The words are expressed in the most general terms, and in effect enact that the power



of the Indian Legislature is to be territorial and is to extend to all persons and things within British India. Now, the argument is that income-tax is a tax imposed on persons, and that the Ruler of the Patiala State cannot be regarded as a person within British India. The latter proposition is, no doubt, correct, and up to a point I agree with the contention of the assessee on the first proposition. I think that, properly considered, income-tax is a tax on a person in relation to his income. The tax is not imposed on income generally; it is imposed on the income of a person, natural or artificial, as defined in s. 3. The assessment has to be made against a person, and the tax has to be collected from the assessee. The tax is not made a charge on the income upon which it is levied, and I think, broadly speaking, it is accurate to say that income-tax is a tax imposed upon a person in relation to his income. But, in my opinion, that does not mean that legislation as to income-tax can never be regarded as legislation as to a thing in British India within the meaning of s. 65 of the Government of India Act. In my opinion, a tax on income accruing or arising or received in British India by a person resident outside British India is legislation relating to something, i.e. certain income, in British India, and, therefore, to my mind, it falls within the very wide and general words of s. 65. In my judgment, therefore, Act III of 1926 is *intra vires* the Government of India. That was so held in *In the matter of Ram Prasad* (*supra*), to which I have referred, though, as I have indicated, I think that the learned Judges in that case were incorrect in treating this Act of 1926 as being confined to a business carried on in British India. If the Act is *intra vires*, that disposes of the principal question raised by the Commissioner, which is question (1) :

"Whether the Government Trading Taxation Act (III of 1926) is applicable to the Patiala State Bank rendering it liable to taxation under the Indian Income-tax Act, 1922?"

The answer must be in the affirmative.

Question (2) is :

"Whether investment by the Patiala State Bank of a part of its surplus funds in the Government of India Securities constitute trading or business in British India within the meaning of s. 2 of the Government Trading Taxation Act?"

This question is inaccurately expressed. Section 2 does not mention trading or business in British India. We can only answer the question by saying that the income from the investments are profits from the business of the bank received in British India, and as such taxable.

Question (3) is :

"Whether the property situate at Mussoorie taken over by the Patiala State Bank from its debtor, a subject of the Patiala State, in part satisfaction of a loan advanced to him, is property occupied in British India for the purposes of its trade or business in British India within the meaning of section 2 of the Government Trading Taxation Act and whether all income arising from such property is liable to assessment by virtue of the provisions of the said Act?"

Substantially I think the answer to this question must be in the affirmative, but I think that the property, which has been taken over in respect of a bad debt of the banking business, is not property occupied in British India for the purposes of the business, but the income derived from such payments is

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O. C. J. income arising in connection with such business, and in that sense falls to be  
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Then question (4) is :

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"Whether the sum of Rs. 66,720 received by the Patiala State Bank on the sale of its investments during the year 1934-35 being the excess realised by it over the cost price of such investments, which has been included under the heading of profits in the relative profit and loss accounts and balance sheet, is assessable to Income-tax?"

That seems to be really a question of fact, and we must answer it in accordance with the facts found by the Commissioner. He has found that these profits on the sale of investments are part of the income of the Bank. It might be suggested that they are accretions to capital, but the Commissioner having found from the accounts of the Bank that they are profits of the Bank, I think we must answer the question in the affirmative.

Question (5) seems to be covered by the answer to question (2). Question (6) does not arise. The answer to question (7) must be answered in the affirmative.

We answer the questions accordingly and direct the assessee to pay costs. Costs to be recovered from the assets of the Patiala State Bank.

KANIA J. The relevant facts and sections of Acts of the Indian Legislature have been referred to in the judgment just delivered by the learned Chief Justice.

The important question argued before us is in respect of the validity of Act III of 1926 described as "an Act to determine the liability of certain Governments to taxation in British India in respect of trading operations." It was argued on behalf of the assessee that the Act was *ultra vires* the Government of India, whose powers to legislate were limited by s. 65 of the Government of India Act, 1919. It was secondly argued that the Patiala State was not one of His Majesty's Dominions, as stated in s. 2(3) of Act III of 1926, and, therefore, it was not covered by the Act. It was next argued that the machinery to assess the State under s. 42 and / or s. 43 of the Indian Income-tax Act, 1922, was not adopted. It was lastly contended that as the State is owned by the Ruler, it was not competent for the Government of India to legislate in respect of the Ruler.

The question, whether the Act was *ultra vires* the Government of India or not, was raised and decided in *In the matter of Ram Prasad*<sup>1</sup> and the learned Judges there rejected the contention that it was *ultra vires*. The argument in substance is that Act III of 1926 makes a Dominion Government in respect of its trade or business, wherever carried on, liable to be taxed as a company. The words "in British India" are not used in connection with trade or business or income arising in connection therewith. Where the Legislature wanted to use those words in connection with property occupied in British India, and goods owned in British India, they expressly said so. From the omission of those words in connection with trade or business or income arising in connection therewith, it was contended that the legislative power of the Government of India had been exceeded. In my opinion, that contention is unsound. The only object of the Act of 1926, in my opinion, was to legislate in respect of a

particular use of the public property of a Dominion Government. Under International Law the legislature of a country does not enact laws which affect the public property of another country. By Act III of 1926 therefore the attempt was not to legislate generally in respect of the public property of a Dominion Government but in respect of its trading operations only. It appears that a mutual arrangement was made between the different Dominions of His Majesty by consent, and by s. 2(3) the Act was made applicable equally to territories which were under His Majesty's protection or over which a mandate was being exercised by His Majesty's Government. If such a Dominion Government carried on trade or business, the Government of India enacted that it should be liable to tax under the Indian Income-tax Act in the same manner and to the same extent as in the like case a company would be liable. In other words, the legislation was to state that a Dominion Government carrying on trade would, for the purpose of the Indian Income-tax Act, be treated as a company in like circumstances. If the State carried on business within British India, its liability would be as defined by the Indian Income-tax Act. If it carried on business wholly outside British India, it would not be affected by the Indian Income-tax Act, because that Act only was in respect of income within British India, either actually accruing or deemed to accrue as defined by that Act. This piece of legislation is covered by the words of s. 65 of the Government of India Act, which permit the Government of India to legislate for all persons, for all Courts, and for all places and things, within British India. While it cannot be disputed that the liability to pay income-tax is on the individual, it is a tax on the income. In so far, therefore, as the liability of a Dominion Government was stated by Act III of 1926 to be in respect of its income covered by the Indian Income-tax Act, there appears no reason to consider it *ultra vires*. With respect, I am unable to agree with the line of reasoning adopted in *In the matter of Ram Prasad* where the words "in British India" were attempted to be read as connected with "trade" in s. 2 of Act III of 1926. The words "in British India" have to be read in connection with income by reason of the provisions of the Indian Income-tax Act. But Act III of 1926 does not in terms state that the word "trade" or "business" or "income arising in connection therewith" have to be in British India. I find no justification for including those words in s. 2 of Act III of 1926 in connection with "trade" business or income arising in connection therewith. As I have pointed out, by reason of sub-s. (3) of s. 2 however the result is the same, namely that the liability of the Dominion will be as if it were a company working under like circumstances under the Indian Income-tax Act.

The second contention, that the Patiala State was not under the protection of His Majesty, cannot be upheld in view of Sanads III and IV of 1815, which are found printed in Aitchison's "Treaties, Engagements and Sanads" Vol. I, at pages 158-159. It is there clearly provided that the Raja had the right of protection from the British Government. The Patiala State is, therefore, a Dominion under the protection of His Majesty.

The third contention that the liability to tax has to be worked out under ss. 42 and 43, and there was no other method by which the State Bank could be assessed, discloses some misunderstanding. In *Whitney v. Inland Revenue*

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O. C. J. *Commissioners*<sup>1</sup> Lord Dunedin pointed out that there are three stages in the imposition of a tax as follows (p. 52):—

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"... there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend upon assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

The question of how the person whose liability to tax is determined has to be assessed is a matter of machinery. It is admitted here that the Patiala State Bank (assessee) when called upon sent a return\* to the Income-tax Officer. We are not, therefore, at this stage concerned with the question what would have happened, if the assessee had refused to send a return. I do not propose to anticipate an argument on that point nor to express any opinion on it.

The last question, whether the Ruler is liable to be assessed, also does not directly arise. The assessee in the case is the Patiala State Bank. On the facts mentioned in the reference, it is a department of the State. There is a difference between the private property of the Ruler of the State and the property of the State itself. In holding that it was competent to the Government of India to legislate in respect of trading operations of the State, I think it is also held that the State as such, and to the extent it is covered by s. 2(1) of Act III of 1926, is liable to assessment. *Statham v. Statham and the Gaekwar of Baroda*,<sup>2</sup> which was relied upon in this connection, has in the circumstances no application.

I, therefore, agree that the answer to questions (1) and (7) should be in the affirmative. As regards the other questions, they are questions of fact, and I agree that the answers should be in the affirmative also.

*Income-tax Reference No. 2 of 1940.*

PER CURIAM. The answers in the second reference will be the same as in the first reference, and the same order as to costs. The assessee to pay costs, to be recovered from the assets of the Patiala State Bank.

*Answers accordingly.*

Attorney for Commissioner: *D. H. Namavati*, Solicitor to the Central Government at Bombay.

Attorneys for assessee: *Craigie, Blunt & Caroa*.

<sup>1</sup> [1926] A. C. 37.

<sup>2</sup> [1912] P. 92.

## CRIMINAL APPELLATE.

*Before Mr. Justice Broomfield and Mr. Justice Wassoodew.*

EMPEROR

v.

KUNVERJI KAVASJI KAVARANA.\*

1940.

October 1.

*Indian Sale of Goods Act (III of 1930), Secs. 21, 23—Sale of unascertained goods—Contract complete as soon as goods sold are ascertained and appropriated—Payment of price does not affect such completion—Liquor—Sale of liquor—Bottling of liquor after completion of sale—Delivery of sold liquor at customer's house does not affect completion of contract—Bombay Abkari Act (Bom. V of 1878), Sec. 45 (c)—License to sell country liquor—Breach of condition of license.*

The expression 'specific goods' as used in s. 21 of the Indian Sale of Goods Act, 1930, necessarily means goods capable of being ascertained with certainty—*certum est quod certum reddi potest*. A sale of some specified quantity of liquor out of a store-house or cask is not capable of ascertainment until it is removed or separated. The words 'specific goods' will, according to their natural interpretation, mean goods the delivery of which can be demanded in specie.

The accused was a vendor of country liquor under a license, condition No. 2 of which prohibited him from selling liquor at any place other than the licensed premises. The accused sent round his servants to tout for customers and canvass orders. The servants secured orders and carried them to the accused's shop, where liquor was measured out in fulfilment of the orders, and it was supplied to the customers at their respective places of residence and the price of liquor sold was recovered there. The accused was prosecuted for an offence punishable under s. 45(c) of the Bombay Abkari Act, 1878, for a breach of a condition of his license for selling liquor outside the licensed premises:—

*Held*, applying the provisions of the Indian Sale of Goods Act, 1930, (1) that the contract to sell some liquor out of a big cask containing much larger quantity, the required quantity not being separated or bottled, was not a contract of sale of specific goods within the meaning of s. 21 of the Act;

(2) that a contract of sale of a small quantity of liquor stored in bulk could more properly be regarded as a contract for sale of unascertained goods, and, under s. 23(1) of the Act, the ownership would not pass till the quantity ordered by the purchaser was ascertained and appropriated, which might be done by the bottling of the liquor;

(3) that in view of the provisions of s. 23 (2) it was immaterial that the delivery of the goods took place at the house of the purchasers;

(4) that in the present case the servant of the seller could very well be treated as a bailee for the purpose of the transmission to the buyer, and delivery to such servant, which admittedly took place in the licensed premises, would be effective delivery to the buyer himself;

(5) that it was not material for the purpose of the charge to ascertain whether the price of the liquor was paid in the shop, for the completion of the sale did not depend upon payment of the price of the goods sold;

\* Criminal Appeal No. 242 of 1940, by the Government of Bombay, against an order of acquittal passed by D. V. Vyaa, Sessions Judge, Surat,

setting aside the conviction and sentence passed by U. S. Kalyani, First Class Magistrate, Surat.

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(6) that therefore the sales in question were completed within the licensed premises and the accused was not guilty of the offence with which he was charged.

OFFENCE under s. 45 (c) of the Bombay Abkari Act, 1878.

The accused was a licensed vendor of country liquor at Surat. One of the conditions of his license prohibited him from selling liquor at any place except the licensed premises.

The accused used to send out his servants to canvass customers for liquor. The servants canvassed orders for liquor from such customers, got the quantities so canvassed measured off at the shop from casks of liquor either by the accused or his servants, and carried the quantities to the respective houses of customers. The prices were either paid on delivery or sometimes afterwards.

Between April 1 and June 11, 1938, the accused secured, through his servant Soma, three orders for liquor measuring half a gallon, one gallon, and half a gallon respectively for three customers, Makan Naran, Hiralal Jamnadas, and Chhagan Jekison. The quantities sold were measured off at the shop of the accused and delivered by Soma at the respective houses of the customers. Soma stated :—

"I was a servant of the accused. I was given Rs. 20 as pay. I had to go to customers for taking orders regarding liquor. I would then go and inform the accused about the orders given to me and the accused would then himself give the liquor, and if he is not present, his servant would fill up the bottles. Then I would give the liquor to the customers' houses and would recover the money and give it over to the accused."

Thakordas, another employee of the accused, stated :—

"There were two authorised servants besides myself and five to seven unauthorised servants. They had to bring orders for liquor by moving about in the city and then to get a note made by me or the accused. The accused then would fill up the bottles and then the servant would take the bottles to the customers and bring money from them and pay it to the accused and if anybody had not paid, his name would be noted on the debit side."

On these facts, the accused was charged with an offence punishable under s. 45(c) of the Bombay Abkari Act, 1878, for committing a breach of condition No. 2 of his license, in selling liquor by sending it to his customers' places instead of selling it at his shop.

The accused was tried by the First Class City Magistrate at Surat, who convicted him of the offence charged and fined him in a sum of Rs. 200.

On appeal, the Sessions Judge reversed the conviction and sentence and acquitted the accused, because Soma being an accomplice was not reliable in absence of corroboration by independent evidence, and remarked :

"We do not know whether the understanding was that the accused was to see that the liquor reached Makan, Hiralal and Chhagan at their houses or whether it was to the effect that the liquor was to be given to Soma who was to carry it to the houses of Makan, Hiralal and Chhagan and give it to them there. If the understanding was of the former kind, the handing over of the liquor at the houses would amount to delivery at the houses, but if the understanding was of the latter kind, then the handing over of the liquor by the accused to his servant Soma in the shop would amount to a 'delivery' to Soma as the agent for Makan, Hiralal and Chhagan. In other words, it would amount to delivery to Makan, Hiralal and Chhagan themselves. In that view of the matter the sales would be deemed to have

been concluded at the shop itself. The subsequent act of Soma of mere handing over the liquor to Makan, Hiralal and Chhagan at their houses would make no difference to that position. . . In this particular case as we do not know the exact nature of the understanding that was arrived at in the accused's shop between the purchasers of the liquor and the accused himself, the benefit of that lacuna must be extended to the accused and he must be acquitted."

The Government of Bombay appealed against the order of acquittal.

*R. A. Jahagirdar*, Government Pleader, for the Government of Bombay.

*H. R. Pardiwala*, with *Pochaji Jamshedji*, for the accused.

WASSOODEW J. This is an appeal by the Government of Bombay against the order of acquittal passed by the Sessions Judge of Surat in an appeal by the accused. The latter, who is a licensed vendor of country liquor, was convicted and sentenced to pay a fine of Rs. 200 under s. 45(c) of the Bombay Abkari Act (Bom. V of 1878) by the First Class City Magistrate of Surat for contravening a term of his license.

It was alleged by the prosecution that the accused sold a quantity of country liquor outside the building or shop mentioned in the license to three different persons, according to the orders placed by each of them, between April 1 and June 11, 1938, in contravention of cl. (2) of the license. That clause provides as follows :—

"Under this license the license-holder will be entitled to keep or sell country liquor in the building or premises mentioned hereunder...that is to say, in the building or premises known as...and situate on...Road and numbered as...And he will not be entitled to keep or sell the same at any place except the aforesaid place. This building or premises is henceforth regarded as the place of license."

The prosecution led evidence of the servants of the accused to show that they were asked to tout for customers and canvass orders, and that they went round the place, obtained orders and carried them to the shop, delivered the liquor to the customers at their respective places of residence and recovered there the price of the liquor sold. One of the servants examined by name Soma (exhibit 3) stated as follows :—

"I would go and inform the accused about the orders given to me and then the accused would himself give the liquor, and if he was not present, his servant would fill up the bottles. Then I would give the liquor to the customers' houses and would recover the money and give it over to the accused."

The prosecution maintained that that evidence if believed would inevitably lead to the inference that the sale took place outside the licensed place and therefore in violation of cl. (2) of the license. The learned Magistrate accepted the evidence of the accused's servants as true and convicted the accused. The learned Sessions Judge in appeal took a contrary view of the facts and acquitted the accused holding that the statement of the servants that the price of liquor was not paid at the shop could not be acted upon without independent and reliable corroboration, as the servants were no better than accomplices, and the memoranda of the supposed orders received by the accused could not be regarded as sufficient corroboration.

It is unnecessary in the view we take of the legal position, which was not properly appreciated in the Courts below, to examine that evidence of the prosecution. The question is whether upon the allegation in the complaint the sale could be said to have been completed outside the place of license.

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The learned Government Pleader has argued that the sale was completed upon delivery of liquor at the buyers' houses and not before, and upon notice given to them that the liquor was bottled from the casks and put into a deliverable state. He says that this case would be governed by the provisions of s. 21 of the Indian Sale of Goods Act (III of 1930). That section provides that :—

“Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.”

The argument of the learned Government Pleader assumes that a contract of sale of a quantity of liquor out of a large cask or cistern is a contract of sale of specific goods. I find the greatest difficulty in holding that a contract to sell some liquor out of a big cask containing much larger quantity, the required quantity not being separated or bottled, would be a contract of sale of specific goods within the meaning of s. 21. The expression ‘specific goods’ necessarily means goods capable of being ascertained with certainty—*certum est quod certum reddi potest*. A sale of some specified quantity of liquor out of a store-house or cask would not be capable of ascertainment until it was removed or separated. The words ‘specific goods’ would according to their natural interpretation mean goods whose delivery can be demanded in specie. Consequently in my opinion s. 21 would be inapplicable.

The appropriate section applicable to the facts alleged in this case would be s. 23 of the Indian Sale of Goods Act. Sub-section (1) of that section provides as follows :—

“Where there is a contract for the sale of unascertained... goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.”

In my opinion a contract of sale of a small quantity of liquor stored in bulk could more properly be regarded as a contract for sale of unascertained goods. The ownership will not pass till the quantity ordered by the purchaser is ascertained and appropriated. The bottling of the liquor would be an act of ascertainment and appropriation. That is what the evidence suggests. It is argued that it could not be said that the goods are ascertained until the appropriation by one party is assented to by the other, that there is no evidence that the purchaser had assented to the appropriation, and that such assent could not be implied till the liquor was delivered to the purchaser into his house or place named. The section itself provides that the assent may be express or implied, and may be given either before or after the appropriation is made. The question whether the assent was implied must necessarily depend upon the circumstances of each case. In this particular case it appears that the customer had assented that the goods should be delivered to the shop's servants for delivery to him. That is what Soma has suggested. If the prosecution intended to prove that the contract was different, it was open to them, and in fact necessary, to call the best evidence on the point,



namely, that of the customer, who could say what the terms of the contract were. That has not been done in this case.

In view of the provisions of sub-s. (2) of s. 23 of the Act it is immaterial whether the delivery of the goods took place at the house of the purchaser. Sub-section (2) of s. 23 provides that :—

“Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.”

The servant of the seller in the circumstances could very well be treated as a bailee for the purpose of transmission to the buyer; and delivery to such servant, which admittedly took place in the licensed place, would be effective delivery to the buyer himself. Nor would it be material for the purpose of the charge to ascertain whether the price of the liquor was paid in the shop, for the completion of sale does not depend upon payment of the price of the goods sold. It seems, according to the statement of Soma, that upon delivery of the liquor to the customers at their houses money was paid to him and he delivered the same to the accused in his shop, and that in some cases money was recovered later on. It has been pointed out to us that under cl. (10) of the license sale on credit of country liquor is prohibited. That is so provided in that clause. But assuming that there has been a transgression of that term of the license, the accused has not been charged with breach of it. All that he is charged with is that he has offended against cl. (2) of the license which relates to the sale outside the premises. In the view we take, the sales in question were completed within the premises and therefore the accused could not be convicted of the offence with which he was charged. We therefore dismiss the appeal.

BROOMFIELD J. I agree.

*Appeal dismissed.*

*Before Mr. Justice Broomfield and Mr. Justice Wassoodew.*

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*v.*

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*Indian Electricity Rules, 1937, r. 48—Indian Electricity Rules, 1922, r. 40A—Supersession of old rule by new one—Old rule not remaining in operation during interval—General Clauses Act (X of 1897), Sec. 24—Act or regulation, repeal and re-enactment of—Notification under rules—“Their own works”—“Works”—Interpretation—Indian Electricity Act (IX of 1910), Sec. 2(n).*

Rule 40A of the Indian Electricity Rules, 1922, provided that no electrical installation should be carried out upon the premises of a consumer or owner

\* Criminal Appeals Nos. 179 and 180 of 1940, by the Government of Bombay, from an order of acquittal

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except by an electrical contractor licensed by the Provincial Government and under the direct supervision of a person holding a certificate of competency issued by the Provincial Government, but reserved to the Provincial Government power to exempt any work or specified class of consumers or owners from the operation of the rule. Accordingly by a notification issued on November 15, 1934, the Provincial Government exempted from the operation of the rule all electric supply companies in so far as "their own works" were concerned. Rule 40A was superseded by the Indian Electricity Rules, 1937, on March 27, 1937, but the corresponding new r. 48 did not come into force till March 22, 1938.

The accused, who was a licensee and proprietor of an electric supply company at Ilkal, and who held a certificate of competency issued by the Provincial Government but not an electrical contractor's license, carried out, in February and early in March, 1938, small installation works on the premises of half a dozen inhabitants of Ilkal, at the expense of the supply company, the light points, switches etc. remaining the property of the company, for which he was charged with a breach of r. 48 of the Indian Electricity Rules, 1937 :—

*Held*, acquitting the accused, (1) that he had committed no breach of r. 48 of the Indian Electricity Rules of 1937, for it was not in force at the time the offences were alleged to have been committed ;

(2) that the old r. 40A could not be deemed to have remained in force till the new r. 48 was promulgated under s. 24 of the General Clauses Act, 1897, because the notification by which the new rules of 1937 were introduced expressly stated that they were in supersession of the rules of 1922 ;

(3) that s. 24 of the General Clauses Act came into operation only where a Central Act or Regulation had been repealed and re-enacted, and neither the Act or Regulation included a rule made under an Act ;

(4) that, even assuming that r. 40A applied, the accused was protected by the notification of 1934, inasmuch as he was one of the "Electric Supply Companies" doing "their own works" ;

(5) that the words "their own works" in the notification did not mean "such works when carried out on their own premises" ;

(6) that by the word "works" was meant the kind of works referred to in the rule and not the kind of works referred to in the definition of the term as given in s. 2(n) of the Indian Electricity Act, 1910 ;

(7) that the words "their own works" meant works carried out by the exempted bodies themselves, or perhaps works belonging to them ;

(8) that since the notification applied to installation works the works carried out by the accused were fairly included in the expression "their own works."

It is usually a sound rule of construction to give the same meaning to words used in rules made under an Act as the words have in the Act itself.

PROSECUTION under r. 48 of the Indian Electricity Rules, 1937.

The accused was a licensee and proprietor of an electric supply company at Ilkal. He held a certificate of competency issued by the Bombay Government, but he had not an electrical contractor's license.

Between February and March, 1938, the accused carried out small installation works at the shops of half a dozen merchants of Ilkal. The works consisted of putting in one light point with switches and cut-outs. The works were done at the expense of the supply company, and the light points, switches etc. remained the property of the company.

Under the provisions of the Indian Electricity Act, 1910, the Government

of India promulgated the Indian Electricity Rules of 1922, r. 40A of which made it compulsory that installation works should be carried out upon the premises or on behalf of any consumer or owner for the purposes of the supply of energy to such consumer or owner only "by an electrical contractor licensed by the Provincial Government in this behalf and under the direct supervision of a person holding a certificate of competency issued by the Provincial Government". There was a proviso to the rule which enabled the Provincial Government to exempt by notification "any such description of works."

Accordingly, on November 15, 1934, the Bombay Government issued a notification, exempting among other bodies "all electric supply companies... in so far as their own works are concerned."

On March 27, 1937, the Government of India issued new Indian Electricity Rules of 1937 in supersession of the Indian Electricity Rules of 1922. It was on March 22, 1938, that r. 48 in the rules of 1937, which was in the same terms as r. 40A in the rules of 1922, came into force.

The accused was tried for a breach of r. 48 of the rules of 1937.

The trying Magistrate acquitted the accused of the offence charged, observing as follows :—

"The object of r. 40A was to prevent wiring works of private individuals in a manner endangering human life or property. Under r. 46 the condition comes into operation only when a supply company does contractor's work. In other words, the supply company requires a contractor's license only when it does wiring and installation works for a consumer. If the supply company does such works as their own the exemptions referred to above apply. It appears that the ownership of the works makes all the difference. If the work belonged to the consumer or owner, these rr. 48, 123 are applicable as well as r. 46 of the rules and conditions. If they are the works of the supply company the exemptions above referred to apply. The works referred to in the exemptions should mean the works of the nature specified in the notification and not others. In the case of first six bodies premises are not mentioned whereas in the case of the remaining bodies the works should be on their own premises. The supply companies come in the first category. The omission of mentioning the premises in the case of the first set of bodies appears to be intentional. If the supply companies were to be forbidden to do their works in private premises, then they should have been included in the second set of bodies."

The Government of Bombay appealed against the order of acquittal.

*R. A. Jahagirdar*, Government Pleader, for the Government of Bombay.

*K. G. Datar*, for the accused.

BROOMFIELD J. These are appeals by the Government of Bombay in two connected cases in which one Raghunath Ramchandra Karlekar, licensee and proprietor of an electric supply company at Ilkal in the Bijapur District, was prosecuted for an alleged breach of r. 48 of the Indian Electricity Rules, 1937, and was acquitted by the Magistrate.

There is no dispute about the facts of the case. In the months of February and March, 1938, the accused carried out certain small installation works on the premises of some half a dozen inhabitants of Ilkal. The installation works consisted of putting in in each case one light point with switches and cut-outs. Three of these works were made the subject of one case and three of the other. The work was admittedly done at the expense of the supply

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A. Cr. J. company, and the light points, switches etc. remained the property of the  
1940 company.

— Rule 48, which is alleged to have been infringed, is as follows :—

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*"Precautions to be adopted by consumers and owners, electrical contractors and electrical workmen.—*(1) No electrical installation work, including additions, alterations, repairs, and adjustments to existing installations, except such replacement of lamps, fans, fuses, switches and other component parts of the installation as in no way alters its capacity or character, shall be carried out upon the premises or on behalf of any consumer or owner for the purposes of the supply of energy to such consumer or owner, except by an electrical contractor licensed by the provincial Government in this behalf and under the direct supervision of a person holding a certificate of competency issued by the provincial Government."

Provided that, the provincial Government may by notification in the Official Gazette exempt on such conditions as it may impose any such description of work either generally or in the case of any specified class of consumers or owners from so much of this sub-rule as requires such work to be carried out by an electrical contractor licensed by the provincial Government in this behalf :

Provided further that this rule shall not apply to any work carried out by or on behalf of the Government of India unless the Government of India so direct.

(2) This rule shall come into force in any province or part thereof on such date as the provincial Government may by notification in the Official Gazette appoint."

The accused in this case holds a certificate of competency issued by the Provincial Government, and it is not disputed that the works in question were carried out under his supervision. But the accused has not an electrical contractor's license. It is by reason of the want of this license that the prosecution alleges the rule has been infringed.

The first difficulty in the way of the prosecution is that r. 48 under which the accused was charged did not come into force until March 22, 1938. That was the date fixed in the notification issued under part (2) of the rule. It is common ground that the installation works in question were carried out by the accused in February and March, 1938, before March 22, 1938. But under the Indian Electricity Rules of 1922 there was a r. 40A, which was in precisely the same terms as the present r. 48. It is suggested, therefore, that the reference to r. 48 of the rules of 1937 was a mere slip, that the charge should have been under r. 40A of the rules of 1922, but that this mistake has not in any way prejudiced the accused, the wording of the two rules being precisely the same. That, however, does not get rid of the difficulty. The rules of 1937 were introduced by a notification dated March 27, 1937, which was as follows :—

"In exercise of the powers conferred by s. 37 of the Indian Electricity Act, 1910 (IX of 1910), and in supersession of the Indian Electricity Rules, 1922, the Governor-General in Council is pleased after previous publication to make the following rules applicable to the whole of British India."

Therefore, the old r. 40A was superseded *prima facie* when the new rules were made applicable on March 27, 1937. As I have said, the corresponding new r. 48 did not come into force until March 22, 1938, and, according to the contention of the learned advocate for the accused, in February and the first part of March, 1938, when he carried out these installation works, there was no rule corresponding to the present r. 48 in force.

The learned Government Pleader attempts to get over this difficulty by relying on s. 24 of the General Clauses Act, X of 1897. That provides, so

far as is material, that where any Central Act or Regulation is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any rule made under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made under the provisions so re-enacted, unless and until it is superseded by any rule made under the provisions so re-enacted. The learned Government Pleader's argument is that the old r. 40A cannot be considered to have been superseded by the Electricity Rules of 1937 when they were made applicable on March 27, 1937, and was only superseded when the new r. 48 came into force in consequence of the notification issued under part (2) thereof. However, the notification by which the new rules were introduced expressly stated that they were in supersession of the Indian Electricity Rules, 1922, and it is a little difficult to see how an exception is to be made in the case of r. 48. Another point is that s. 24 only comes into operation where a Central Act or Regulation has been repealed and re-enacted. According to the definitions in the General Clauses Act, neither Central Act nor Regulation would include a rule made under an Act, unless by some straining of language it is possible to say that the rule can be regarded as part of the Act, because it is provided that it is to have the same effect as though it were part of the Act.

Assuming, however, for the sake of argument that the old r. 40A can be regarded as having been in force at the time when the accused was prosecuted, we are not satisfied that a breach of the rule has in fact occurred. The accused has relied for his defence on the terms of a notification (No. 640/27-II) which was issued by the Bombay Government on November 15, 1934, (p. 2566, Part I). It was as follows :—

"In exercise of the powers conferred by the Proviso to sub-r. (1) of r. 40A of the Indian Electricity Rules, 1922, the Governor in Council is pleased to direct that the following Administrations, Institutions and Bodies shall be exempted from the operation of the said sub-r. (1) of r. 40A in so far as their own works are concerned, namely :—

1. The Electrical Branch of the Public Works Department, Bombay.
2. The State Railways.
3. The Victoria Jubilee Technical Institute, Bombay.
4. The College of Engineering, Poona.
5. The N. E. D. Civil Engineering College, Karachi.
6. All Electric Supply Companies.
7. All factories within the meaning of the Indian Factories Act, 1911 (XII of 1911).
8. The Royal Indian Navy Dockyard, Bombay.
9. Railways other than State Railways.

Provided that in the case of bodies referred to at items 7, 8 and 9 above, a person holding a Certificate of Competency is employed for Supervising such works on their own premises."

The accused relies on the words "their own works" in this notification and contends that as the installation works in question were carried out by the company itself, and after being carried out remained the property of the company, they are the company's own works, and therefore the exemption given by this notification in the case of electric supply companies is applicable to him. The case depends therefore on the interpretation of this notification

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and in particular of the words "their own works". The learned Government Pleader says that what is meant is works carried out on the premises of the various bodies referred to. There seems to be no very good reason, however, why the words "on their own premises" should be implied. It would have been very easy to say "works carried out by them on their own premises." Moreover, at the end of the notification there is a proviso that in the case of certain bodies "such works" (which would naturally mean their own works), *when carried out on their own premises*, are not exempted unless a person holding a certificate of competency is employed for supervising them. If the words "their own works" in themselves meant works on the premises of the body concerned, the addition of the words "on their own premises" in this last proviso would have been unnecessary. This interpretation of the words therefore seems to be unacceptable.

The learned Government Pleader has argued with more force that the word "works" should be interpreted with reference to the definition contained in the Act. According to that definition "works" includes electric supply-lines and any buildings, machinery or apparatus required to supply energy and to carry into effect the objects of a license granted under Part II, which deals with the supply of energy. The definition is not exhaustive. Nevertheless a reference to other provisions in the Act does seem to indicate that when the expression "works" is used it usually means works connected with the supply of energy, and not lighting installations of the kind with which we are concerned which have nothing to do with the supply of energy. It is usually a sound rule of construction to give the same meaning to words used in rules made under an Act as the words have in the Act itself. We were therefore at first somewhat impressed by the argument put forward on behalf of Government in this respect. But when we look at the language of r. 48 or 40A, it becomes extremely difficult, if not impossible, to suppose that the word "works" in the notification has the meaning ascribed to it in the definition in the Act. The section begins by referring to "installation works" and the description of the work there given clearly covers the kind of work which was carried out by the accused in this case and in respect of which he has been prosecuted. The work referred to there is quite obviously not work connected merely with the supply of energy. Then the notification goes on to say that the Provincial Government may by notification exempt *any such description* of work either generally or in the case of any specified class of consumers or owners from the requirement that a licensed electrical contractor must be employed. So that the kind of work referred to in the rule is not work connected with the supply of energy but electrical installation work, and, that being so, when we find the notification issued under the rule stating that certain bodies shall be exempted in so far as their own works are concerned, it seems reasonable to hold that by "works" is meant the kind of works referred to in the rule and not the kind of works referred to in the definition.

The words "their own works" would naturally mean works carried out by the exempted bodies themselves, or perhaps works belonging to them. In the present case the works were not only carried out by the electric supply company but were carried out at their own expense and remained their own property. Since it seems to be clear that the notification applies to the instal-

lation works, we find it impossible to say that the works carried out by the accused in this case are not such as can be fairly included in the expression "their own works" in this notification. If Government intended that the exemption was only to apply in the case of works carried out by the various bodies on their own premises, that intention has not been made sufficiently clear.

On behalf of Government reliance was also placed on r. 46 of the rules issued on November 15, 1932, in connection with the issue of certificates of competency under r. 40A of the Indian Electricity Rules, 1922. That rule is as follows : —

"Supply companies to obtain contractor's licenses.—No electrical contracting work shall be carried out by any electric supply company unless they have obtained an Electrical Contractor's License and employed a separate staff of supervisors and wiremen, in compliance with these rules."

It is not clear, however, that the work carried out by the accused in this case can be described as electrical contracting work within the meaning of this rule. In any case, if he is exempted under the provisions of the notification from the operation of r. 40A, he could not be convicted of a breach of that rule, and it is a breach of that rule which is the subject of the charge.

For these reasons we are of opinion that the learned Magistrate was right in acquitting the accused in this case, and we dismiss the appeals.

*Appeals dismissed.*

## CRIMINAL REVISION.

*Before Mr. Justice Broomfield and Mr. Justice Wassoodew.*

EMPEROR

*v.*

DR. H. L. BATLIWALLA SONS & CO., LTD.\*

1940

*September 23.*

*Indian Companies Act (VII of 1913), Sec. 73—Company—Name-board of company—Business premises or office of company—Place where name-board can be affixed.*

The words "outside the office or place where the business is carried on" in s. 73(a) of the Indian Companies Act, 1913, do not mean outside the premises. The section has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. The requirements of the section will be satisfied if a company affixes a board of the necessary conspicuousness and legibility outside the office room though it be inside the building.

Hence, where the office of a company is situated in a building within a compound, it is not necessary that the name of the company should be painted or affixed outside the compound as well as the building. It is sufficient for the

\* Criminal Application for Revision No. 278 of 1940, from conviction and sentence passed by K. J. Khambata,

Presidency Magistrate, Fourth Court, Girgaum, Bombay.

A. Cr. J. requirements of s. 73(a) if the board of the company is affixed outside the office in the building.  
1940

EMPEROR PROSECUTION under the Indian Companies Act, 1913.  
v. Dr. H. L. Batliwalla Sons & Co., Limited, (accused No. 1), hereinafter  
BATLIWALLA called the company, was registered as a private company under the Indian  
SONS & CO., Companies Act, 1913. Kaikobad and his father Cawashaw (accused Nos 2  
LTD. and 3) were directors of the company. The complainant Jehangir was a  
brother of accused No. 3. There was no love lost between the complainant  
and accused Nos. 2 and 3.

The company was formed for the manufacture and sale of the Batliwalla  
Ague Mixture.

The registered office of the company was in a bungalow named Saklat  
Villa, which was situated at Cleveland Hill at Worli in Bombay. The bungalow was situated within a compound, which had two gates, one facing the north and the other towards the south. On the southern entrance, which was the principal one, a board bearing the words "Saklat Villa" was affixed. The whole building was owned by the accused. On the other gate there was found a board bearing the words "Dr. H. L. Batliwalla Sons & Co., Ltd., Worli, Bombay". The largest capital letters were one inch in size and the others were three-fourths of an inch in size. The office room was located on the first storey of the bungalow. On the wall opposite the landing there was another small board bearing the letters "Dr. H. L. Batliwalla Sons & Co., Ltd." This board was fixed in such a manner as that it would be visible to any one who got up the staircase, though it would not be visible from the road. The board was two feet by one foot in size, and the largest capital letters were two and a half inches in height, and the others about one inch in size.

The complaint in the case was that on September 1 to 3, 1937, there was no name board of the company affixed on the southern gate of the compound, and that as there was no outside board bearing the name of the company affixed either to the compound wall or the building the accused had committed the offence punishable under s. 74 of the Indian Companies Act, 1913.

The trying Magistrate came to the conclusion that "the company's board was not kept affixed outside its premises on those three days (viz. September 1 to 3), as required by the law". The Magistrate gave accused No. 3 the benefit of doubt and acquitted him. He convicted accused Nos. 1 and 2 of an offence under s. 74 of the Indian Companies Act, and fined accused No. 1, the company, in a sum of Rs. 50 for each of the three days, September 1, 2 and 3, 1937, on which its board was not conspicuously kept affixed outside its premises, and fined accused No. 2 in a sum of Rs. 25. He directed that out of the fine, if recovered, a sum of Rs. 150 should be paid for the costs of the proceedings, under s. 279 of the Act. The Magistrate observed :—

"I may add that the fact that there has been a board inside on the first floor landing does not help the defence. The whole bungalow and the compound was the company's premises, and the board should be kept affixed outside the premises for the purpose of the requirements of s. 73 of the Indian Companies Act. The board on the first floor landing was not visible from the road outside, and the compound was not such an open space as that anybody could walk in, go up the first floor,



and satisfy for himself whether the company's office was there or not; in fact as the evidence shows the compound used to be kept closed and a Pathan posted with instructions not to admit any stranger inside."

Accused Nos. 1 and 2 applied to the High Court in revision.

*G. C. O'Gorman*, with *J. C. Tarapore*, for the accused.

*H. C. Coyajee*, with *V. N. Chhatrapati*, for the complainant.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

A. Cr. J.

1940

EMPEROR

v.

BATLIWALLA

SONS & CO.,

LTD.

BROOMFIELD J. This revision application involves a question of the construction of s. 73(a) of the Indian Companies Act. The applicants are (1) Dr. H. L. Batliwalla Sons & Co., a limited company, which manufactures and sells a patent medicine called Batliwalla Ague Mixture, and (2) Kaikobad Cawashaw Batliwalla, who is one of the directors of this company. They have been prosecuted for an alleged contravention of s. 73(a) of the Indian Companies Act which requires that every limited company shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible and in English characters. The complaint was that on the first three days of September, 1937, this company had not got its name painted or affixed outside its office or place of business as required by the section, and the learned Presidency Magistrate has found this proved as a fact and has convicted the applicants under s. 74(1) of the Act, which makes the contravention of s. 73 penal, and imposed sentences of fine.

The firm in question is a family firm. The complainant in the case is a member of the family. It appears that he has had disputes with the directors of the company for some time, and so far as the facts of the case are concerned, it is a purely private quarrel of no general importance. The point of law involved is however of some importance to companies generally.

The office of the company is situated in a bungalow at Worli which is surrounded by a compound. The office is on the first floor. There are two entrance gates to the compound. At one of these gates there is a board bearing the name of the bungalow "Saklat Villa" but no board bearing the name of the company. It was disputed whether there was a board bearing the company's name at the other gate of the compound, which was on the north. The accused alleged that there was such a board and called evidence to prove it. The learned Magistrate, while apparently prepared to accept the view that there normally was a board at that gate, has found that on these particular days in September, 1937, there was no board there. On behalf of the complainant it is now contended that the evidence showed that there was no board anywhere on these three particular days. The learned Magistrate in the course of his judgment says that he visited the premises on December 14, 1939. He was then shown a board on one of the pillars of the north gate of the compound, i.e. the board which, as I say, he has found was not in existence at that place on the relevant dates. He also says that he was taken upstairs to the landing of the upper storey of the bungalow where the office room is located and on the wall opposite the landing he found a small board, as he describes it, with the words "Dr. H. L. Batliwalla Sons & Co., Ltd." This board was fixed in such a manner that it would be visible to anyone

A. Cr. J. who goes up the staircase but would not be visible from the road. The board  
 1940 was two feet by one foot and the largest capital letters were two and a half  
 — inches, the others about one inch.  
 EMPEROR  
 v. A perusal of the very long and careful judgment of the learned Magistrate  
 BÄTLIWALLA points to the conclusion that the question between the parties was as to the  
 SONS & CO., existence of the board at the northern gate of the compound and as to whether  
 • LTD. it was necessary that there should be a board at one of the compound gates  
 • *Broomfield J.* in order to comply with the terms of s. 73. Elsewhere in the judgment the  
 — learned Magistrate says: "I may add that the fact that there has been a  
 board inside on the first floor landing does not help the defence." The reason  
 he gives for this finding is that the whole bungalow and the compound constitute  
 the company's premises, and on the view he took of the construction of  
 s. 73, it was necessary that there should be a board outside the premises and  
 not merely outside the office room situated in a bungalow in the compound.  
 There is nothing in the whole of the judgment to suggest, as far as we can see,  
 that it was seriously argued before him, or at any rate that he found as a fact,  
 that the board, the nature of which I have described, was not in existence  
 on the relevant dates outside the office room. The question for our considera-  
 tion therefore is whether this board was a sufficient compliance with s. 73  
 or whether that section requires that the company should have maintained  
 a board with its name outside one or other of the compound gates. In the  
 view we take the requirements of the section are satisfied by the board outside  
 the office room.

The learned Magistrate's view is that "Outside the office" in s. 73(a)  
 means outside the premises. But that is not what the section says. Accord-  
 ing to the literal meaning of the words used there has been no contravention  
 of the section. It is a penal provision and has to be construed strictly, and  
 therefore the burden is very strongly on the prosecution, i.e. the opponents  
 in this application, to show that there really has been an infringement of the  
 law and that in circumstances such as those existing in this case a meaning  
 must be given to the section which is not the literal one. The learned Magis-  
 trate's reason for holding that the words "outside the office or place where  
 the business is carried on" mean outside the premises or in this particular  
 case outside the compound seems to be that in the absence of a board outside  
 there would be a difficulty or might be a difficulty in finding one's way to the  
 office. That is to say, he takes the object of this provision to be to require  
 that companies should advertise their whereabouts and assist members of  
 the public to find their way to the office of the company. There does not  
 however appear to be anything in the Act to suggest that that is the object,  
 and no authority of any kind has been cited in that connection. On the other  
 hand in *Palmer's Company Law* (at p. 261 of the fifteenth edition) the  
 learned commentator in dealing with the corresponding sections of the Eng-  
 lish Company Act gives the object of this provision as something quite  
 different. He says:—

• "Why this solicitude on the part of the legislature as to publication of a com-  
 • pany's name? The answer is, that the legislature, whilst allowing limited liability,  
 • desired by this means to make the company itself continually bring to the notice  
 • of those who dealt or might deal with it the fact that it was limited. This policy

it has fortified by pecuniary penalties."

According to that view at any rate—and in our opinion that is at least as likely to be the correct view as that now put forward on behalf of the prosecution—s. 73 has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. It is well-known that in most cities there are large buildings which contain a considerable number of offices of companies and it might be extremely inconvenient if the law required that boards bearing the names of these various companies should be affixed or that the names should be painted outside the building. We think that in such a case clearly the requirements of the Act would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building. No doubt in the present case the company owns the whole of the premises, but we do not consider that that makes any difference in principle, and we are not prepared to hold that when an office is situated within a compound the law requires the name of the company to be painted or affixed outside the compound as well as outside the office.

Our attention was drawn to evidence that was given in the case to show that certain persons who desired to enter the compound were prevented from doing so or obstructed in doing so by a watchman maintained by the company. We do not consider, however, that this fact has anything to do with the construction of s. 73(a).

The learned Magistrate has not found and we do not think that it could have been found that the board outside the office room did not comply with the section in respect of conspicuousness and legibility. It was not a large board nor were the letters on it very large. But the Magistrate said that it would be visible to anyone who gets up to the landing where the office is situated. The letters were obviously large enough to be read with ease and the board seems to have been sufficiently conspicuous. In our opinion the law does not require anything more than this.

This being our view of the construction of s. 73(a), we are of opinion that the conviction under s. 74 cannot be sustained. We, therefore, make the rule absolute, set aside the convictions and direct that the fines be refunded.

*Rule made absolute.*

A Cr. J.

1940

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SONS & CO.,

LTD.

Broomfield J.

## CRIMINAL REFERENCE.

*Before Mr. Justice Broomfield and Mr. Justice Wassoodew.*

1940

EMPEROR

v.

October 3.

CHAMPAKLAL CHUNILAL BANKER.\*

*Criminal Procedure Code (Act V of 1898), Sec. 234—Joinder of charges—Irregularity—Consent of pleader—Practice—Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 159†—Offensive liquid, running out of, into street or open space—Liability of secretary of textile mill—Consolidation of criminal cases.*

Criminal cases cannot like civil suits be consolidated and tried together on the same evidence except within the limits as to joinder of charges laid down in the Criminal Procedure Code. Such illegality is not cured by the fact that the accused's pleader has consented to the procedure adopted.

Under s. 159 of the Bombay Municipal Boroughs Act, 1925, it must be proved, firstly, that the accused is a person who has the building or land under his control, secondly, that he allowed the water to run upon any street, land or space, and, thirdly, that the water was or was likely to become offensive.

The secretary of a textile mill cannot, in absence of evidence, be made liable as such for an offence under s. 159 as being in control of the mill premises.

FIFTEEN cases were instituted against the same accused, nine of which were for an offence under s. 159 of the Bombay Municipal Boroughs Act, 1925, and the remaining six were with reference to an offence under s. 160 of the Act. The accused pleaded not guilty in all the cases, and contended that he was not the secretary of the New Manekchowk Mills, with reference to which premises the offences were alleged to have been committed.

The Magistrate recorded evidence only in one of the cases, rejected the plea of the accused, found him guilty under s. 159 of the Bombay Municipal Boroughs Act, and sentenced him to pay a fine of Rs. 10.

Next, the Magistrate, without recording evidence in any of the remaining fourteen cases, proceeded to pass an order of conviction either under s. 159 or s. 160 as the case might be and imposed a similar fine of Rs. 10 in each of those cases.

When the trying Magistrate was asked to justify the procedure adopted by him, he stated :—

"In all fifteen cases against the Secretary of the New Manekchowk Mills were kept for hearing on November 29, 1939. On the day of hearing, the defence pleader

\* Criminal References Nos 98 to 112 of 1940, made by G. S. Rajadhya-ksha, Sessions Judge, Ahmedabad.

† The section runs as under :—

159. Whoever causes or allows the water of any sink or sewer or any other liquid or other matter which is or which is likely to become offensive, from any building or land under his control, to run, drain, or be thrown or put upon any street or

open space, or to soak through any external wall, or causes or allows any offensive matter from any sewer or privy to run, drain or be thrown into a surface drain in any street, without the permission in writing of the Chief Officer or who fails to comply with any condition prescribed in such permission, shall be punished with fine which may extend to twenty-five rupees.

Mr. Bhatt informed the Court that all the cases were of the same nature and so one case should be heard fully as a test case and that the decision of that case will hold good in other cases.

The evidence was recorded in one case only and as the fact, nature of the offence and the party, viz., the accused *v.* The Municipality was the same; the same evidence was taken in the remaining other cases. The copying clerk however has copied the evidence of one case in all the cases, while making copies from the summary register. This he has done through mistake. Fresh copies of these cases from the summary register are submitted."

The Sessions Judge of Ahmedabad made references to the High Court in all fifteen cases as he was of opinion that the procedure adopted by the Magistrate in the remaining fourteen cases was illegal and that the conviction in the test case was contrary to law. He observed as follows :—

"It would appear from the report that all the fifteen cases were tried separately. The evidence was recorded only in one case. The learned Magistrate observes : 'The same evidence was taken in the remaining other cases.' He presumably means thereby that the evidence recorded in the test case was considered in deciding the other cases also. The procedure adopted by the learned Magistrate is manifestly illegal....

As regards the test case, under s. 159 of the Bombay Municipal Boroughs Act it has got to be proved (1) that the accused is a person who has the building or land under his control, (2) that he allowed the water to run upon any street land or space, and (3) that the water was or was likely to become offensive. The judgment of the learned Magistrate merely concerns itself with the question whether the accused is the Secretary of the New Manekchowk Mills or not. On that there is a finding that the accused is the Secretary of the mills. But it has still to be proved that as Secretary he had the control of the mills; that he allowed the water to flow upon any street or open space, and that the water so allowed to run was or was likely to become offensive. On none of these points there is any finding of the learned Magistrate. The accused having pleaded not guilty to the charge and having added that he was not even the Secretary as alleged, it was incumbent on the prosecution to prove all these points and for the Magistrate to give findings thereon. Ordinarily the Secretary is not a person who has the control of the building or lands of a mill. Under s. 2 (9) of the Indian Companies Act it is the manager who has the management of the whole affairs of the company. Under s. 2 (11) the term 'officer' includes a Secretary but no authority has been shown to me to prove that a Secretary has the control of the buildings or lands."

The reference was heard.

*S. T. Desai*, with *M. H. Chhatrapati*, for the accused.

*J. C. Shah*, for the complainant.

No appearance for the Crown.

BROOMFIELD J. These are references from the Sessions Judge of Ahmedabad in fifteen cases in which the Additional Stipendiary First Class Magistrate, Ahmedabad, convicted one C. C. Banker, said to be the Secretary of the New Manekchowk Mill at Ahmedabad, of offences under ss. 159 and 160 of the Bombay Municipal Boroughs Act (Bom. XVIII of 1925). In nine cases the prosecution was under s. 159 which renders punishable the act of causing or allowing the water of any sink or sewer or any other liquid or other matter which is or which is likely to become offensive, from any building or land under the control of the accused, to run, drain, or be thrown or put upon any street or open space. In the other six cases the charge was under s. 160 which makes it an offence for the owner or occupier of any building or land

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*Broomfield J.*

to keep or allow to be kept for more than twenty-four hours, or otherwise than in some proper receptacle, any dirt, dung, bones, ashes, night-soil, etc., in or upon such building or land.

It appears that at the suggestion of the defence pleader the learned Magistrate recorded evidence in one of the cases only, which is the subject of the first of these criminal references, No. 98. Having convicted and imposed sentence in that case the Magistrate then passed orders in the other cases without recording any further evidence. As the learned Sessions Judge says, this procedure is not contemplated by the Criminal Procedure Code and is clearly illegal. We had to deal with the same kind of illegality in another case (*Emperor v. Panubhai Laljibhai*<sup>1</sup>) from the Ahmedabad District not very long ago, and as it appears that the Ahmedabad Magistrates are under a serious misapprehension as to their powers in this respect, it is desirable to repeat what was said in the judgment in that case, which applies exactly to the present case :—

“We agree with the learned Sessions Judge of Ahmedabad that when you have a series of complaints of an offence alleged to have been committed on fourteen different occasions it is not permissible to do as the Magistrate in this case did viz., to hear the evidence and write a judgment in one of the cases and then proceed to pass merely consequential orders in the other cases. Criminal cases cannot like civil suits be consolidated and tried together on the same evidence except within the limits as to the joinder of charges laid down in the Criminal Procedure Code. It would have been permissible for the Magistrate to try the charges in groups of three, and I may say incidentally that I should have thought it quite sufficient for all practical purposes if the Municipality had restricted themselves to lodging three or at the most six complaints. However that may be, the Magistrate's procedure is plainly illegal and the illegality is not cured by the fact that the accused's pleader appears to have consented to the procedure adopted.”

In the present case it appears that the defence pleader suggested the adoption of this procedure. That makes no difference. It is plain therefore that the conviction of the accused in all the cases in which no evidence was recorded, that is, the cases which are the subject of references Nos. 99 to 112 of 1940, must be set aside and the fines and process fees ordered to be paid must be refunded to the accused.

The learned Sessions Judge has also recommended that the conviction in the first case (No. 98), in which evidence was recorded, should also be set aside. He points out quite correctly that under s. 159 of the Bombay Municipal Boroughs Act it has got to be proved, firstly, that the accused is a person who has the building or land under his control, secondly, that he allowed the water to run upon any street, land or space, and, thirdly, that the water was or was likely to become offensive. He says in his letter of reference that there is no finding of the Magistrate on any of these points. The accused denied that he was the Secretary of the Mill; evidence was given to show that he was; the Magistrate held that he was; and on the strength of that finding, according to the learned Sessions Judge, he convicted the accused.

Mr. J. C. Shah, who appears for the Municipality which was the complain-

ant in these cases, disputes the statement of the learned Sessions Judge that there is no finding of the Magistrate on points 2 and 3. He says that the first sentence of the order shows that the accused was charged with having discharged waste water of the Bleaching and Dyeing Departments on the street land and thus committed an offence punishable under s. 159, and that further on in the judgment the Magistrate said :—

"Here the offence has been committed as supported by the prosecution evidence."

It is by no means clear, I think, that the particulars of the charge have been stated sufficiently clearly to make it to appear that the learned Magistrate had applied his mind to the necessary ingredients of the offence. 'Waste water' would not necessarily be offensive or likely to become offensive; which is what the section requires, and the Magistrate's statement that the prosecution evidence justifies a conclusion that the offence had been committed hardly enables one to say that the necessary evidence as to the offensive character of the waste water had been produced. However, it is not necessary to deal with the matter on points 2 and 3.

It is quite clear from the learned Magistrate's judgment that he did not apply his mind to the question whether the accused was a person who had the building or land of the mill under his control. Mr. Shah has not suggested that there was any evidence produced to show that he had such control. He says that the secretary is an officer of the company and that the Magistrate may have assumed that as secretary he was liable to be convicted. It may well be that the Magistrate did make this assumption, but if he did, it was a wrong assumption. It was recently pointed out by this Court in *Emperor v. Jagannath P. Thakar*<sup>1</sup> that the secretary of a mill was not as such liable to be convicted under s. 159 as being in control of the premises. The learned Chief Justice said in that case :—

"*Prima facie*, the Secretary of a Mill would be a person to attend to the office and clerical work, but he would certainly not be a person to control the working of the mill or to see in what manner the waste water is to be discharged. That would be for the Manager. If the Secretary in the case of this Mill has control of the Mill, there ought to be evidence to that effect."

In the present case also there is no presumption that the accused as secretary was in control of the premises, and, as far as we can see, no evidence to that effect was produced. In this case also therefore we agree with the learned Sessions Judge that the conviction cannot stand. In the case which is the subject of reference No. 98 of 1940 the conviction is set aside and the fine and process fees must be refunded to the accused.

*Convictions set aside.*

A. Cr. J.

1940

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v.

CHAMPAK-

LAL

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Broomfield J.

<sup>1</sup> (1940) Crim. Ref. No. 71 of 1940, decided by Beaumont C.J., on

## APPELLATE CIVIL.

*Before Mr. Justice Broomfield and Mr. Justice Divatia.*

1940

August 12.

AMBABAI BHAICHAND GUJAR

v.

KESHAV BANDOCHAND GUJAR.\*

*Hindu Law of Inheritance (Amendment) Act (II of 1929)—Applicability of Act to Hindus and Jains, as also to Mitakshara and Mayukha systems of law—Succession—Sister's son—Father's sister—Priority between.*

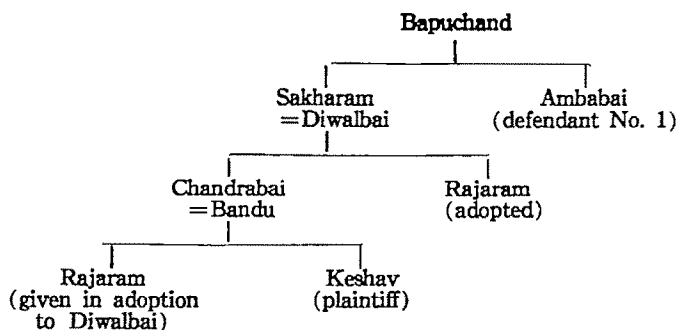
The Hindu Law of Inheritance (Amendment) Act, 1929, applies to Hindus, including Jains, and to all persons governed by the Mitakshara law, including those governed by the Mitakshara law as modified by the Mayukha.

Hence, among the Jains who have migrated from Gujarat and settled in the Belgaum district, a sister's son is entitled to succeed in preference to the father's sister of the propositus.

The rise and growth of the Mitakshara and the Mayukha systems of law discussed.

SUIT to recover possession of lands.

The lands in dispute belonged originally to one Sakharam, to whom the parties were related as shown in the following genealogical tree :—



The parties were Jains. They hailed from Gujarat and settled in the Belgaum district.

Bapuchand died on October 9, 1892, leaving him surviving his son Sakharam and a daughter Ambabai (defendant No. 1). Sakharam died in 1897 leaving behind him his widow Diwalbai. On October 9, 1900, Diwalbai adopted Rajaram, who was the son of her daughter Chandrabai. Diwalbai died on October 13, 1900. Chandrabai died on March 24, 1905, leaving her husband Bandu and her son Keshav (plaintiff). Bandu died on April 16, 1923.

On Rajaram's death on June 10, 1932, his property was claimed by Keshav, who was his natural brother but who became the sister's son when Rajaram

\* First Appeal No. 140 of 1938,  
from the decision of S. A. Aranha,  
Joint First Class Subordinate Judge

at Belgaum, in Regular Civil Suit  
No. 222 of 1935.



was adopted by Diwalbai. The claim was contested by Ambabai, the father's sister of Rajaram. The suit was filed on July 10, 1935.

Defendant No. 1 contended *inter alia* that she was the preferential heir of Rajaram.

The trial Court held that the parties were governed by the Mitakshara modified by the Mayukha, that the Hindu Law of Inheritance (Amendment) Act, II of 1929, applied to Jains, and that therefore the plaintiff was the preferential heir. The suit was therefore decreed, for the following, among other, reasons :—

"Confining ourselves to Gujarat it follows that the law applicable is Mitakshara, but Mayukha is the 'overruling authority' in the 'few points in which it differs from Mitakshara.' Where therefore the legislature makes use of the words 'only to persons...subject to the law of Mitakshara' in the Act of 1929, I think it meant all the 'subdivisions' of the Mitakshara school, subject of course to any 'overruling authorities' in particular provinces...Now a sister's son is a bandhu...It is not shown to me that the Mayukha gave him any higher place than that given him by the Mitakshara. On the other hand, as regards the succession of bandhus there is no difference between the Mitakshara and Mayukha. The Act of 1929 has lifted him up still higher in the category of gotraja sapindas and since in this respect there is no conflict between the Mitakshara and Mayukha, I think in the present case plaintiff is the preferential heir to defendant and must succeed."

Defendant No. 1 appealed to the High Court.

A. G. Desai, with S. A. Kher and B. M. Gujar, for the appellant.

R. A. Jahagirdar, for the respondent.

DIVATIA J. The decree against which this appeal is preferred by defendant No. 1 was passed in favour of the plaintiff who sued to recover possession of certain property on the ground that he was a preferential heir of one Rajaram. The plaintiff was the natural brother of Rajaram, but the latter was adopted by his maternal grandfather and he therefore became his sister's son. Rajaram died on June 10, 1932, without leaving a widow or any issue, and the dispute arose about his property which was claimed by the plaintiff against defendant No. 1, who is the sister of Rajaram's adoptive father. The contest is thus between sister's son and father's sister. It is common ground between the parties, who are Jains, that their ancestors migrated from Gujarat and settled in the Belgaum District. It was agreed during the hearing of the suit that Rajaram's adoption was proved and was valid, as a daughter's son could be adopted among the Jains. The plaintiff claimed to be the preferential heir under the Hindu Law of Inheritance (Amendment) Act (II of 1929), s. 2 of which provides that "a son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother." His case was that defendant No. 1 being the father's sister was a remote gotraja sapinda, and therefore not entitled to priority over him.

It is clear that if the Act of 1929 applies, the plaintiff is a preferential heir. Before the passing of this Act a sister's son was only a bandhu, while a father's sister was held to be a gotraja sapinda in cases governed by the Mayukha, and, therefore, came before the bandhus; but under the new Act the sister's son is taken much higher up and placed even before a father's

A. C. J.  
1940

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- brother. Defendant No. 1, however, contended—and that was her main defence to the suit—that the case was not governed by the Act, firstly, because it applies only to Hindus and not to Jains; and, secondly, because it applies only to persons who are subject to the law of Mitakshara, while the parties' ancestors, having migrated from Gujarat, were subject to the law of Mayukha. The first two issues were, therefore, framed to cover this contention. The first issue was whether Mayukha or Mitakshara was applicable to the parties, and the second was whether the Act was applicable to Jains. The learned Judge below held that the parties were governed by Mitakshara subject to Mayukha, and that the Act was applicable to Jains. He, therefore, decreed the suit.

Mr. Desai on behalf of the appellant-defendant No. 1 has raised the same two points before us. Taking the second point first, he has urged that Jains are not Hindus and the Legislature has not expressly included them in this Act as it did in another Act passed in the same year, namely, the Indian Succession (Amendment) Act (XVIII of 1929), by which s. 57 of the Indian Succession Act of 1925 was enlarged by the addition of the new clause making it applicable to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain after January 1, 1927. It is not necessary to dwell at length on the question whether Jains are Hindus for the purpose of the law of succession, as the point has been concluded by authority : vide *Chotay Lall v. Chunno Lall*<sup>1</sup> and *Ambabai v. Govind*.<sup>2</sup> Even in the matter of adoption, although it has a secular and not a religious origin with Jains, it has been held by our Court in a series of decisions beginning from *Bhagwandas Tejmal v. Rajmal*,<sup>3</sup> and ending with the recent decision in *Hinachand v. Rowji Sojpal*,<sup>4</sup> that the Hindu law of adoption applies to Jains, and the burden of proving any custom to the contrary lies on the party alleging it. Mr. Desai relies upon certain observations of Kumaraswami Sastri, Acting C. J., in *Gettappa v. Eramma*,<sup>5</sup> to the effect that Jains were not Hindu dissenters and that the onus should be thrown on those who assert that in any particular they had adopted Hindu law and custom and had not followed the law as laid down by their own law-givers. Those observations, however, were his personal opinion, and he was constrained to hold that the matter was concluded by authority, and a series of decisions extending over several years had held that the presumption was that Jains were governed by ordinary Hindu law unless it was shown that by custom a different law prevailed among them. It is not necessary to discuss the origin of Jainism, because whatever its origin, it is clear that the Jains have adopted the Hindu law of succession from very ancient times. But Mr. Desai argues that although the Hindu law of succession might apply, the Act of 1929 does not apply to them as it does not specifically say that it is applicable to Jains. The preamble to the Act speaks of altering the order in which certain heirs of a Hindu male succeed to his estate. As the Jains have been judicially recognized as governed by the Hindu law of succession, a legislative alteration in that law would presumably apply to them also unless it was specifically stated that it was not to apply to them. It

<sup>1</sup> (1878) L. R. 6 I. A. 15.

<sup>4</sup> (1938) 41 Bom. L. R. 760.

<sup>2</sup> (1898) I. L. R. 23 Bom. 257.

<sup>5</sup> (1926) I. L. R. 50 Mad. 228.

<sup>3</sup> (1873) 10 B. H. C. R. 241.

is true that the Indian Succession (Amendment) Act of 1929 speaks of Jains as well as Hindus and ss. 4 and 57 of the Indian Succession Act of 1925 also do the same. At the same time it must be noted that s. 331 of the Indian Succession Act of 1865, which is replaced by s. 4 of the Indian Succession Act of 1925, did not make any separate mention of Jains but used the expression "Hindu, Mahomedan or Buddhist", and it has been held in *Bachebi v. Makhan Lal*<sup>1</sup> that the term "Hindu" in s. 331 included Jains. The Hindu Wills Act of 1870, which applied to the territories under the Lieutenant-Governor of Bengal and the cities of Bombay and Madras, no doubt mentioned Jains as well as Hindus as being governed by certain sections of the Succession Act of 1865, but the Indian Succession Act of 1925 was a consolidating Act which repealed the previous Act of 1865 as well as the Hindu Wills Act of 1870. It was, therefore, probably thought necessary *ex majore cautela* to separately mention the Jains in the consolidating measure. In all the other recent enactments affecting the Hindu law there is no separate mention of Jains along with the Hindus. I am, therefore, of opinion that Jains are also governed by the Act of 1929, and the learned Judge was right in his finding on the second issue.

The second point urged by Mr. Desai is more important. The Act applies to all persons who, but for the passing of the Act, would have been subject to the law of Mitakshara in respect of the provisions therein enacted. The parties are governed by the law of succession prevailing in Gujarat where Mayukha is said to be of paramount authority. It is contended that the law propounded by Mayukha is different from the law of Mitakshara and cannot be said to be included in it; Mayukha being the overriding authority in Gujarat and North Konkan, it has superseded in those parts of the Bombay Province the Mitakshara law which applies to all other parts of the province, and the Legislature has confined the operation of the Act to those places which are subject only to the law of Mitakshara. This argument is based upon the assumption that Mitakshara and Mayukha are two schools of Hindu law exclusive of each other and based upon different foundations. It is, therefore, necessary to examine the correctness of this assumption. As is well known, Vijnyaneshwar's Mitakshara is a standard commentary on the Yajnyavalkya Smriti. Vijnyaneshwar flourished towards the end of the eleventh and the beginning of the twelfth century. His commentaries mark a departure from the prevalent notion of the right of succession to property being based on the capacity to confer spiritual benefit on the deceased owner. He placed the right of succession on a new system based on sapinda in the sense of blood relationship and thus brought many near relations as heirs who would be excluded under the theory of spiritual benefit. His views having found favour with a large majority of public opinion, the authority of his work was soon established in the Deccan where it was compiled, and it gradually extended to the whole of India except in Bengal. Even in the latter province the authority of Mitakshara was at one time supreme till it was ousted by the renowned work of Jimutavahana, the Dayabhaga, in the thirteenth century. The Dayabhaga was in some respects conservative and in other respects advanced. In mat-

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ters of succession it stuck to the old theory of right to property being based on the capacity to offer *pindas*, meaning thereby the funeral cakes, while Vijnyaneshwar had revolutionized the old theory by interpreting the word "*pinda*" as the body, and therefore, "*sapinda*" as blood relationship. In other respects the Dayabhaga went beyond the Mitakshara doctrine of rights in the joint family being acquired by birth and by survivorship which was substituted by the new doctrine of a family consisting of co-tenants. It is sufficient to note for our purpose that in the midst of a large number of other commentaries of various Smritis and numerous digests, these two standard works, the Mitakshara and the Dayabhaga, hold the field for the last seven centuries and have been recognized as the two main schools of Hindu law. Subsequent writers have propounded various divergent interpretations of the original texts, but they all based their views on the subject of succession either on the theory of propinquity as propounded by the Mitakshara or the theory of religious efficacy as propounded by the Dayabhaga. One such prominent author was Nilkantha at the beginning of the seventeenth century who compiled among other works the Vyavahara Mayukha which is a digest of legal principles and procedure. He was a Deccani Brahmin whose ancestors had migrated to Northern India. It soon attracted the attention of Deccani Shastris as it embodied in a lucid manner the popular views of that age. The prevalent law in the Maharashtra at that time was based on the Mitakshara, but thereafter the Mayukha also came to be consulted by the Shastris on points on which they could not get sufficient light from the Mitakshara. As observed by Colebrooke in his preface to the translation of the Mitakshara, the Mayukha had concurrently with the Mitakshara considerable weight among the Marathas and among those works which "agree in generally deferring to the authority of the Mitakshara, in frequently appealing to the text, and in rarely and at the same time modestly dissenting from its doctrines on particular questions." So also Borradaile observes in his preface to the translation of the Vyavahara Mayukha that in all the schools of Hindu law except in Bengal "the Mitakshara, one of the earliest of these compilations, is received with respect as the chief general authority, though in each some more modern local work is allowed to compete with it on a few points. The most remarkable of those are the Mayukha for the Maharashtra and the west, the Smriti Chandrika for the south of India, the Ratnakar and Chintamani for Mithila. Bengal proper alone denies authority to the Mitakshara having established for itself a totally different school, of which Jimutavahana is the head." The later development of how the Mayukha came to be regarded as the principal authority in Gujarat and the city of Bombay is well described by West J. in the full bench decision in *Bhagirthibai v. Kahnajirav*.<sup>1</sup> He says (p. 294) :—

"The special and almost paramount authority which the Vyavahara Mayukha has gained in Gujarat and in the city of Bombay is not recognized in other parts of this Presidency. Yet it must not be supposed that the Vyavahara Mayukha presents a development of the Hindu law connected in any peculiar way with the religious or social system of the Gujaratis. Before the Maratha conquest of Gujarat in the middle of the last century it had long been under Mahomedan rule. The

customary law of the Hindus had almost dwindled away into mere rude caste usages, and the Brahminical influence had almost perished. The Vyavahara Mayukha was one of the latest products of the Maratha school, and had gained the eminent position which it has retained in the Deccan. The Maratha Brahmins, following the Maratha Chiefs into the newly conquered country, naturally took their law books with them. And of these, the Vyavahara Mayukha was the most comprehensive and characteristic. In Gujarat it had virtually no rival; and, as a Hindu polity was revived there, it took a place analogous to that of the Roman law in the mediæval Europe, with the Maratha Brahmins as its expositors. Hence arose the somewhat strange consequence that the Maratha doctrines of the Mayukha gained a more undivided sway over Gujarat than amongst the Marathas themselves, who had men of wide learning and copious sources of information at hand."

And he concludes (p. 295) :—

"It follows, from what has been said, that, without in any way assailing the position of the Mitakshara as the principal authority in the Maratha country, we may properly construe it in doubtful cases by the light of the Vyavahara Mayukha."

A number of decided cases have emphasized the intimate relation between the doctrines of the Mitakshara and those of the Mayukha. The decisions in *Krishnaji Vyanktesh v. Pandurang*,<sup>1</sup> *Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle*,<sup>2</sup> *Bai Kesserbai v. Hunsraj Motarji*<sup>3</sup> and *Bhagwan v. Warubai*<sup>4</sup> are relevant on this point. The gist of these decisions is summarized in Mayne's Hindu Law, at p. 47, 10th edn., as follows :—

"In Gujarat, in the island of Bombay and also in the North Konkan, its authority [of Mitakshara] is controlled by the Mayukha on the very few points on which they differ, the general principle however being to construe the Mitakshara and the Mayukha so as to harmonise them as far as it is reasonably possible."

It would be clear from this discussion that there are only two fundamental schools of Hindu law, the Mitakshara and the Dayabhaga, and Mayukha, in spite of its different interpretation of the ancient texts on some points, belongs to the Mitakshara school of Hindu law. The phrase "the law of Mitakshara" used in s. 1 of the Act of 1929 includes all sub-divisions of the Mitakshara law and excludes the law of Dayabhaga. In fact, there is some indication in the Act itself to show that it recognizes the existence of different schools or sub-divisions of the general Mitakshara law and is applicable to them all. Section 3, cl. (b), provides that the three female heirs elevated higher up in the order of succession shall have no estate larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed. The word "school" here evidently refers to the Bombay school on the one hand and the Benares and the Madras schools on the other. In the former, these heirs take the property absolutely while in the latter they take a limited estate. The Bombay school would include the Mayukha under which also they take an absolute estate. The Act could not have been applied to Bengal without shaking the foundation of the Dayabhaga law based upon the capacity to confer spiritual benefit by the offering of funeral cake which was not possessed by females except the five specified ones mentioned in the Dayabhaga.

1 (1875) 12 B. H. C. R. 65.

2 (1892) I. L. R. 17 Bom. 114.

3 (1906) L. R. 33 I. A. 176,

s. c. 8 Bom. L. R. 446.

4 (1908) I. L. R. 32 Bom. 300,

s. c. 10 Bom. L. R. 389.

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The object of the Act appears to bring the heirs mentioned therein higher up in the order of succession on the ground of their being nearer in blood to the deceased than many of the heirs who formerly preceded them. The Act was, therefore, meant to apply to all the branches of the main school of the Mitakshara law which based succession on the principle of propinquity and the Mayukha is undoubtedly based on that principle. In the latest edition of Mayne's Hindu Law the opinion is expressed to the effect that the Act would apply to the Mitakshara law in Bombay or even where the Mayukha is supreme. That seems to me to be the correct interpretation of the intention of the Legislature.

The conclusion, therefore, is that Act II of 1929 applies to Hindus, including Jains, and to all persons governed by the Mitakshara law, including those governed by the Mitakshara law as modified by the Mayukha.

It is, however, contended on behalf of the appellant that even if the Act applies, the position of the father's sister is saved by the provisions of s. 3, cl. (a), of the Act, according to which the Act is not to affect any special family or local custom having the force of law. It is urged that under the Mayukha a paternal aunt is a gotraja sapinda and comes in before the bandhus, that that position is assigned to her by reason of a local custom recognized by a judicial decision in absence of a special text; a sister's son, being a bandhu, is, therefore, postponed to the paternal aunt. Reliance is placed on the decision in *Shidramappa Nilappa v. Neelawabai*,<sup>1</sup> where in holding that a sister in the Bombay Province retains her place immediately after the father's mother and before the father's father, even after the enactment of Act II of 1929 Rangnekar J. expressed an *obiter dictum* that if necessary he would be prepared to hold that a sister in Bombay was assigned a fixed place on the ground of a local custom having the force of law, and the cases such as *Mulji Purshotum v. Cursondas Natha*<sup>2</sup> and *Rudrapa v. Irava*<sup>3</sup> show that it was on the ground of usage that the right of a sister was based. It is argued on the analogy of this reasoning that a paternal aunt's place is also similarly fixed and her case is also saved under the Act, but the decision in *Ganesh v. Wagh*,<sup>4</sup> which is relied upon in support of this argument, does not put the right of the paternal aunt on the ground of usage. In that case it was held that the grandson of a paternal great-grandfather was entitled to succeed in preference to a paternal aunt, and it is observed in the course of the judgment that it was previously held by our Court in an unreported decision in Second Appeal No. 158 of 1870 that a paternal aunt even in Gujarat was not entitled to come in at the head of the gotraja sapindas but was postponed to distant male gotraja sapindas. There is nothing to show that the decision was based upon proof of any usage, and there is also no evidence of usage in the present case which might attract the application of the opinion expressed in *Shidramappa Nilappa v. Neelawabai*.<sup>5</sup> The present case is, therefore, not saved by the proviso in s. 3 (a) of the Act.

1 (1932) I. L. R. 57 Bom. 377,

s. c. 35 Bom. L. R. 397

2 (1900) I. L. R. 24 Bom. 563,

s. c. 2 Bom. L. R. 721.

3 (1903) I. L. R. 28 Bom. 82,

s. c. 5 Bom. L. R. 676.

4 (1903) I. L. R. 27 Bom. 610,

s. c. 5 Bom. L. R. 581.

5 (1932) I. L. R. 57 Bom. 377,

s. c. 35 Bom. L. R. 397.

In my opinion, therefore, the decision of the lower Court is correct, and the appeal is dismissed with costs.

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BROOMFIELD J. The question for decision is whether among Jains from Gujarat governed by the Mayukha a sister's son or a father's sister is a preferential heir to a deceased male. Prior to the Hindu Law of Inheritance (Amendment) Act of 1929, the sister's son was a bandhu, whereas the father's sister came in the order of succession after the most remote gotraja sapindas but before the bandhus. Section 2 of this Act places the sister's son before the father's brother, i.e. quite high up among the gotraja sapindas. Therefore, if this section applies to Jains, the plaintiff, who is a sister's son, will succeed. If it does not apply, defendant No. 1, who is a father's sister, will succeed.

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Mr. Desai who appears for the appellant has argued, firstly, that the Act does not apply because its operation is limited to Hindus and the Jains are not strictly speaking Hindus. But there was no need to mention Jains separately because it is well settled that the Hindu law of inheritance applies to Jains in the absence of proof of a special custom or usage varying that law : *Sheo Singh Rai v. Mussumut Dakho*<sup>1</sup>; *Chotay Lall v. Chuno Lall*<sup>2</sup> and *Ambabai v. Govind*.<sup>3</sup>

A more weighty argument is that the Act does not apply to Jains because it applies only to "persons who, but for the passing of the Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted." But, as my learned brother says, the most reasonable view seems to be that the Mitakshara is mentioned as one of the two main schools of Hindu law, in contradistinction to the Dayabhaga but not in contradistinction to the Mayukha, which is only a sub-division of the Mitakshara school. The reference in s. 3(b) to the school of Mitakshara law by which the male was governed shows that the "Mitakshara law" in the Act was intended to include its sub-divisions.

It is true that in Gujarat the Mayukha overrides the Mitakshara in the very few points in which there is a difference between them. But it is difficult to say that there was any difference between them before the Act as to the relative positions of the sister's son and the father's sister. The former was a mere bandhu according to both. According to the Mitakshara the position of the father's sister was, and still is, rather obscure. But in *Ganesh v. Wagh*<sup>4</sup> this High Court was prepared to concede that she might come in as a gotraja sapinda after all other gotraja sapindas were exhausted, that is to say, in accordance with the rule settled by the Courts in cases governed by the Mayukha. That means that prior to the Act the sister's son would have been postponed to the father's sister both under the Mitakshara and the Mayukha. But if the sister's son had been a gotraja sapinda, even the most remote in degree, the father's sister would have been postponed to him whether the Mayukha or the Mitakshara applied to the case. Now that the sister's son has been brought in high up among the gotraja sapindas, I can see no reason why he should not be a preferential heir even under the Mayukha law.

1 (1878) L. R. 5 I. A. 87.

2 (1878) L. R. 6 I. A. 15.

3 (1898) I. L. R. 23 Bom. 257.

4 (1903) I. L. R. 27 Bom. 610.

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It is not as if the Mayukha had a specific text about the father's sister. She is nowhere mentioned. In *Ganesh v. Wagh*, the case to which I have referred just now, the argument was put forward that the reasons given in the Mayukha for treating a sister as a gotraja sapinda might apply equally to a father's sister. But the decision of the Court was based on the principle of *stare decisis*, and the father's sister was given a place after distant male gotraja sapindas because it had been so decided in a case of 1870. It is clear from Sir Lawrence Jenkin's judgment in that case that no custom justifying the inclusion of the father's sister among gotraja sapindas was found to exist comparable to the custom by which, according to some decisions, the sister had come to be treated as gotraja sapinda in Bombay. So far as I am aware, no such custom in the case of the father's sister has ever been alleged, and there is no evidence of it in the present case. That being so, it is impossible to accept Mr. Desai's argument that the position of the father's sister as a gotraja sapinda, and therefore as a preferential heir to all persons who are or ever had been bandhus is saved by s. 3(a) of the Act, which provides that it is not to affect any special family or local custom having the force of law. Whether or not Mayne (10 edn., p. 682) is right in saying that the custom referred to in the Act must be one in derogation of the law of the school governing the parties, it is, at any rate, clear that judicial decisions based either on inferences drawn from the texts or on the principle of *stare decisis* cannot constitute a custom within the meaning of the Act.

I agree with my learned brother that the decision of the lower Court should be confirmed.

*Appeal dismissed.*

*Before Mr. Justice Broomfield and Mr. Justice Divatia.*

## THE COLLECTOR OF BROACH AND PANCH MAHALS

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v.

August 15.

OCHHAVLAL BHIKALAL.\*

*Indian Penal Code (Act XLV of 1860), Sec. 70—Criminal Procedure Code (Act V of 1898), Sec. 386—Fine, recovery of, by sale of immoveable property of offender—Warrant issued for recovery of fine—Darkhast filed after six years from date of sentence—Limitation.*

Section 70 of the Indian Penal Code, 1860, is not controlled by s. 386, sub-ss. (1) (b) and (3), of the Criminal Procedure Code, 1898. Section 386 of the Criminal Procedure Code deals only with procedure for levying fine imposed under the Indian Penal Code.

The warrant issued by a Court passing a sentence, under s. 386, Criminal Procedure Code, to recover fine from an offender is to be deemed as a decree for certain purposes only, and is executed according to the mode laid down in the

\* First Appeal No. 163 of 1939, from the decision of M. I. Patel, Additional First Class Subordinate

Judge of Broach and Panch-Mahals at Nadiad, in Panch-Mahals Special Darkhast No. 1 of 1938.



Civil Procedure Code, 1908, but s. 48, Civil Procedure Code, does not apply to such a warrant.

The period during which such a warrant could be executed is governed by s. 70 of the Indian Penal Code and not by the Indian Limitation Act. A darkhast filed after six years to recover fine by sale of immoveable property of the offender is, therefore, time-barred under s. 70 of the Indian Penal Code.

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#### EXECUTION proceedings.

On January 12, 1929, the opponent, Ochhavlal Bhikhalal, was convicted of the offence of cheating by the Sessions Judge of Broach, and sentenced to three years' rigorous imprisonment and a fine of Rs. 15,000, and in default of payment of the fine to further rigorous imprisonment for nine months.

As the opponent failed to pay the amount of fine, the Sessions Judge sent a letter to the Collector of Broach, on May 10, 1929, authorising him under s. 386 (1) (b) of the Criminal Procedure Code, 1898, to realise the amount of fine by attachment and sale of the immoveable property of the opponent.

The Collector filed a darkhast in 1929 and another in 1930 to realise the amount of the fine and a sum of Rs. 4,227 was realised in execution.

In 1933 he filed a third darkhast and the undivided interest of the opponent in certain immoveable property was ordered to be sold.

On June 19, 1935, an auction for sale took place, but as there were no bidders the property could not be sold, and the darkhast was disposed of.

On February 8, 1938, the Collector filed a fourth darkhast to recover the balance of the fine out of the interest of the opponent in certain immoveable property.

The opponent contended that as he had undergone further imprisonment in default of payment of the fine his property was not liable to the payment of the arrears of the fine; and that under s. 70 of the Indian Penal Code the amount of fine could not be recovered after six years from the date of the sentence.

The First Class Subordinate Judge held that the opponent's liability to pay the fine imposed on him remained although he had undergone imprisonment in default of payment of the fine; that under s. 386 (3) of the Criminal Procedure Code, the warrant issued by the Collector did not become a decree of a civil Court, and s. 48 of the Civil Procedure Code did not apply; that the provisions of s. 70 of the Indian Penal Code were not affected by s. 386 (3) of the Criminal Procedure Code, and the darkhast was therefore time-barred.

The Collector of Broach appealed to the High Court.

*R. A. Jahagirdar*, Government Pleader, for the appellant.

*M. R. Vidyarthi*, *P. M. Kapadia* and *B. Moropanth*, for the respondent.

**DIVATIA J.** This appeal arises in execution of a darkhast to recover a certain amount by the appellant who is the Collector of Broach and Panch Mahals against the respondent. The latter had been convicted on January 12, 1929, of the offence of cheating and sentenced to three years' rigorous imprisonment with a fine of Rs. 15,000, and rigorous imprisonment for nine months in default of payment of fine. On May 10 of that year a letter was sent by the Sessions Judge to the Collector under s. 386(1) (b) of the Criminal Procedure

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Code authorising him to realise the amount of the fine by execution according to civil process against the immovable property of the defaulter. This letter was sent because the opponent had not paid the amount of fine although he subsequently suffered the period of imprisonment in default of payment of the fine.

Two darkhasts were filed by the Collector in 1929 and 1930 to realise the amount of the fine and a sum of Rs. 4,227 was realised in execution. The third darkhast was filed in 1933 and the undivided interest of the opponent in certain immovable property was ordered to be sold. The sale took place on June 19, 1935, but as there were no bidders the property was not sold and the darkhast was therefore disposed of. Thereafter on February 8, 1938, the present darkhast was filed to recover the balance of the fine out of the interest of the opponent in certain immovable property.

The opponent contended in the course of that darkhast that as he had suffered rigorous imprisonment in default of payment of the fine, his property was no longer liable to the payment of the fine. His second contention was that under s. 70 of the Indian Penal Code the fine imposed upon him should have been recovered only within six years from the date of the sentence, and the present darkhast, which was filed in February, 1938, after the period of six years was over, was therefore time-barred.

The learned First Class Subordinate Judge rightly held on the first point that the claim of the darkhastdar was legal even if the opponent had undergone imprisonment in default of payment of the fine. That is clear from the provisions of the Indian Penal Code.

On the second point the learned Judge was of the opinion that under the provisions of s. 386 (3) of the Criminal Procedure Code the warrant issued by the Collector did not become a decree of a civil Court for all purposes and that the provisions of s. 70 of the Indian Penal Code were not affected by s. 386 (3) of the Criminal Procedure Code, which was added for the first time in 1923. He therefore held that the darkhast was time-barred and accordingly dismissed it.

This appeal is presented against that order, and it is contended on behalf of the Collector that s. 70 of the Indian Penal Code is controlled by the provisions of s. 386, sub-ss. (1) (b) and (3), of the Criminal Procedure Code. Now it is clear that under s. 70 the fine, or any part thereof which may remain unpaid, may be levied at any time within six years after the passing of the sentence. This means that the fine could not be levied after the period of six years is over except in the circumstances mentioned in that section i.e. where the person is imprisoned for a longer period than six years. Under s. 386, Criminal Procedure Code, as it stood before the amendment of 1923, whenever an offender was sentenced to pay a fine, the Court passing the sentence may issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender. By the amendment the power to issue a warrant has been given to the criminal Court so as to proceed against the moveable as well as the immovable property of the defaulter. It is provided therein that the Court might issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender and it may also issue a warrant to the Collector authorising him to

realise the amount by execution according to civil process against the moveable or immoveable property, or both, of the defaulter. Then sub-s. (3) provides that where the Court issues a warrant to the Collector under sub-s. (1), cl. (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, and the nearest civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree. It is lastly provided that all the provisions of that Code as to execution of decrees shall apply accordingly.

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Relying on this new provision it is contended by the learned Government Pleader that all provisions relating to execution in the Civil Procedure could be applied to this warrant, which is to be regarded as a decree of a civil Court, and that s. 48 of the Civil Procedure Code would therefore apply to such a warrant. Under that section where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from certain dates mentioned therein. Now in the first place it is important to realise that s. 70 of the Indian Penal Code is substantive law as to the payment of fine while s. 386 of the Criminal Procedure Code relates to the procedure of its recovery. It is true that in certain matters such as the prevention of offences and maintenance of wives and children the Criminal Procedure Code provides for certain substantive rules, but it is quite clear that s. 386 deals only with procedure of levying the fine imposed under the substantive law of crimes. It is a general rule relating to the construction of statutes that in absence of an express provision, an adjective law cannot control the provisions of substantive law. It must be presumed that the legislature had the provisions of s. 70 of the Indian Penal Code in mind at the time when this new provision was introduced for the first time in 1923, and if no change was made in that section, it must be for the reason that the warrant issued under s. 386 (1)(b) of the Criminal Procedure Code was to be deemed to be a decree for certain purposes only and not for all purposes. For the purpose of limitation, therefore, the substantive law contained in s. 70 was not to be affected.

The warrant which was to be deemed to be a decree was to be executed according to the mode laid down in the Civil Procedure. That is the only effect of sub-s. (3). But the learned Government Pleader says that under that subsection all the provisions of that Code as to execution shall apply, and that would include the application of s. 48 of the Civil Procedure Code. But that section only says that no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from certain dates. It does not prescribe any period of limitation for taking out execution. That is provided for in the Indian Limitation Act, and, if it was the intention of the legislature that the provisions of the Indian Limitation Act were to apply, it would have expressly stated that the warrant, which was deemed to be a decree, was to be governed for the purpose of execution by the Indian Limitation Act. But the fact that it does not say so, and the further fact that there has been no amendment or alteration in s. 70 of the Indian Penal Code, mean that so far as limitation i.e. the period during which

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the fine was to be realised was concerned, it did not contemplate any change. All that it intended to do was that over and above the moveable property of the offender the immoveable property could also be proceeded with by means of execution of the warrant which was to be treated for that purpose as if it were a decree, but the levy of the fine as against moveable as well as immoveable property was subject to the control of the provisions of s. 70, viz., that it was to be levied within the period of six years. We think, therefore, the lower Court was right in holding that the darkhast which was presented after the period of six years from the date of the sentence is barred under s. 70 of the Indian Penal Code.

The order of the lower Court is therefore confirmed and the appeal is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Broomfield and Mr. Justice Divatia.*

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 August 19,

ABDUL AZIZ VALAD HAJI SUBHAN

v.

MAHOMED IBRAHIM GHATKARI

HUSSAINBI HAJI SUBHAN

v.

SAYAD KHAIRUDDIN KUTUBUDDIN KAJI.\*

*Mahomedan law—Mujawarship—Mujawarship entailing purely ministerial or menial functions—Female, whether competent to hold office of mujawar.*

Under Mahomedan law a female is competent to hold the office of a mujawar, where such an office entails the performance of duties which consist in sweeping and cleaning the place, reading the Fatiha, offering prayers and incense and looking after the general management of the shrine.

*Mumavaru Begam Sahibu v. Mir Mahapalli Sahib*,<sup>1</sup> followed.

*Mirazmalli v. Hidayatbi*<sup>2</sup> and *Mujawar Ibrambibi v. Mujawar Hussain Sheriff*,<sup>3</sup> distinguished.

*Shakar Banoo v. Aga Mahomed Jaffer Bindaneem*,<sup>4</sup> *Shekh Karimodin v. Nawab Mir Sayad Alamkhan*,<sup>5</sup> *Kaniz Zohra v. Saiyid Mustaba Husain*<sup>6</sup> and *Biyamma v. Ahmadsaheb*,<sup>7</sup> referred to.

SUIT for declaration and injunction.

The facts are fully set out at 41 Bom. L. R. 875. Mr. Justice Lokur's judgment, against which these Letters Patent appeals were preferred, is at p. 876.

\* Letters Patent Appeals Nos. 20 and 21 of 1939, from the decision of Lokur J., in Second Appeal No. 810 of 1935 and Second Appeal No. 614 of 1935, preferred against the decision of P. M. Lad, Assistant Judge at Satara, in Appeal No. 26 of 1933 and Appeal No. 25 of 1933.

1 (1918) I. L. R. 41 Mad. 1033.

2 (1901) 3 Bom. L. R. 772.

3 (1880) I. L. R. 3 Mad. 46.

4 (1906) L. R. 34 I. A. 46,  
 s. c. 9 Bom. L. R. 85.

5 (1885) I. L. R. 10 Bom. 119.

6 (1923) J. L. R. 2 Pat. 819.

7 (1934) 37 Bom. L. R. 257.

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|----------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| L. P. Appeal No. 20 of 1939.                 | { A. G. Desai, for the appellants.<br>W. B. Pradhan and M. W. Pradhan,<br>for respondents Nos. 1 and 2.                                                                                      | A. C. J.<br>1940<br>—<br>ABDUL AZIZ<br>v.<br>MAHOMED<br>IBRAHIM<br>—<br>HUSSAINBI<br>v.<br>KHAIRUDDIN<br>KUTUBUDDIN<br>— |
| L. P. Appeal No. 21 of 1939.                 | { A. G. Desai, for the appellants.<br>A. S. Nawalkar, for appellant No. 8.<br>M. G. Chitale, for respondent No. 1.<br>K. B. Sukhtankar, for P. B. Gajendra-<br>gadkar, for respondent No. 2. |                                                                                                                          |
| <i>Letters Patent Appeal No. 20 of 1939.</i> |                                                                                                                                                                                              |                                                                                                                          |

DIVATIA J. This appeal has been preferred against the judgment of Mr. Justice Lokur confirming the decree of the lower Court. The appellants are some of the original defendants in a suit by the plaintiffs for partition of certain lands and for a declaration that they were entitled to the management of the devasthan called Peer Mahi Taj and its property as mujawars thereof. The property consists of two fields, survey Nos. 773 and 590. With regard to the first field the question was whether it was the private property of the mujawars or it belonged to the Peer. Both the lower Courts came to the conclusion on evidence that it belonged to the Peer and was not the private property of the mujawars. Mr. Justice Lokur agreed with that finding. There is no question of law involved in that finding.

With regard to survey No. 590, it is contended on behalf of the appellants that the plaintiffs were not receiving the income thereof for a very long time, and the defendants, therefore, who performed the service as mujawars, and who, it is admitted, devoted the income of that field for the shrine, were entitled to hold it to the exclusion of the plaintiffs. There was no plea of adverse possession in the lower Courts, and therefore, there was no issue upon it. The only issue framed was whether the plaintiffs were entitled to the injunction in respect of this survey number. The finding of the lower Court was that the plaintiffs were entitled in their turn to perform the duties as mujawars and as such they were entitled to spend the income of this field for the purposes of the institution. The defendants admit that the income could not be appropriated by the mujawars as their private property. That being so, no question of adverse possession arises. The plaintiffs are held entitled to do service as mujawars by rotation, and they are entitled to realise the income and spend it for the purposes of the institution. It is clear, therefore, that Mr. Justice Lokur was right in holding that the plaintiffs are entitled to the relief sought by them.

The appeal is, therefore, dismissed with costs.

*Letters Patent Appeal No. 21 of 1939.*

The suit from which this appeal arises was instituted by the plaintiffs-respondents for a declaration that as heirs of one Dada Saheb Shaikh Mire they were entitled to the property in dispute which was assigned for service as mujawars of the shrine Peer Mahi Taj at Wai in the Satara District. Dada Saheb had a daughter named Bedar Begum who was married to one Kazi Kutubuddin. After Dada Saheb's death, his widow gifted the suit field to her son-in-law Kazi Kutubuddin. Later on Bedar Begum as well as Kutubuddin

A. C. J. died. Plaintiff No. 1 was the son of Kutubuddin by his first wife, plaintiff  
 1940 No. 2 is his daughter by Bedar Begum, and plaintiff No. 3 is the husband  
 of plaintiff No. 2. Their claim was resisted by the defendants mainly on the  
 ground that the plaintiffs, who claim through females, were not entitled to  
 muja<sup>h</sup>warki rights as no female could officiate as a mujawar. The material  
 issue was whether the defendants proved the alleged custom of exclusion of  
 females.

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The trial Court as well as the appellate Court found that Dada Saheb was  
 entitled to one-third share in the field and that the alleged custom had not  
 been proved. They, therefore, gave a decree in favour of plaintiffs Nos. 1 and  
 2, and plaintiff No. 3 was not held to be an heir.

In second appeal, this decision was confirmed by Mr. Justice Lokur who  
 held, following the decision in *Shahar Banoo v. Aga Mahomed Jaffer Bindaneem*<sup>1</sup>  
 and *Mumtazaru Begam Sahibu v. Mir Mahapalli Sahib*,<sup>2</sup> that the duties  
 which a mujawar had to perform in this particular shrine could be and were  
 at one time performed by a female. He, therefore, dismissed the appeal. The  
 defendants have now preferred this further appeal under the Letters Patent.

It has been found on evidence that the duties of a mujawar in this case  
 consist of sweeping and cleaning the place, reading the Fatiha, offering prayers  
 and incense, and looking after the general management of the shrine. The  
 appellants contend that reading the Fatiha and offering prayers and incense  
 are duties of a religious nature which, under the Mahomedan law, could not  
 be performed by females. Mr. Desai, who appears for the appellants, has not  
 been able to cite any provision of the Mahomedan law that a female has no  
 legal right to perform any duty whatever of a religious kind. On the other  
 hand, Ameer Ali in his Mahomedan Law bases the incapacity of females to  
 perform certain religious duties attached to an institution on the ground of  
 custom and not any rule of Mahomedan theology or canonical law. Mac-  
 naghten in his work on Mahomedan law also bases it on the usage of the coun-  
 try. He considers the case of sajjadanashin who is in charge of the spiritual  
 affairs of an endowment. In his opinion, although the office of a trustee could  
 be held by a woman and its duties be discharged by proxy, the office of a  
*superior* such as that of sajjadanashin required peculiar personal qualifications.  
 He says further on :

"Females are not competent to assume the office of *superior* of an endowment ;  
 and such an act is at variance with the usages of the country, because it is the duty  
 of the *superior* to instruct and guide his disciples, to teach his scholars, and to keep  
 their company continually, in private and in public, and this cannot be done with  
 propriety by a woman, whose duty it is to live retired and secluded."

These remarks are made not in reference to the position of a mujawar but  
 to those religious or priestly offices which require certain special qualifications.  
 The usage would, therefore, depend on the particular kind of duties and not  
 on any abstract notion of a religious duty. A mujawar is described in Wilson's  
 Glossary as "a servant or sweeper of a Mahomedan temple or shrine." His  
 position is different from that of a mutawalli or a sajjadanashin. The former  
 is a manager or a trustee of a wakf and the latter holds the position of a spiri-

1 (1906) L. R. 34 I. A. 46,  
 s. c. 9 Bom. L. R. 85.

2 (1918) I. L. R. 41 Mad. 1033.

tual preceptor. So also an imam who holds the prayers at a congregation, and a mulla who officiates at religious services, like marriages, funerals, etc., are religious officials unlike a mujawar whose main duty is to take care of a shrine.

Mr. Desai relies upon two decisions in support of his case that a female cannot act as a mujawar. The first decision is in *Murzamalli v. Hidayatbi*<sup>1</sup> in which the plaintiffs claimed the right to perform certain services in a mosque to the exclusion of females and deputies of females by virtue of a sanad granted to their ancestors. The plaintiffs there were not mujawars, but were grantees of land for the purpose of specified ceremonies, viz., imamat (preaching by being a priest), moujani (calling to prayer), and khitabat (reading the Koran at the mosque). The sanad expressly stated that they were to perform those duties from generation to generation in the male line and according to custom. It was held that females were excluded under the terms of the sanad as well as the usage of the country from performing duties of a purely spiritual nature. Moreover, the duties of preaching and calling to prayer as well as reading the Koran are distinguishable from merely reading Fatihas, i.e. certain *suras* from the Koran, and offering prayers and incense. The former kind of duties require special personal qualifications which are not necessary for the latter type. That decision, therefore, does not support the appellants' case.

The next case relied on is *Mujawar Ibrambibi v. Mujawar Hussain Sheriff*.<sup>2</sup> It was held there that the plaintiff, who was a woman, was not entitled to perform the duties of a mujawar of a durga which were not of a secular nature. The duties in that case were reading the Fatiha, offering prayers and incense, etc. It is urged that those are the duties in the present case also and that that decision is, therefore, a direct authority in favour of the appellants. But this is not correct. The decision was also based on the evidence that the office was never held by a female in that durga, and that there was a previous decision in respect of the same endowment in *Hussain Beebee v. Hussain Sherif*,<sup>3</sup> where a claim advanced by the widow of a deceased mujawar was negatived. In the present case, however, it has been found on evidence that defendant No. 1, who is herself a female, used to manage the shrine and defendant No. 5 has admitted that if any of them died without a male issue, his widow, daughter and sisters were entitled to get a share in the land of the Peer. It is also found that the mujawars of the Peer in the present case are not required to teach any doctrine or to come in contact with strangers whom women may not approach having regard to custom or usage. The Madras High Court itself has, in a later decision in *Munnavaru Begam Sahibu v. Mir Mahapalli Sahib*,<sup>4</sup> discussed this case and held that it was a decision on its own facts and that the learned Judges did not intend to lay down any general proposition of Mahomedan law that the Fatiha could not be said or that prayers and incense could not be offered by a woman. The case of *Munnavaru Begam Sahibu v. Mir Mahapalli Sahib* was that of a mujawar, and Abdur Rahim J., a distinguished Mahomedan Judge, was of the opinion that a religious office can be held by a woman under the Mahomedan law unless the duties were of such a religious nature which she cannot perform in person or by a deputy, that the burden of establishing that a woman was precluded from holding a

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3 (1868) 4 M. H. C. R. 23.

2 (1880) I. L. R. 3 Mad. 95.

4 (1918) I. L. R. 41 Mad. 1033.

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particular office was on those who pleaded the exclusion, and that in the absence of anything in the rules by the founder, the usages of the institution were to govern the case. He followed the decision in *Shahar Banoo v. Aga Mahomed Jaffer Bmdaneem*,<sup>1</sup> where it was held that under the Mahomedan law there was no legal prohibition against a woman holding a mutawalliship when the trust by its nature involved no spiritual duties which a woman could not properly discharge in person or by a deputy. There is a clear distinction between merely reading the Fatiha, i.e. certain *suras* in the Koran, or offering prayers and incense on the one hand and preaching before a congregation or officiating at religious services on the other. The decisions in *Shekh Karimodin v. Nawab Mir Sayad Alamkhan*<sup>2</sup> and *Kaniz Zohra v. Saiyid Muztaba Hussain*,<sup>3</sup> on the position of a sajjadanashin, and *Biyyamma v. Ahmadsaheb*,<sup>4</sup> relating to mullagiri rights, do not apply to the case of a mujawar whose case is governed by the observations of Abdur Rahim J. in *Munnawaru Begam Sahibu v. Mir Mahapalli Sahib*.<sup>5</sup>

It must be stated, moreover, that it has been held in *Shekh Karimodin v. Nawab Mir Sayad Alamkhan* that even in the case of a sajjadanashin although females may be excluded, it would not follow that males, who establish their descent from the propositus through females should also be excluded. Even assuming, therefore, that females would be excluded from mujawarship, the same remarks would apply to the position of a male person who claims descent from a female. In any case, therefore, plaintiff No. 1 would come under this class. But, as I have observed above, the exclusion of females is not proved in the case of mujawarship.

In the present case, therefore, plaintiffs Nos. 1 and 2 are entitled to the reliefs granted to them on the ground that the Mahomedan law is not against the plaintiffs and the usage is admittedly in their favour.

The decision of Mr. Justice Lokur is, therefore, correct, and the appeal is dismissed with costs.

BROOMFIELD J. I have nothing to add to what my learned brother has said with regard to Letters Patent Appeal No. 20 of 1939.

In the other appeal the first question is whether females are competent to perform the duties of a mujawar, which consist, according to the finding of the Assistant Judge, in reading the Fatiha, offering prayers and incense and looking after the general management of the shrine. Mr. Justice Lokur has held that they are competent to perform these duties and to succeed to the office in due course of inheritance. Several cases have been cited in the argument. In some of these references have been made to Macnaghten's Precedents and Baillie's Digest of Mahomedan Law. We have examined these passages and we find that wherever it is stated in these authorities that females are incompetent to perform the duties of a religious office, that is said in connection with the office of a sajjadanashin, i.e. the spiritual head of an institution. It seems that there may be a considerable variety in the functions which may be performed by mujawars. Having regard to the literal meaning of the

1 (1906) L. R. 34 I. A. 46,  
 s. c. 9 Bom. L. R. 85.

2 (1885) I. L. R. 10 Bom. 119.

3 (1923) I. L. R. 2 Pat. 819.

4 (1934) 37 Bom. L. R. 257.

5 (1918) I. L. R. 41 Mad. 1033.



word these functions may be purely ministerial or menial. But some religious or *quasi* religious functions may be combined with the ministerial duties. Whether a female is or is not competent to hold the office must depend on the nature of these religious or *quasi* religious duties, that is to say, must depend on the evidence in each particular case.

There is no Bombay authority which is inconsistent with the view taken by Mr. Justice Lokur. *Mirzamalli v. Hidayatbi*<sup>1</sup> was not a case of mujawars. Some of the duties which had to be performed in accordance with the terms of the sanad were quite obviously religious duties of a kind which custom would not allow to be performed by females, for instance, imamat, which was translated in the report of that case as "preaching by being a priest", and kitabat, i.e. "reading the Koran at the mosque." Moreover, the Court in that case took the view that the terms of the sanad itself excluded females from inheritance quite apart from the nature of the duties to be performed. In *Biyamma v. Ahmadsaheb*<sup>2</sup> I held that lands assigned for the remuneration of a village mulla cannot be inherited by a female heir, because the duties of a mulla, which are of a religious nature, cannot, according to Mahomedan law, be performed by a female. As appears from my judgment, it was admitted there that the female plaintiff was not capable of performing the duties. The only question for decision was whether those duties could be performed by proxy.

Mr. Justice Lokur has relied, to some extent, on the decision of the Privy Council in *Shahar Banoo v. Aga Mahomed Jaffer Bindaneem*.<sup>3</sup> I am not sure that that case helps very much because there their Lordships were dealing with the office of mutawalli, which is essentially a secular office, and mutawallis and mujawars would not necessarily be on the same footing. At the same time, there is certainly nothing in the Privy Council case which lends any support to the appellants' argument. Mr. Desai has relied on two Madras cases, *Hussain Beebee v. Hussain Sherif*<sup>4</sup> and *Mujavar Ibrambibi v. Mujavar Hussain Sherif*.<sup>5</sup> The former case dealt with mujawars, but the mujawars there were priests, and different, therefore, from those with whom we are concerned. *Mujavar Ibrambibi v. Mujavar Hussain Sherif* followed that case. There the facts were no doubt similar to those of the present case in respect of the duties to be performed by the mujawar, but the Court partly relied on evidence as to usage, and the decision might not have been the same if the evidence as to usage had been the same as in our case. Moreover, this case is dissented from, or at any rate explained away, in *Munnawaru Begam Sahibu v. Mir Mahapalli Sahib*.<sup>6</sup> There we have the opinion of an eminent Mahomedan Judge which, I think, Mr. Justice Lokur was fully entitled to follow.

As my learned brother has pointed out, whatever the decision had been as to plaintiff No. 2, plaintiff No. 1, at any rate, would not be disqualified, as it was held in *Sheikh Karimodin v. Nawab Mir Sayad Alamkhan* that males claiming through females may succeed even to the office of sajjadanashin.

I agree that the appeal should be dismissed with costs.

*Appeal dismissed.*

1 (1901) 3 Bom. L. R. 772.

2 (1934) 37 Bom. L. R. 257.

3 (1906) L. R. 34 I. A. 46,  
S. C. 9 Bom. L. R. 85.

4 (1868) 4 M. H. C. R. 23.

5 (1880) I. L. R. 3 Mad. 95.

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## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

Present :

LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON, AND  
MR. M. R. JAYAKAR.

1940

THE BANK OF CHETTINAD, LIMITED

v.

June 2.

THE COMMISSIONER OF INCOME-TAX, MADRAS.

*Indian Income-tax Act (XI of 1922), Secs. 42 (1), and 43—'Agent,' meaning of—Bank in Indian State having business connection with bank in British India—Income on loans advanced to bank in British India by bank in Indian State, whether liable to income-tax—Principle of fiscal legislation.*

A large money lending business with many branches was being carried on by A and his three sons. They formed a bank at a town K in British India and another at P in an Indian State out of British India. Their business was transferred to these two banks as well as to a limited company registered in the Indian State. All the shares of the two banks were held by A and the members of his family and the banks were controlled by them. The P bank advanced several loans through one of its branches to a branch of the K bank. Six of these loans were used in the Rangoon business of the K bank. The income arising from those loans was assessed for the purpose of income-tax. The K bank objecting to the assessment, the Commissioner made a reference to the High Court of Madras under s. 66 (2) of the Indian Income-tax Act, 1922, in which he stated that in substance those loans represented money lent by the P bank to the K bank, but the transactions had been unnecessarily complicated by resorting to a series of entries which were as superfluous as they were confusing. He submitted that the income from those loans accrued and arose to the P bank directly or indirectly through or from a business connection in British India, within the meaning of s. 42 (1) of the Indian Income-tax Act, between the K bank and the P bank. The High Court decided that the submission of the Commissioner was right. On appeal to His Majesty in Council :—

*Held*, (1) that the suggestion that in revenue cases the substance of the matter might be regarded as distinguished from the strict legal position was wrong ;

(2) that the terms of s. 42 of the Indian Income-Tax Act were wide enough to cover profits or gains which could be said to accrue or arise to the P bank directly or indirectly through or from any business connection which might exist between the P bank and the K bank in British India ;

(3) that the income-tax authorities were acting within the power conferred upon them by s. 43 of the Income-tax Act in treating the K bank as the agent of the P bank for the purposes of the Act ; and

(4) that the income from the loans was chargeable to income-tax in the name of K bank :

*Income-tax Commissioner v. Remington Typewriter Co. (Bombay), Ltd.*,<sup>1</sup> referred to.

<sup>1</sup> (1930) L. R. 58 I. A. 42,  
S. C. I. L. R. 55 Bom. 243,

• 33 Bom. L. R. 413.

In taxation cases the subject is not to be taxed merely because, in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. He is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. The principle of all fiscal legislation is that if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

*Inland Revenue Commissioner v. Westminster (Duke)*<sup>1</sup> and *Partington v. Attorney-General*,<sup>2</sup> referred to.

INCOME-TAX reference.

The facts appear fully in the judgment.

*A. T. Miller K. C., Raymond Needham K. C. and R. P. Hills*, for the appellant.

*J. Millard Tucker K. C. and W. Wallach*, for the respondent.

SIR LANCELOT SANDERSON. This is an appeal from a judgment of the High Court of Madras dated November 17, 1938, which was given upon a reference of a question of law made to the High Court by the Commissioner of Income-tax under s. 66 (2) of the Indian Income-tax Act, XI of 1922.

The question was as follows :—

"Whether on the facts of this case the Income-tax authorities were entitled to hold that the income from the first six items of loans referred to in paragraph 21 of the Income-tax Officer's assessment order accrued and arose to the Pudukottai Bank directly or indirectly through or from a business connection in British India within the meaning of section 42 (1) of the Indian Income-tax Act between the Kanadukathan Bank and the Pudukottai Bank."

The Commissioner of Income-tax submitted that this question should be answered in the affirmative. The High Court (consisting of Sir Lionel Leach C. J., Madhavan Nair and Varadachariar JJ.), decided that the submission of the Commissioner was right and answered the question in the affirmative.

From this decision the appellant, the Bank of Chettinad, Ltd., has appealed to His Majesty in Council.

The reference arose out of the assessment of the Bank of Chettinad, Ltd., Kanadukathan (hereinafter for the sake of brevity referred to as the "Kanadukathan Bank") as agent of the Chettinad Bank, Ltd., Pudukottai (hereinafter referred to as the "Pudukottai Bank"), for the assessment year 1933-34.

The assessment proceeded on the basis that certain profits or gains accrued to the Pudukottai Bank, resident out of British India, directly or indirectly through or from a business connection in British India, and that under s. 42(1) of the Indian Income-tax Act of 1922 such profits or gains were chargeable to income-tax in the name of the Kanadukathan Bank, resident in British India, which was treated as the agent of the Pudukottai Bank under s. 43 for all the purposes of the Act.

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<sup>1</sup> 1 [1936] A. C. 1.

<sup>2</sup> (1869) L. R. 4 H. L. 100, 122.

P. C. The material facts may be stated as follows :—

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Raja Sir Annamalai Chettiar of Chettinad with his three sons had a large money lending business with many branches in Burma, Ceylon, the Federated Malay States and French Cochin China. In 1929 they formed the Kanadukathan Bank which has its headquarters at Kanadukathan in British India. Kanadukathan lies about two miles from the border of the State of Pudukottai and eighteen miles from the town of Pudukottai, the capital of the State. In 1930 they formed the Pudukottai Bank and also registered in Pudukottai a company called the Chettinad Corporation, Limited, both of which have their registered offices at Pudukottai. The business carried on by the Raja and his sons were wound up and all the assets and liabilities transferred to the three companies. The assets and liabilities of the branches in Burma (which until April 1, 1937, was a part of British India), were transferred entirely to the Kanadukathan Bank. The assets and liabilities of the branches in the Federated Malay States were mostly transferred to the Pudukottai Bank. The assets and liabilities of the branches in Ceylon were transferred partly to the Colombo branch of the Kanadukathan Bank and partly to the Branches of the Pudukottai Corporation, Limited, in Ceylon. Part of the value of the excess over liabilities was adjusted against the paid-up capital of the three companies. The balance was apportioned and the sums treated as being deposits of the Raja and other members of his family with these companies.

The nominal capital of the Kanadukathan Bank is Rs. 3,00,00,000 and the paid-up capital Rs. 1,00,00,000, divided into 20,000 shares of Rs. 500 each. All the shares of the company are held by the Raja and members of his family. The directors are the Raja, his wife and two outsiders, neither of whom holds any shares : one is an employee and the other the agent of the Raja.

The nominal capital of the Pudukottai Bank is Rs. 2,00,00,000, and its paid-up capital is Rs. 1,70,00,000, divided into 20,000 shares, of which 10,000 are Rs. 700 each paid up and 10,000 of Rs. 1,000 each fully paid up.

All these shares, except three, are held by the Raja and the members of his family. The directors are the Raja, his wife and his son, and two outsiders, each of whom holds one share. There is no doubt that the two companies are controlled by the same people.

The Kanadukathan Bank has twenty-two branches, twenty in Burma, of which one is at Rangoon, and one at Bentong, in the Federated Malay States and one at Colombo.

The Pudukottai Bank carries on no money lending business at Pudukottai, but it has a branch at Kuala Lumpur, situated about thirty miles from Bentong in the Federated Malay States.

It appears that between September, 1930, and February 1933, loans amounting to Rs. 1,32,86,888 were made by the Pudukottai Bank to the Kanadukathan Bank. The loans were carried out through the Kuala Lumpur branch of the Pudukottai Bank and the Bentong branch of the Kanadukathan Bank.

They fall under the following nine heads, as stated in the reference made by the Commissioner of Income-tax :—

|       |         | " Rs.         | P. C.                     |
|-------|---------|---------------|---------------------------|
| (1)   | .. .. . | 45,00,000     | 1940                      |
| (2)   | .. .. . | 9,74,100      |                           |
|       |         | (\$6,34,327)  |                           |
| (3)   | .. .. . | 5,24,191      | BANK OF                   |
| (4)   | .. .. . | 2,35,000      | CHETTINAD                 |
| (5)   | .. .. . | 19,38,505     | v.                        |
| (6)   | .. .. . | 4,40,000      | COMMISS-                  |
| (7)   | .. .. . | 5,15,092      | SIONER OF                 |
| (8)   | .. .. . | 34,60,000     | INCOME-TAX,               |
| (9)   | .. .. . | 7,00,000      | MADRAS                    |
| Total | .. .. . | 1,32,86,888 " | Sir Lancelot<br>Sanderson |

The Bentong branch of the Kanadukathan Bank did no money-lending business and the only duties of the officer in charge of that branch appear to have been to receive hundies from the Kuala Lumpur branch of the Pudukottai Bank and to pass them on to the Rangoon branch after making the relevant entries in the books.

The first six of the above-mentioned items represent monies used in the Rangoon business of the Kanadukathan Bank in accordance with the procedure hereinbefore indicated : They are the six items mentioned in the reference to the High Court, and the income arising from the said loans is the subject matter of the assessment, which is now in question.

The Commissioner of Income-tax in his reference stated that "*in substance* these loans represent money lent by the Pudukottai Bank to the Kanadukathan Bank, but the transactions have been unnecessarily complicated by resorting to a series of entries which are as superfluous as they are confusing."

Their Lordships think it necessary once more to protest against the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal position.

In the case of *Inland Revenue Commissioners v. Westminster (Duke)*<sup>1</sup> disapproval of this doctrine was expressed in the opinions of Lord Tomlin and Lord Russell of Killowen.

A passage from the opinion of Lord Russell of Killowen at page 24 may usefully be cited. It is as follows :—

"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. As Lord Cairns said many years ago in *Partridge v. Attorney-General*<sup>2</sup> : 'as I understand the principle of all fiscal legislation it is this : If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.'"

The question on this part of the case is not whether "in substance" the loans represented money lent by the Pudukottai Bank to the Kanadukathan Bank,

<sup>1</sup> [1936] A. C. 1.

<sup>2</sup> (1869) L. R. 4 H. L. 100, 122.

P.C. but it is whether in fact the Pudukottai Bank lent the said money to the  
1940 Kanadukathan Bank.

BANK OF Their Lordships have no doubt that on the facts of the case the said six  
CHETTINAD items did represent loans made by the Pudukottai Bank to the Kanadukathan  
Bank, and that the money was used in the branch of the Kanadukathan Bank  
at Rangoon, which was then in British India.

COMMIS- The fact that the transactions were negotiated through the branches of  
SIONER OF the banks does not affect this question : the branches were not separate entities,  
INCOME-TAX, but were parts of the two respective banks, and it is obvious that the business  
MADRAS  
— 90 transacted by the two branches was the business of the two banks.

*Sir Lancelot  
Sanderson*

The questions to be considered are whether on the facts of this case the Pudukottai Bank had a business connection in British India and whether the profits in question accrued or arose to the Pudukottai Bank directly or indirectly through or from such business connection within the meaning of s. 42 (1) of the Act.

It was argued on behalf of the appellant bank that in order to bring the case within the section it must be shown by the income-tax authorities that the Pudukottai Bank, non-resident in British India, had a business connection in British India in relation to the actual transactions in question, that a business connection arises out of business transactions and that the transactions in this case, namely, the above-mentioned loans, were made not in British India but in the Malay States and were to be repaid in the Malay States in the Malay States currency. Consequently it was argued that although the profits of such transactions did accrue to the Pudukottai Bank, they did not accrue through a business connection in British India.

Section 42 (1) is as follows :—

In the case of any person residing out of British India, all profits or gains accruing or arising, to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax :

The terms of the section are very wide, and their Lordships are not prepared to place upon them the limitation for which the appellant contends. The words are wide enough to cover profits or gains which can be said to accrue or arise to the Pudukottai Bank directly or indirectly through or from *any* business connection which may exist between the Pudukottai Bank and the Kanadukathan Bank in British India.

That the Pudukottai Bank had a business connection with the Kanadukathan Bank in British India cannot on the facts be doubted, and the transactions in question could not have been carried out but for the existence of the Kanadukathan Bank which was in British India, and the business connection between that bank and the Pudukottai Bank.

It has already been shown that the two banks are controlled by the same people, viz., the Raja and his family. It further appears that the main function of the Pudukottai Bank was to finance the Kanadukathan bank, that the loans advanced by the Pudukottai Bank to the Kanadukathan Bank represented a large part of the capital of the Pudukottai Bank, that the flow of busi-

ness between the two banks was secured by the complete control exercised by the Raja and his family over the business of both banks, so that the loans could be safely made without security and for indefinite periods. In view of these facts their Lordships are of opinion that the High Court was right in holding that the Pudukottai Bank had a business connection with the Kanadukathan Bank in British India during the year of assessment, and they are further of opinion that the profits and gains, the subject matter of the assessment, accrued to the Pudukottai Bank directly or indirectly through such business connection in British India.

There remains the question whether the Income-tax Commissioner was correct in treating the Kanadukathan Bank as the agent of the Pudukottai Bank within the meaning of s. 43 of the Act.

It is to be noted that the agent contemplated by the section is so to speak an artificial creation, for it is provided that any person having a business connection with a person residing out of British India, upon whom the Income-tax Officer has served a notice of his intention of treating him as agent of the non-resident person, is to be deemed to be such agent.

In view of the above-mentioned conclusions it is clear that the Income-tax Officer was acting within the power conferred upon him by s. 43 in treating the Kanadukathan Bank as the agent of the Pudukottai Bank for the purposes of the Act.

Several cases were cited to their Lordships, but, with one exception, they were not of much assistance, for the facts in the cited cases were different from those of the present appeal, and the decision in each case must of course depend upon its own facts. The exception is *Income-tax Commissioner v. Remington Typewriter Co. (Bombay), Ltd.*<sup>1</sup> The headnote of that case is as follows :—

"A company incorporated in the U. S. A., and hereinafter called 'the American company', carried on business in New York, and there manufactured and sold typewriter machines. The respondent company had been incorporated under the Indian Companies Act, 1913, and had purchased from the American company for shares the goodwill of that company in the Bombay Presidency and adjoining territory; the American company held all its shares except three issued to that company's nominees. Two other companies had been incorporated in India, each being in substance in the same position towards the American company as the Bombay company; their respective business territory covered the rest of India."

It was held that there was a business connection within the meaning of s. 43 and s. 42, sub-s. (1) of the Indian Income-tax Act, 1922, between the American company and each of the Indian companies, and consequently under s. 43 the respondent company could be deemed for the purposes of the Act to be the agent of the American company, and as its agent could be charged to tax under s. 42, sub-s. (1), in respect of profits made by the American company upon machines exported to British India.

The question whether the necessary business connection existed was argued before the Board, although no appeal had been lodged by the respondents and their Lordships had no doubt that the necessary business connection did exist. It was stated in the judgment that (p. 48) :—

1 (1930) L. R. 58 I.A. 42,  
s. c. I. L. R. 55 Bom. 243,  
R. 18.

33 Bom. L. R. 413.

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—

"The Bombay company was formed for the express purpose of acquiring from the American company and carrying on in a particular area the American company's business of selling the American company's manufactures. Although no contractual obligation exists by which the Bombay company is compelled to purchase any of the manufactures of the American company, the flow of business between the two companies is secured by the fact that the ultimate and complete control of the Bombay company is vested in the American company, which owns all its shares."

It was further held that the profits and gains in question accrued or arose to the American Company directly or indirectly through or from a business connection in British India.

This case is material, because in their Lordships' opinion, if the appellant's contention in this appeal were correct, viz., that the business connection existed only in respect of actual business which was transacted by the branches of the two banks outside British India, the above cited case should have been decided the other way in so far as it related to the matter now under consideration.

For the above-mentioned reasons their Lordships are of opinion that this appeal should be dismissed and that the appellant should pay the respondent's costs of this appeal. They will humbly advise His Majesty accordingly.

*Appeal dismissed.*

Solicitors for appellant : *Lambert & White.*

Solicitor for respondent : Solicitor, India Office.

[On appeal from the High Court of Judicature at Allahabad.]

*Present :*

VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT,  
SIR GEORGE RANKIN, AND MR. M. R. JAYAKAR.

BISHUN DAYAL

v.

KESHO PRASAD.

1940

June 8.

*Civil Procedure Code (Act V of 1908), Sec. 66—Property purchased at Court sale—Sale certificate solely in name of auction purchaser—Plaintiff claiming property on ground that it was purchased by certified purchaser on his own behalf and on behalf of plaintiff—Claim whether maintainable.*

Section 66 of the Civil Procedure Code, 1908, excludes any claim of plaintiff based upon an averment that property purchased by the certified purchaser at a Court auction sale was purchased by him on his own behalf and on behalf of the plaintiff or some one through whom he claims. The section is not a bar to a claim based on a title independent of the auction purchase.

SUIT against certified auction purchaser at a Court sale.  
The facts appear fully in their Lordships' judgment.



*J. M. Parikh*, for the appellant.

*Sir Thomas Strangman K. C.* and *W. Wallach*, for the respondent.

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SIR GEORGE RANKIN. This appeal is brought by the plaintiff from a decree dated August 11, 1936, of the High Court at Allahabad, which affirmed the decision (June 30, 1932), of the Subordinate Judge at Banda dismissing the suit. The only question which now arises is as to the maintainability of the suit in view of s. 66 of the Code of Civil Procedure :—

66.—(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

The plaint was filed on January 8, 1932, and the case made thereby was as follows. One Ram Dayal died in 1910 leaving as his heiress Mst. Ram Piari Kuer, his widow. On her death in 1922 the plaintiff succeeded to his property as reversioner according to the Hindu law. The first defendant Kesho Prasad was nephew to Ram Dayal, and on July 20, 1907, at a Court sale at which the village of Mamsi Khurd was sold in execution, he had bid therefor on behalf of himself, his brother Kedar Nath and Ram Dayal. The bid was accepted and the sale confirmed, but the sale certificate was made out in the sole name of Kesho Prasad, and his name alone was recorded in the revenue record (*khewat*). The property was held by Ram Dayal and the defendants jointly, Ram Dayal and afterwards his widow receiving their share of the net profits from Kesho Prasad, who was himself the *lambardar* of the village. But after the death of the widow in 1922 the defendants stopped paying any part of the profits and denied the right of the plaintiff. The relief prayed for by the plaint was a decree for joint possession of one-half of the village and mesne profits. This was on the footing that Ram Dayal had a one-half interest, the other half belonging to Kesho Prasad either alone or jointly with his brother Kedar Nath.

The plaint contained other allegations directed to show that at the time of a previous suit brought by the plaintiff in 1923 against the defendants and others he did not know of the facts giving rise to his present claim. It contained an express averment that Ram Dayal was not joint with the defendants at the time of his death and it is not now suggested that they were joint in 1907 at the time of the execution sale.

The learned trial Judge held that the purchase was made by Kesho Prasad solely on his own account and that neither the plaintiff nor Ram Dayal nor the widow were ever in possession of a half share. The High Court (Sulaiman C. J. and Bajpai, J.) having pointed out that Ram Dayal and Kesho Prasad were separate, and that the plaintiff's claim as laid in the plaint was to rights alleged to have been acquired by the auction purchase of 1907, held that s. 66 applied to the case and barred the suit. The learned Judges did not find it necessary to come to a finding on the questions of fact upon

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which the plaintiff had failed in the trial Court. They were careful in two parts of their joint judgment to make clear that the plaintiff's case was rested by him upon the auction purchase :—

"There was, however, no case put forward by the plaintiff in the plaint suggesting that subsequent to the auction purchase of 1907 either Ram Dayal or his widow had by adverse possession for over 12 years acquired title to this property. The suit was not based on any such adverse title claimed independently of the rights alleged to have been acquired by the auction purchase of 1907.

Had the plaintiff come into Court on the allegation that subsequent to the auction purchase of 1907 either Ram Dayal or after him his widow acquired title by adverse possession extending over 12 years, we would have certainly entertained the claim. It has been laid down by their Lordships of the Privy Council in the case of *Abdul Jalil Khan v. Obaidullah Khan* (1929, L. R. 56 I. A. 330) that section 66 is not a bar to a claim based on a title independent of the auction purchase; but no such case was put forward in the plaint and none has been pressed before us in appeal."

On this appeal learned counsel for the appellant has confined his argument to maintaining that the plaint if properly interpreted did raise a case based upon possession subsequent to the auction purchase, which possession had continued for sufficient time to bar the rights of Kesho Prasad under art. 142 or 144 of the Limitation Act and to extinguish his title under s. 28 thereof. Learned counsel did not dispute that s. 66 excluded any claim of the plaintiff based upon an averment that the auction purchase had been made by Kesho Prasad on account of Ram Dayal as well as on his own account. Their Lordships have therefore no occasion to discuss the various points emerging from the careful study made in the High Court of the case law upon the section. It is sufficient to say that their examination of the plaint leads them to agree with the High Court in holding that the only case pleaded by the plaintiff was that Ram Dayal derived his right to half of the village from the auction purchase having been made in part on his behalf by Kesho Prasad. No case independent of this purchase and basing title upon subsequent possession is traceable in the memorandum of appeal to the High Court or in the grounds of appeal to His Majesty. In these circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the first respondent, who alone has appeared to contest the appeal.

*Appeal dismissed.*

Solicitors for appellant : *Hy. S. L. Polak & Co.*

Solicitors for respondents : *T. L. Wilson & Co.*

[On appeal from the High Court of Judicature at Allahabad.]

Present :

LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON, AND MR. M. R. JAYAKAR.

MUSSAMMAT HAR NARAINI KUNWAR

v.

SAJJAN PAL SINGH.

1940

June 28.

*Hindu law—Widow—Daughters—Reversioners—Reference by widow of reversioners' rights to arbitration—Whether such reference binds reversioners.*

Under Hindu law a reversioner has no right or interest *in presenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*. His guardian, if the reversioner happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

*Amrit Narayan Singh v. Gaya Singh*<sup>1</sup>, followed.

A Hindu left, by his will, his divided property one of which was mentioned as ancestral, to his wife in the first instance, and on her death to his daughters. A dispute about the ancestral property having arisen between the widow and her husband's collaterals, the widow in her own right as well as the mother and guardian on behalf of her minor daughter referred it to arbitrators, who decided that the property should be enjoyed by the widow during her lifetime, and that after her death it should be divided among the collaterals. After the widow's death, the only surviving daughter, who was a minor at the date of arbitration, sued to recover possession of the ancestral property alleging that the award was not binding on her :—

*Held*, that the plaintiff was entitled to succeed and the award was not binding on the plaintiff, because the widow in making the agreement to refer in no way purported to bind the estate or to act as representing the estate of her husband.

THE facts are sufficiently set forth in the judgment.

*J. M. Parikh*, for the appellant.

*W. Wallach*, for the respondent.

LORD RUSSELL. In order to explain the reasons why their Lordships think that this appeal should succeed, the barest statement of the relevant facts will be sufficient. One Jiwa Ram made his will dated August 20, 1890, by which, after stating that being a member of a divided family he was the owner of the divided property specified below, he provided that (in the events which happened) his wife Hans Kunwar should "remain the owner in possession of the entire property left by me like a Hindu widow till her lifetime", and after her death "all the married and unmarried daughters who be alive or whose male issue be alive shall get the estate acquired, i.e., the property in equal shares." At the end of the will were specified four items of property of which the first was described as "ancestral property in mauza Isauli, pargana Jalisar, district Etah—4 biswas out of 20 biswas." The other three items were non-ancestral property which had been acquired by the testator.

1 (1917) L. R. 45 I. A. 35, s. c. 20 Bom. L. R. 546.

P. C.        The testator, who never had a son, died on August 26 or 27, 1890. He  
 1940        was survived by his wife and two daughters, viz., a married daughter Kawal  
 HAR NARAINI Kunwar and the plaintiff who was then aged three. A third daughter (Het  
 KUNWAR Kunwar) was born posthumously, who died at about the age of seven years.  
 v.        The will has been construed as containing no disposition, in the events  
 SAJJAN PAL which happened, of the ancestral property in mauza Isauli after the death  
 SINGH        of the widow. It would accordingly (the testator being divided and having  
 Lord Russell no son) in the normal course belong to the daughter or daughters living at  
 the death of the widow.

Shortly after the death of the testator disputes arose. Certain collaterals claimed the ancestral property, alleging that they were joint with the testator. One Nem Kunwar claimed that her son Narain had been adopted by the testator, and that the testator had made a later will leaving the whole property to him.

On February 27, 1891, an agreement was entered into between the various claimants of the one part, and the widow and the testator's married daughter of the other part, by which it was agreed to refer the disputes to arbitration. The material recital states: "There is a dispute between us the parties in respect of the property specified below . . . and it is not settled, hence for its decision we the parties unanimously have accepted to abide by the decision of the arbitrators regarding the dispute." The specified property consisted of the four items specified by the will.

By their award the arbitrators decided that as to the ancestral property in mauza Isauli the widow should remain in possession and occupation during her life, and that after her death it should be divided among the collaterals in certain detailed shares, the testator's daughters not having any concern therewith nor any share therein. As to the acquired property the widow was to remain in possession and occupation during her lifetime, and after her death it was to go to the daughters as therein mentioned.

The widow died on February 12, 1928, leaving the plaintiff as the sole survivor of the three daughters. The Isauli property was mutated in favour of the collaterals. As to the other property the plaintiff succeeded thereto and the present litigation is not in any way concerned with it.

The plaintiff instituted the present suit in the Court of the Subordinate Judge at Etah, on January 11, 1930, against the collaterals, claiming that under Hindu law she alone became entitled to succeed to the property in Isauli on the death of the widow, and that the agreement to refer and the award were not binding on her for a number of reasons specified in the plaint.

The Subordinate Judge decreed the suit.

On appeal to the High Court of Judicature at Allahabad the decree of the Subordinate Judge was set aside and the suit was dismissed with costs in both Courts.

From that order the plaintiff has now appealed to His Majesty in Council, and a number of points have been argued before the Board. . . .

It is, however, unnecessary to express an opinion upon any except one, which in their Lordships' opinion is covered by authority of this Board, and is decisive of this case.

It was contended, and this was the foundation of the High Court's judg-

ment, that a Hindu widow represents her husband's estate, and can compromise claims so as to bind reversioners. That this is true as regards such matters as claims by creditors who are claiming to be paid out of an estate, but are not disputing the title of those beneficially interested in the estate, is beyond doubt; but whether the principle necessarily applies when the claim is one which disputes such title, is another question. But it need not be investigated in the present case for the simple and sufficient reason that in making the agreement to refer, the widow in no way purported to bind the estate, or to act as representing the estate of her husband. The agreement is clear upon the point. She and her married daughter executed the agreement as the second party, and the widow is expressly described as doing so in a double capacity, viz. "in her right and as mother and natural guardian of minor daughters Musammat Hamaraini"—i.e. the plaintiff—"and Het Kunwar." She was, as guardian, contracting on behalf of her infant children.

In those circumstances she was attempting to do what this Board has, viz., in the case of *Amrit Narayan Singh v. Gaya Singh*,<sup>1</sup> said, cannot be done.

In that case an infant was under Hindu law entitled to succeed on the death of his mother to property which originally belonged to his maternal grandfather. Under a compromise in an arbitration with certain agnates who claimed the property, in which compromise the infant's father Rajander acted for his son, an arrangement was come to, during his mother's lifetime, which deprived the infant of his reversionary interest in his grandfather's property. On the mother's death the son brought a suit to recover the property, and it was held that he was not bound by the compromise. It will be observed that the interest of the plaintiff in the property in suit in the present case is identical with that of the infant son; and in relation to that interest their Lordships made use of the following language (p. 39):

"... a Hindu reversioner has no right or interest in presenti in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere spes successionis. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. Rajander's action, therefore, in referring to arbitration any matter connected with his son's reversionary interest was null and void."

Their Lordships are of opinion that the present plaintiff is in precisely the same position as was the son in the case cited, that her mother had no power to bind her by the agreement to refer, and that consequently her right to the property in suit is unaffected by the award.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be discharged and the decree of the Subordinate Judge restored.

The respondents must pay the costs of this appeal and of the proceedings in both the Courts in India.

*Appeal dismissed.*

Solicitors for appellant: *H. S. L. Polak & Co.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

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## CRIMINAL APPELLATE.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

EMPEROR

v.

BASANGOUDA YAMANAPPA.\*

1940

\*November 19.

*Circumstantial evidence—Accused charged with murder and robbery—Property of murdered person—Accused pointing out property in their possession—Failure to give explanation of possession—Inference of robbery—Accused known to murdered person—Intention to conceal detection evident—Inference of murder—Duty of counsel and Court to fit in explanation as to accused's innocence—Indian Penal Code (Act XLV of 1860), Secs. 34, 302, 394, 457.*

Circumstantial evidence must be consistent, and consistent only with the guilt of the accused; if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. One of the circumstances which has to be taken into account is the fact that the accused has offered no explanation, or has offered a particular explanation; but it must be borne in mind that the accused cannot go into the witness-box, and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him. Often the accused is an illiterate person, and makes a statement under s. 342, Criminal Procedure Code, which is obviously untrue, or he is not prepared to admit anything.

The fact that an accused is not willing to admit that he took part in a robbery which is proved against him ought not to prejudice the question whether he committed murder at the same time.

It is the duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence. Where the accused is not represented, or not properly represented, the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and, if there is, he is not justified in convicting. A reasonable explanation of the evidence should not be rejected because not offered by the accused.

Dicta to the contrary in *Narayana v. King-Emperor*<sup>1</sup> dissented from.

Where three accused produced property which had been stolen on the occasion of a robbery and murder, and at the trial they did not offer any explanation of the possession of the property but merely said that they did not produce it, an inference that they were guilty of robbery would be justified. Further, where the evidence disclosed that the accused belonged to the same village as that of the woman murdered at the time of committing robbery and were known to her, the only possible common intention which could be attributed to them was that they intended to murder her in order to prevent her giving evidence against them. The Court, under such circumstances, would be justified in coming to the conclusion that the accused committed the robbery and that pursuant to their common intention to rob the deceased and avoid detection they had the further intention of murdering her, and that they carried out that intention.

\* Criminal Confirmation Case No. 23 of 1940, with Criminal Appeals Nos. 448, 449 and 450 of 1940 from convictions and sentences passed

by S. M. Kaikini, Additional Sessions Judge of Dharwar.

<sup>1</sup> (1932) I. L. R. 56 Mad. 231.

## CONFIRMATION case.

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In the village of Hulgur in the Dharwar district there lived a family of Lingayat priests consisting of Gangava, her son Chanbasaya aged fourteen years, and her mother-in-law, Mallava aged sixty-five. They lived in a house known as Jamkhandi-math.

In March, 1940, there was an *uras* (anniversary) of a *darga* (tomb) about a mile from Hulgur. A fair was held at that time and in that fair Gangava had opened a tea-shop. Gangava and her son Chanbasaya spent their time in this shop. Chanbasaya used to go to the math in the morning for performing *pūja* (worship). Mallava used to accompany her grandson when he went back, and took her meal in the tea-shop but came to Jamkhandi-math in the afternoon to spend the nights there.

On March 26, 1940, Mallava came to the tea-shop as usual, took her meals, and returned to Jamkhandi-math in the afternoon.

In the morning of March 27, 1940, when Chanbasaya as usual went to the Jamkhandi-math, he found the murdered body of his grandmother Mallava. A blood-stained crowbar was lying near her body and there were wounds on the head. He informed the neighbours and thereafter his mother Gangava and the Police patil. The Sub-Inspector of Police, who was at the neighbouring town of Shiggaon, came to Hulgur in the afternoon and sent the body to the Medical Officer. On recording the statement of Gangava he found that robbery was also committed as the contents of two boxes, which contained *saris*, bodice-cloths and some gold and silver ornaments, were stolen.

From the statements of several persons, the Sub-Inspector suspected accused No. 1, Basangauda, to have a hand in the affair. He was found at another village, and on being questioned implicated accused No. 2, Ninga, and accused No. 3, Hanmantappa.

On information given by accused No. 1, the Sub-Inspector and some *panchas* went to Niralgī which was the village of accused No. 1. From a heap of chaff lying on the threshing floor of his field the accused took out a bundle which contained some of the articles mentioned in the statement of Gangava. The party returned to Gadag and there the Sub-Inspector recorded statements of two Sarafs to whom some property was sold by accused No. 1. Accused No. 1 was then arrested.

On April 11, 1940, accused No. 2 was arrested and he also pointed out a place in his backyard from where he took out a bundle containing some missing articles.

Accused No. 3 was then arrested and he also pointed out a spot on the roof of his house from which he took out a bundle containing some missing articles.

The accused were thereupon charged with having committed offences punishable under ss. 302, 457 and 394 read with s. 34 of the Indian Penal Code, and the Magistrate committed them to the Court of Session at Dharwar for trial.

The Additional Sessions Judge of Dharwar, before whom the trial took place with the aid of assessors, convicted the accused and sentenced them to death under s. 302 read with s. 34 of the Indian Penal Code, and ten years rigorous imprisonment under each of the ss. 457 and 394 read with s. 34

A. Cr. J. of the Indian Penal Code, the sentences of rigorous imprisonment to run concurrently and to come into force in case the death sentence was not confirmed. The accused appealed to the High Court. The Additional Sessions Judge applied for confirmation of the death sentences.

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S. R. Joshi, (appointed), for the accused.  
 R. A. Jahagirdar, Government Pleader, for the Crown.

BEAUMONT C. J. These are three appeals by the three accused against their convictions by the Additional Sessions Judge of Dharwar of the offence of murder, and there is an application to confirm the death sentences which the learned Judge passed upon all of them.

The facts established by the prosecution are these. The murdered woman was one Mallava, who was aged about sixty-five. She and her daughter-in-law Gangava and the latter's son used to live in the Jamkhandi-math in the village of Hulgur. But Gangava had some time back opened a hotel about a mile away from the math, and she and her son thereafter lived in the hotel. Mallava used to go there in the day time to take her meals, but she went back to sleep at night in the math, and Gangava's son used to go to the math every day and spend part of his time with Mallava. On the night of March 25 last Mallava went back from the hotel to the math, and the next morning, when Gangava's son went to the math, he found that Mallava had been murdered. She had been severely beaten over the head, and there is, I think, no doubt that the weapon used was a crowbar, which used to be kept in the math, and which was found near the body stained with human blood. The object of the murder was undoubtedly robbery, because boxes had been broken open, and a large number of ornaments and other articles had been taken, though certain ornaments on the body of the deceased had not been removed.

The first evidence in chronological order is that of Channava, (exhibit No. 5), who lived in a house near to the math. She says that on the day before the date on which the murder was discovered she went in to pound chillies in the math; that Mallava was there and that accused No. 1 came in whilst the witness was there, sat talking with Mallava, and was still there when the witness left about 8 p.m. It is not suggested that accused No. 1 committed the murder on the occasion of that visit, but it is certainly possible that he went there to make sure that Mallava was alone.

Then the next witness is Ningappa, (exhibit 6), a servant of accused No. 1, who on the night in question was sleeping in accused No. 1's shop, which is three houses removed from Jamkhandi-math. He says that on that night accused No. 1 went out and returned about midnight, and the witness woke up at the sound of the door being opened; he asked who it was, and accused No. 1 said that it was Basangouda. He says that accused No. 1 opened the lock of his box and put a bundle into it. He identifies the box as article 110, and it is proved by the panch, (exhibit No. 20), and the panchnama, (exhibit No. 22), that this box, article 110, was subsequently produced from the house of accused No. 2, which shows a connection between accused No. 1 and accused No. 2.

Then the next witness is Yallappa (exhibit No. 11). He says that the day before he heard of the murder of Mallava he had been to a cinema per-



formance and that he left the theatre at midnight. He says :

"I was entering my house when I saw the three accused coming out of the door of the Jamkhandi-math. On their coming near me I questioned them where they had gone and they told me not to interfere in such matters. Then they proceeded to the shop of accused No. 1. Accused Nos. 1 and 2 carried a bundle each and accused No. 3 had nothing."

Then he adds :

"The three accused used to meet in accused No. 1's shop always."

It is true that that witness did not come forward until the arrival of the Police Sub-Inspector and the arrest of the accused on April 9 ; but one may assume, I think, that the witness was threatened that he should not speak of what he had seen ; and, as the learned Judge points out, from the fact that he was examined by the Police Sub-Inspector on the day on which accused No. 1 was arrested, it is probable that his name was mentioned by accused No. 1 as a possible witness. No reason is suggested why this witness should give false evidence, but his evidence is the only direct evidence connecting the accused with the offence on the night in question.

The other evidence consists of the fact that each of the accused produced a substantial part of the stolen property, which was identified by Gangava. Accused No. 1 produced the property from his field, accused No. 2 from his backyard, and accused No. 3 from the roof of his house. There is no reason whatever for rejecting the evidence of the panch and the panchnamas as to the production of the stolen property. It is also proved against accused No. 1 that he sold certain of the stolen articles under a false name on two occasions.

I should say that the accused in their statements simply deny everything. They deny the production of any property, or that they had any connection with the offence. There can, I think, be no doubt whatever that the facts proved, and particularly the possession by the accused of all this property, which was the result of the robbery, justify an inference that they took part in the robbery. But the further question arises whether the evidence justifies an inference that they committed the murder of Mallava. The learned Judge, in discussing the circumstantial evidence, followed a decision of the High Court of Madras in *Narayana v. King-Emperor*.<sup>1</sup> I have had occasion before to consider that case, and, though I do not for a moment suggest that the decision was a wrong one, I do not find myself in agreement with some of the dicta of the learned Judges. The principal judgment was delivered by Mr. Justice Reilly, but the learned Chief Justice, Sir Owen Beasley, concurred in a short judgment. The learned Judges differed from certain observations made in a previous case before the High Court of Madras, *Sogaimuthu Padayachi v. King-Emperor*.<sup>2</sup> The question with which the learned Judges had to deal in *Narayana's* case was whether an inference that the accused committed murder could be drawn from the circumstances of the case, including his production of property stolen from the murdered person. They do not accept the statement of Mr. Justice Wallace in the earlier Madras case to the effect that "the Court has to be satisfied not merely that the thief could not have come into possession of the property unless murder had been commit-

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1 (1932) I. L. R. 56 Mad. 231.

2 (1925) I. L. R. 50 Mad. 274, 291.

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ted, but also that he could not have come into possession of the property unless he himself had taken part in the murder or was privy to it." Mr. Justice Reilly says (p. 237) :

"When it is the duty of a Judge or a jury to draw from evidence a reasonable inference, it is not their duty to find that there was no conceivable possibility other than the conclusion which they reach."

— Later in his judgment he says (p. 241) :

Beaumont C.J. "If the accused offers no explanation, it is not for the Judge or jury to invent one. One of the facts before them, which it is their duty to take into account, is the fact that he has offered no explanation."

Sir Owen Beasley says with reference to *Sogaimuthu Padayachi v. King-Emperor* that the case is constantly quoted as an authority for the principle that criminal Courts in the absence of any explanation by the accused can only draw an inference that the accused committed the murder where no other inference is possible. I do not think the learned Chief Justice in that passage was merely emphasizing the word "possible" as distinguished from the word "reasonable". If that were the only point of his observation, I should agree that the Court is not bound to have regard to possible or conceivable, but extremely improbable, explanations of the evidence; but in my view both the learned Judges in *Narayana's* case state the law in relation to circumstantial evidence wrongly. In my opinion, the rule is that circumstantial evidence must be consistent, and consistent only with the guilt of the accused, and that if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. No doubt one of the circumstances, which has to be taken into account, is the fact that the accused has offered no explanation, or has offered a particular explanation; but it must be borne in mind that in this country the accused cannot go into the witness-box, and is not bound to give any explanation at all. An accused person, who knows the law, is quite entitled to say: "The evidence is just as consistent with the guilt of somebody else as with my guilt, and, that being so, there is a doubt, and you cannot convict me, and I am not going to open my mouth." The fact that he does not open his mouth cannot be used against him. One must remember also that very frequently the accused is an illiterate person, and makes a statement under s. 342, Criminal Procedure Code, which is obviously untrue. Very frequently he is not prepared to admit anything, whereas, if he was wise, he would admit facts which are definitely proved against him, and offer an explanation about them. But very often he will not admit anything. The fact that an accused is not willing to admit that he took part in a robbery which is proved against him ought not to prejudice the question whether he committed murder at the same time. I particularly dissent from the view of Mr. Justice Reilly that it is not the duty of the Court to invent possible explanations.

I remember many years ago discussing with an eminent King's Counsel in London, who afterwards became a Judge on the Common Law Side of the High Court and was a great criminal Judge, the effect of the introduction of the Criminal Law (Amendment) Act of 1898, under which accused persons were for the first time allowed to give evidence in England, and he told me that one effect of the Act was to destroy the whole romance of defending an

accused. Formerly counsel could exercise his ingenuity in inventing possible theories which fitted in with the evidence, and were consistent with the innocence of the accused ; but after the accused was allowed to go into the box, it was no good suggesting possible theories, because the facts could be proved by evidence. I only mention that story to illustrate my own view of what the duty of counsel and the Court is in India at the present time. It is clearly the duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence. In many cases the accused are unable to employ counsel, and in other cases counsel are asked to defend by the Court, and such counsel may be inexperienced, and I think that the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and if there is, in my opinion, he is not justified in convicting. A reasonable explanation of the evidence should not be rejected because not offered by the accused.

Now, the facts here, first of all, are that the three accused produced property which had been stolen on the occasion of this robbery and murder. That is clearly established. They do not offer any explanation of the possession of the property, but merely say that they did not produce it. As I have said, that is quite enough to justify an inference that they were guilty of robbery. But is it enough to justify an inference that they were guilty of murder? The murder was committed with this crowbar. That, I think, is clear, and as there was only one instrument used, it is probable that only one of the assailants gave the actual blow, and, of course, we do not know which assailant it was. Therefore, we can only convict the accused, if we find that there was common intention to commit murder within s. 34 of the Indian Penal Code. In considering that question it is of vital importance to notice that all the accused come from the same village as the deceased woman. Accused No. 1 was obviously known to her, because he was in her house on the evening on which she was murdered and talking to her, and there can be no doubt, I think, that she knew accused Nos. 2 and 3, who were both from the same village. Therefore, if these three people committed the robbery, they must, I think, have intended to murder their victim ; otherwise she would have given them away to the police. I do not see what rational intention one can attribute to the robber or robbers, except that they intended to murder the woman, to whom they were known. If they had come from a different village, or if there was any evidence that they had concealed their faces behind masks and that the victim could not recognize them, then one might perhaps say that the common intention was to rob and one of the robbers may have gone too far in committing murder. But in a case of this sort, the murder of a local inhabitant by three men of the village, I think the only possible intention which one can attribute to them is that they intended to murder her in order to prevent her giving evidence against them. I cannot see any rational explanation of the evidence which is consistent with the innocence of the accused. Of course, it is conceivable that somebody else committed the murder and robbery, and that that person was subsequently robbed by the accused, or handed over the property to the accused, but that does not seem to me a rational explanation. If that were the explanation,

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 it is almost inconceivable that the accused would not have given it and mentioned who it was who gave them the property. There is not a particle of evidence that there was any suspicious character in the neighbourhood of the math on the night of the offence. Therefore, I think, the theory that the accused might have got the stolen property from some third party is an instance of an explanation which is conceivable, but not rational, nor one which any Court can be asked to accept.

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 It seems to me that on the evidence the learned Judge and the assessors were right in coming to the conclusion that the only rational explanation, which fitted in with the whole of the evidence, is that the accused committed this robbery, and that pursuant to their common intention to rob the deceased and avoid detection they had the further intention of murdering her, and that they carried that intention out.

In my opinion, therefore, the appeals must be dismissed and the death sentences confirmed.

SEN J. I agree.

It is perhaps not altogether safe to rely on the uncorroborated evidence of Yallappa (exhibit No. 11) that on the night of the murder he saw all the three accused coming out of the door of the math at about midnight. He did not mention this to any one in the village for about a fortnight though he is one of the Walikars in the village, and he would ordinarily be expected to report a matter like this, when he saw two accused persons coming out with bundles in their hands, to the police patil. Besides, his statement that all the three accused proceeded towards the shop of accused No. 1 is not corroborated by the evidence of accused No. 1's servant Ningappa (exhibit No. 6). The evidence of Channavva (exhibit No. 5), again, that she saw accused No. 1 talking to the deceased woman till about 8 p.m. on the night of the murder does not materially help the prosecution as, according to the prosecution, several hours elapsed between the murder and the time when Channavva left the math. We are thus left with the evidence regarding the production of a large number of articles by accused Nos. 1, 2 and 3, all of which have been identified by Gangava as her own property. On this point there has been no cross-examination. Accused Nos. 1, 2 and 3 merely said that they did not produce any of those articles. The evidence is clear, there can be no doubt, that all those articles were produced by the accused. The cross-examination of the panchas who were present at the production of those articles does not show that the accused intended to suggest that the discovery was a mere show, the place having already been known to the police. We thus come to the conclusion that the accused were found with property stolen from the house of the deceased.

The next question that arises is, whether it is possible from this conclusion to arrive at the inference that it was the accused and nobody else who had committed the murder of the deceased. I agree that the decision in *Narayana v. King-Emperor*<sup>1</sup> goes too far, and that it is the Court's duty to speculate, when the accused's statement does not explain the evidence against him, as to the possible hypotheses that may be made out in favour of the accused. The

correct principle appears to have been enunciated by Wallace J. in an earlier Madras case, *Sogaimuthu Padayachi v. King-Emperor*.<sup>1</sup> He said (p. 291):

"In such a case I am confident that neither law nor justice justifies the hanging of a man simply because he does not plead guilty to being a thief or a receiver of stolen property. The Court has to be satisfied not merely that the thief could not have come into possession of the property unless murder has been committed, but also that he could not have come into possession of the property unless he himself has taken part in the murder or was privy to it."

It seems to me that it is possible to think of three or four theories in the accused's favour. In the first place, it may perhaps be said that someone else merely committed the murder and went away, having had a grudge against the deceased, and that the accused came later on the scene and stole the property. There is, however, nothing in the evidence to show that there was enmity between any one in the village or outside and the deceased. The police at first suspected Fakirayya, the son-in-law of Gangawa, as a possible culprit. But Gangawa herself says that Fakirayya, who had been living with her, had left some three weeks before the murder in anger as she had asked him to give some medicine to his daughter who had been ill but he had declined to do so, and that Fakirayya was also thinking of marrying a second wife, his wife (i.e. the daughter of Gangawa) having died. This does not suggest that Fakirayya had any particular reason to be angry with or bore any grudge towards the deceased. This theory would require that the accused came to know of the murder of the deceased woman on the same night as she was murdered. Accused No. 1's servant Ningappa says that accused No. 1 returned to his shop on the same night with a bag; and from the evidence it can be presumed that the bag contained some of the stolen articles. I therefore think that this theory is not tenable.

Secondly, it is perhaps possible to suggest that someone else murdered the deceased and stole the property and then entrusted the said property with the three accused persons. There is evidence that there was a fair on in the village and a large number of outsiders must have been visiting the village. But if it was an outsider who had committed the offence, then one would expect the stolen property to be removed outside the village rather than be entrusted to somebody in the village. In any case, if this was what had actually happened, one would expect the accused to say so in their defence; the offence of keeping stolen property is not such a grave offence as that of murder. This theory again, therefore, does not seem probable.

Thirdly, it may be suggested that somebody had murdered the deceased and robbed her of the property, and he in turn was robbed by the accused. This theory would require that the second robbery took place on the same night as the first robbery, because, as I have pointed out above, Ningappa states that accused No. 1 was found to have returned to his shop on the same night with a bag. This appears to me to be a too far-fetched theory to be at all probable. It requires us to suppose that though the name of the real offender never came to light at all, the three accused persons came to know of the commission of the offence and decided within a few hours of the same to rob him of the stolen property and succeeded in their object the same night.

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Lastly, it has been argued by the learned advocate for the appellants that it is not impossible that one of the three accused committed the murder and that the property of the deceased was later on distributed among the three accused, so that it is impossible to say which of the accused it was who committed the murder. It has also been suggested that the original intention of the accused was not to commit any murder at all but that as the deceased woke up one of the accused killed the deceased on the spur of the moment, so that, again, it is not possible to say which of the accused persons killed her. These theories, again, appear to me to be entirely untenable.

If it was the intention of the accused merely to rob the deceased, I think it must be held that they came to the scene of the offence with the deliberate object of killing the deceased also. They must in that case have intended to break open the trunk and the box which contained the valuable properties of the deceased, and they could not expect that those could be broken open without waking up the deceased; they must have intended to remove the only evidence of their crime by doing away with the deceased. Nor does it seem possible that it was only one of the accused who entered the house and committed the offence and later on distributed the spoils to other persons. If he took the help of the other accused persons in concealing or disposing of the property, it is far more reasonable to think that the three accused were associated together in the offence from the beginning. It thus seems to me impossible to escape the conclusion that all the three accused must have been concerned with the offence from the beginning, i.e. from the inception of the plan to commit the theft, and that the plan must have been to commit the theft by killing the deceased woman. The evidence, in my opinion, is not consistent with the guilt of somebody else or only with the guilt of one or some of the accused. I therefore think that all the three accused have been rightly convicted of the murder of the deceased. It was a cold-blooded and deliberate murder, and there can be no doubt that the proper sentence in such a case is the sentence of death.

*Appeals dismissed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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v.

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GULAMHUSSEIN ALIBHOY JARIWALLA.\*

*Mussalman Wakf Act (XLII of 1923), Secs. 2(e), 3, 5, 10 and Sec. 10B,† added by the Mussalman Wakf (Bombay Amendment) Act (Bom. XVIII of 1935—*

\* Criminal Appeal No. 404 of 1940, from conviction and sentence passed by I. N. Mehta, Chief Presidency Magistrate, Bombay.

† The section runs thus :—

10B. (1) No prosecution under this Act shall be instituted except by or

with the previous sanction of the Court given in the prescribed manner.

(2) No Criminal Court inferior to that of a Presidency Magistrate or of a Magistrate of the First Class shall try an offence under this Act.

*Bombay Mussalman Wakf Rules, 1936, r. 26††—Prosecution under s. 10—Sanction of Court—Form of sanction—Mutwalli holding property within jurisdiction of Court bound to file particulars and accounts—Foreign trust immaterial—Dedication of property to wakf by trustees.*

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Section 10B of the Mussalman Wakf Act, 1923, enacted by the Mussalman Wakf (Bombay Amendment) Act, 1935, directs that no prosecution under the Act shall be instituted except by or with the previous sanction of the Court given in the prescribed manner, i.e. the manner prescribed by rules under the principal Act. Rule 26 of the Bombay Mussalman Wakf Rules, 1936, provides that the order of sanction shall state the offence in respect of which the accused is to be prosecuted.

In dealing with a case involving breach of the provisions of ss. 3 and 5 of the Mussalman Wakf Act, 1923, the civil Judge expressed in his judgment an opinion that an offence punishable under s. 10 of the Act had been committed and directed the papers to be sent to the Public Prosecutor for taking necessary action against the offender. It was objected that the subsequent proceedings failed for want of sanction :—

*Held*, that the remarks made by the Judge were sufficient compliance with r. 26 of the Bombay Mussalman Wakf Rules, though it might be better if a formal sanction had been given independently of the judgment.

A mutwalli, who is in possession of property situate within the local limits of the Small Causes Court at Bombay, is bound to furnish the particulars required by s. 3 of the Mussalman Wakf Act, 1923, to the Chief Judge of the Small Causes Court at Bombay, although other properties of the wakf may be situate, and those who benefit from the wakf may be resident, outside Bombay or outside British India. The section applies to any property of a wakf within the jurisdiction of the local Court.

The term "wakf" as defined by s. 2(e) of the Mussalman Wakf Act is not confined to dedication of property by a beneficial owner, but includes a dedication by a trustee provided he keeps within the terms of his trust. Hence, such dedication is constituted by persons collecting money on terms which make it charitable in the hands of the trustees who hold it, their subsequent investment of that money in immoveable property, and their declaration of a trust of that immoveable property for the charitable purpose for which it is held.

There cannot be an offence under s. 5 of the Mussalman Wakf Act unless a statement has been delivered under s. 3 of the Act.

PROSECUTION under s. 10 of the Mussalman Wakf Act, 1923.

The accused belonged to the Dawoodi Bohra community, which was governed by the Mussalman Wakf Act, 1923, and the Mussalman Wakf (Bombay Amendment) Act, 1935.

The accused and others collected a sum of money from amongst the members of their community at Sunnel, a town in the Indore State, for the purpose of building at Sunnel a madressa (an institution for providing religious in-

†† The rule runs thus :—

26. *Prosecution for offence under this Act.* The Court may either of its own motion or on the recommendation of the Wakf Committee or any member thereof after making necessary inquiry giving an opportunity to the person against whom prosecution

is contemplated to be heard may grant or refuse sanction for such prosecution. The order of sanction shall state the offence in respect of which the accused is to be prosecuted. (*Bom. Govt. Gaz.* Part IV-A, 1937, Notification No. 2217/33, dated January 4, 1937, p. 2).

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struction) called "madressa-e-Haideria" for members of the community. Out of the funds so collected they constructed the madressa at Sunnel. From the balance left on their hands, they purchased on February 26, 1932, a house at 1st Bhoiwada in Bombay for Rs. 14,000, the proceeds of which were devoted towards the expenses of the madressa. On July 7, 1932, the property was entered in their names in the Municipal Assessment Register. In the Cadestral Survey Register the accused was mentioned as one of the trustees.

On December 7, 1934, the accused and his colleagues executed a declaration of trust whereby they declared themselves trustees of all fund moneys in their hands as also of the immoveable properties purchased out of the funds collected by them. They also declared that they were holding the properties as trustees for the support and maintenance of the madressa as a charitable institution and not in their own rights as beneficial owners.

The Bhoiwada property was included in the revised list of wakf properties published in the *Bombay Government Gazette*, dated December 9, 1937, Part I, p. 2775, under entry No. 108, in which the accused and three others were shown as mutwallis of the property.

The accused omitted to file a statement of particulars required by s. 3 of the Mussalman Wakf Act, and also a statement of accounts required by s. 5 of the Act.

On January 20, 1938, the Chief Judge of the Small Causes Court at Bombay issued a notice calling upon the accused and three others to show cause why proceedings should not be taken against them under s. 10 of the Mussalman Wakf Act for failure to file statements under ss. 3 and 5 of the Act.

The Chief Judge was of opinion that though the property was originally purchased in the individual names of the four trustees out of moneys collected by them from Dawoodi Bohras at Sunnel the deed of declaration made it abundantly clear that the property was wakf property and the property was dedicated for the purpose of the madressa. The Chief Judge ordered :—

"I hold that the respondent Gulamhussein Alibhai Jariwala ... has committed default by failing to file particulars and accounts, as required by ss. 3 and 5 of the Mussalman Wakf Act in relation to this property situate in Bombay and has thus rendered himself liable to be prosecuted under s. 10. Hence, I direct the papers to be sent to the Public Prosecutor for taking necessary action against respondent Gulamhussein."

No formal order of sanction to prosecute was drawn up.

On February 10, 1939, the Public Prosecutor filed an information against Gulamhussein in the Court of the Chief Presidency Magistrate for offences under s. 10 of the Mussalman Wakf Act.

The Chief Presidency Magistrate convicted the accused of the offences charged and fined him in a sum of Rs. 200 for each offence, observing :—

"The four persons including accused purchased this property out of funds collected from Dawoodi Bohras of Sunnel and got the conveyance in their own name as joint owners. Later on after about two years they dedicated it for the charitable object of a madressa for Dawoodi Bohras. They are, therefore, the wakifs—the property belonged to them at the time of dedication and by a declaration of trust (exhibit D) they released their right over it and dedicated it in the implied ownership of God in such a manner that the profits were to be used for a madressa-e-Haideria at Sunnel—a charitable institution for imparting religious and secular edu-



cation to the children of Dawoodi Bohras of Sunnel. They appointed themselves as mutwalis by the same declaration of trust. There is nothing against Mahomedan law in a wakif appointing himself a mutwali (vide Mulla's Mahomedan Law, p. 168, where it is stated that the founder of a wakf may appoint himself or his children and descendants as mutwalis). Again at p. 153 (para. 148) Mulla states that a wakf may be made either verbally or in writing. It is not necessary in order to constitute a wakf that the term wakf should be used in the grant if from the general nature of the grant itself such dedication can be inferred. It is true that in the declaration of trust the word wakf is not used but it is called a 'declaration of trust'; but looking to the general nature of the grant itself, the moneys were collected for that purpose. The buying of the property obviously with that object, the vesting of the property in the four persons by a conveyance and then the dedicating of it for charitable object for children of Dawoodi Bohras, it is clear that it is a wakf ...

The other contentions raised ... are that there could not be two charges under s. 3 as well as s. 5 as a charge under s. 5 could not arise unless particulars were filed under s. 3. I do not think there is any force in that argument. Accused has not complied with requirements of both sections and is, therefore, liable under both. The next contention is that sanction to prosecute accused is not given by the Chief Judge in the prescribed manner and cites s. 10B (1) of Bombay Amendment Act XVIII of 1935 and r. 26 at p. 7. I do not think that there is any force in this contention. The judgment of the Chief Judge (exhibit E) states clearly that accused has committed default under ss. 3 and 5 of the Act XLII of 1923 and asks the Public Prosecutor to take necessary action as accused has rendered himself liable to be prosecuted under s. 10 of the same Act."

The accused appealed to the High Court.

*Sir Jamshedji Kanga*, with *R. M. Shah*, for the accused.

*M. C. Setalvad*, Advocate General, with *R. A. Jahagirdar*, Government Pleader, for the Crown.

BEAUMONT C. J. This is an appeal by the accused against his conviction by the Chief Presidency Magistrate, Bombay, under s. 10 of the Mussalman Wakf Act (XLII of 1923) for failure to comply with ss. 3 and 5 of the said Act.

The facts are not in dispute so far as they are material for the present purpose. The accused with others collected monies from Dawoodi Bohras at Sunnel, which is in the Indore State, for the purpose of building a madressa at Sunnel, and a madressa was duly built. On February 26, 1932, the trustees of the madressa purchased an immoveable property at Bhoiwada in Bombay out of the funds belonging to the madressa, and on December 7, 1934, they executed a declaration of trust, which is exhibit D, admitting that they had purchased the Bhoiwada property out of monies collected from Dawoodi Bohras at Sunnel for the support of a madressa at Sunnel, and declaring that they held the property upon trust, in substance, for the madressa.

The appellant was called upon to deliver accounts under s. 3 of the Mussalman Wakf Act, and he failed to do so. Thereupon the Court, that is the Chief Judge of the Small Causes Court at Bombay—who is the Court for the purposes of this case—holding that the appellant fell within the terms of the Act, directed that the papers be sent to the Public Prosecutor of Bombay in order that he might take the appropriate action. This was done, and the learned Chief Presidency Magistrate convicted the accused under ss. 3 and 5

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Four points have been taken in appeal. The first is that the necessary sanction to the prosecution has not been given. By the Mussalman Wakf (Bombay Amendment) Act, which is Bombay Act No. XVIII of 1935, s. 13, there was added to the principal Act s. 10B, which directs that no prosecution under this Act shall be instituted except by or with the previous sanction of the Court given in the prescribed manner. The prescribed manner means the manner prescribed by rules under the principal Act. Rule 26 of the Bombay Mussalman Wakf Rules, 1936, provides that the order of sanction shall state the offence in respect of which the accused is to be prosecuted. In my opinion, the last sentence of the judgment of the learned Chief Judge of the Small Causes Court, in which he holds that the appellant has committed default by failing to file particulars and accounts, as required by ss. 3 and 5 of the Mussalman Wakf Act in respect of this property and has thus rendered himself liable to be prosecuted under s. 10, and in which he directs the papers to be sent to the Public Prosecutor for taking necessary action against the appellant, sufficiently complies with r. 26 though it might be better in future, in order to avoid any question, that formal sanction should be given independently of the judgment.

The second point taken is that a trustee cannot create a wakf, and the third point is that there can be no wakf of a foreign charity. These points can be dealt with together, because they both turn on the definition of "wakf", and the terms of s. 3 of the principal Act. Section 3 provides that within six months from the commencement of this Act every mutwalli shall furnish to the Court within the local limits of whose jurisdiction the property of the wakf of which he is the mutwalli is situated, a statement containing the particulars prescribed. So that if one finds a mutwalli with property within the local limits of the Small Causes Court at Bombay, it seems to me clear that he has to furnish the required particulars, although other properties of the wakf may be situate, and those who benefit from the wakf may be resident, outside Bombay or outside British India. That disposes of the contention that the Act does not apply to a foreign wakf. It applies to any property of a wakf within the jurisdiction of the local Court.

Then we have to see what is the meaning of "wakf", in order to deal with the point that a trustee cannot create a wakf. Now "wakf" is defined in s. 2(e) of the principal Act, and we are only concerned with that definition, and we are not concerned with the question, often difficult, as to whether a particular trust constitutes a wakf under Mahomedan law. Under the definition in this Act "wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable. It is not disputed that the purpose of benefiting the madressa at Sunnel is a purpose recognized as charitable by the Mussalman law; but it is argued that there has been no permanent dedication by a person professing the Mussalman faith, because it is said that the only person who can dedicate a property must be a beneficial owner, and a trustee cannot dedicate. I know of no authority for that proposition, though of course a trustee must keep within the terms of his trust, but in any event the dedication here was not merely the declaration of

trust of 1934 by trustees. The dedication is constituted by the collection of money on terms which made it charitable in the hands of the trustees who held it, their subsequent investment of that money in immoveable property, and their declaration of a trust of that immoveable property for the charitable purpose for which it was held. That, to my mind, constitutes a good dedication. In my opinion, therefore, the learned Chief Judge of the Small Causes Court was right in holding that this was wakf property, and the learned Chief Presidency Magistrate was similarly right.

Then the fourth point taken is that the conviction under s. 5 of the Musalman Wakf Act is bad, because s. 5 cannot come into operation unless s. 3 has been complied with. It is not an argument which invokes my sympathy, because it really enables the accused to escape from the consequences of a breach of s. 5 by his own wrong in committing a breach of s. 3; but on the wording of s. 5, I do not see any answer to the argument. Section 5 provides that within three months after the thirty-first day of March next following the date on which the statement referred to in s. 3 has been furnished, and thereafter within three months of the thirty-first day of March in every year, every mutwalli shall prepare and furnish to the Court a certain statement; but unless a statement has been furnished under s. 3, there is no date within which he is required to furnish a statement under s. 5, and it seems to me that, on the wording of s. 5, there cannot be an offence under that section unless a statement has been delivered under s. 3.

I think, therefore, that we must set aside the conviction under s. 5, but we uphold the conviction under s. 3. The fine of Rs. 200 imposed under s. 5 to be refunded.

SEN J. I agree.

*Order varied.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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*November 27.*

*Criminal Procedure Code (Act V of 1898), Secs. 1(2) and 162—Indian Evidence Act (I of 1872), Sec. 27—Statement made by accused after arrest to police-officer leading to discovery of fact—Whether s. 162 of Criminal Procedure Code a bar to admissibility of such statement—"Specific provision to the contrary", meaning of.*

Information leading to the discovery of a fact made to the police and admissible under s. 27 of the Indian Evidence Act, 1872, is not rendered inadmissible under s. 162 of the Criminal Procedure Code, 1898.

\*Criminal Appeals Nos. 406 to 418 of 1940, from convictions and sentences passed by R. R. Kar-

nik, Additional Sessions Judge, Jalgaon, East Khandesh.

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The words "specific provision to the contrary" in s. 1(2) of the Criminal Procedure Code mean a specific provision that the Code is to override the special law, and s. 162 of the Criminal Procedure Code does not contain a specific provision that s. 27 of the Indian Evidence Act is not to prevail over it.

*Sybbiah Tevar*, In re<sup>1</sup> and *King-Emperor v. Mayadhar Potthal*,<sup>2</sup> followed.

*Hakam v. The Crown*<sup>3</sup> and *Emperor v. Baldeo*,<sup>4</sup> dissented from.

*Narayana Swami v. Emperor*,<sup>5</sup> referred to.

DACOITY and house-breaking.

ON March 5, 1940, the Sub-Inspector of Police of Yawal, in East Khandesh district, received information at noon that nineteen men of the village of Savkheda were going to commit a dacoity during that night at the house of one Vishnu Bari who was residing at Shirsoli in Jalgaon taluka. He went to Jalgaon and communicated the information to the Sub-Inspector of Police of Jalgaon taluka at nine o'clock in the evening. He gave a written report mentioning the names of the nineteen men who intended to commit the dacoity. The Sub-Inspector of Jalgaon informed the Assistant Superintendent of Police, Jalgaon, about it, and the latter officer ordered the City Sub-Inspector of Police of Jalgaon to render assistance to the Sub-Inspector of Jalgaon taluka.

Accordingly the City Sub-Inspector and the Sub-Inspector of Jalgaon taluka and another Sub-Inspector started at eleven o'clock at night in a bus with ten armed policemen and ten to twelve unarmed constables for Shirsoli, which was about seven miles from Jalgaon. The police party got down from the bus at a distance of two miles from Shirsoli and proceeded thence on foot. When they were about a furlong or so from the village, they heard cries coming from the village. They proceeded in the direction from which the sound of cries came and from the village gate they saw the robbers beating the inmates of the house of the complainant Vishnu Bari. On seeing them the robbers began to pelt them with stones. Some of the stones hit the police, and the City Sub-Inspector thereupon gave orders to fire and seventeen shots were fired. The robbers took to their heels by another route. The police found that the complainant's father had received serious injuries at the hands of the robbers who had taken away the ornaments from the persons of the complainant's mother, wife, and the two wives of his brothers. The robbers had also removed from a box ornaments, sixteen currency notes of Rs. 10 each, and rupees ten in coins. The value of the ornaments and cash came to Rs. 320-13. The complainant and his two brothers were sleeping at their threshing floor which was at some distance from their house. They came to the house after the robbers had decamped. The City Sub-Inspector and another Sub-Inspector with two armed constables pursued the robbers but they escaped. The two Sub-Inspectors reached Savkheda next morning at ten o'clock after passing through the village of Kolnhavi near which the river Tapti was fordable by people coming from Savkheda to Jalgaon. Accused Nos. 6-11 were arrested at Savkheda and taken to Yawal. Accused Nos. 3-5 and 12-18

1 [1939] Mad. 947.

2 (1939) I. L. R. 18 Pat. 450.

3 [1940] Lah. 242, F.B.

4 [1940] All. 396, F.B.

5 (1939) 41 Bom. L. R. 428,

s. c. I. L. R. 18 Pat. 234,

L. R. 66 I. A. 66.

were arrested at Thorgaon while crossing the river Tapti by a Head Constable and brought also to Yawal. The City Sub-Inspector took accused Nos. 3-18 to Jalgaon and handed them over to the Sub-Inspector of Jalgaon. Accused Nos. 1 and 2 were also arrested on March 6, 1940. None of the stolen property was found with the accused.

The accused were placed before the Sub-Divisional Magistrate, First Class, and charged with having committed the offences of dacoity and house-breaking punishable under ss. 395 and 458 of the Indian Penal Code. Accused Nos. 6 and 15 were further charged under s. 75 of the Indian Penal Code as they were previously convicted under s. 375 of the Indian Penal Code.

The Sub-Divisional Magistrate committed the accused for trial to the Court of the Additional Sessions Judge, East Khandesh.

At the trial before the Sessions Court the charge under s. 458, Indian Penal Code, was not pressed by the Assistant Public Prosecutor.

The Additional Sessions Judge convicted accused Nos. 1-6, 8, 10, 12-16, and 18 for committing dacoity. Accused Nos. 4, 5, 8, 12 and 18 were sentenced to four years' rigorous imprisonment. Accused Nos. 1-3, 6, and 13-16 were sentenced to two years' rigorous imprisonment. Accused No. 10, who was seventeen years' old, was sentenced to one year's rigorous imprisonment.

Accused Nos. 7, 9, 11, 17 and 19 were acquitted.

Accused Nos. 1-5, 8, 10, 12, 13-16, and 18 appealed to the High Court against their convictions and sentences.

*R. R. Desai*, (*amicus curiae*), for the accused.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

BEAUMONT C. J. In this case the accused, other than accused No. 6, who were convicted by the Additional Sessions Judge of East Khandesh under s. 395 of the Indian Penal Code, appeal against their convictions. We are indebted to Mr. R. R. Desai, who has represented the accused as *amicus curiae*, for the industry he has devoted to the case and the ability with which he has presented it.

The case has some peculiar features. All the accused, except accused No. 18, are from the village of Savkheda in taluka Yaval, and it appears that on March 5, 1940, the Sub-Inspector of Police of Yaval received information that a dacoity was contemplated that night at the village of Shirsol, taluka Jalgaon. So he went to Jalgaon and reported to the Sub-Inspector of Police there and put in a written report, which is exhibit 8, in which he mentioned the names of the nineteen men who, he was informed, were going to commit the dacoity. The Sub-Inspector of Police of Jalgaon and the City Sub-Inspector of Police of Jalgaon accordingly went to Shirsol with a party of police, some of them armed and some unarmed. Unfortunately they did not arrive at Shirsol until about 11 o'clock at night, when the dacoity was in progress, and instead of blocking the exits from the village, the police seem to have entered the village at one end, and, when the dacoits started to throw stones at them, the police fired, whereupon all the dacoits ran away from the other end of the village. The result was that full advantage of this information, which at any rate was good as to the fact that a dacoity was contemplated, was not taken and no arrests were made. But the police suspecting that the dacoits would

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A. Cr. J. go back to Savkheda, and realizing that for that purpose they would have  
 1940 to cross the river Tapti at one or other of the fordable places at Kolnhavi  
 or Thorgaon, posted police at those places. But the police did not arrive at  
 EMPEROR Kolnhavi until about 6 o'clock in the morning by which time there had been  
 v. ample opportunity for any of the dacoits to get across the river. Accused  
 BIRAM No. 1 and, accused No. 2 were arrested at Jalgaon. Accused Nos. 8 and 10,  
 SAEDAR among the present appellants, were arrested at Savkheda, and the other appel-  
 Beaumont C.] lants were arrested at Thorgaon trying to cross the river. All the arrests were  
 made on the 6th, that is to say, in the early morning after the dacoity. None  
 of the stolen property was recovered, and the evidence against the various  
 accused consists primarily of evidence of identification, and experience shows  
 that evidence of identification of those taking part in dacoities at night is  
 apt to be unreliable.

I think that we shall have to be very critical in dealing with the evidence  
 because of this report which the police had obtained and which mentioned the  
 names of various persons. The learned Government Pleader has made a great  
 effort to induce us to treat exhibit 8, report made by the Sub-Inspector of  
 Police of Yaval to his superior in Jalgaon, mentioning the names of suspects,  
 as a sort of first information, and as affording evidence that the persons named  
 in that report were under suspicion in connection with this dacoity ; but it is  
 quite clear that the report cannot be used for any such purpose. The Sub-  
 Inspector of Police has not in his report disclosed the source of his informa-  
 tion, and the mere fact that he says that somebody told him that certain per-  
 sons were going to commit a dacoity is no evidence at all against those per-  
 sons. If the Sub-Inspector of Police wanted to prove as against the accused  
 the information which he had received, he would be bound to give evidence  
 as to the source of his information, and to call his informant, and that, no  
 doubt for sufficient reasons, he was not prepared to do. All that the report  
 amounts to, therefore, is that the Sub-Inspector of Police did receive informa-  
 tion which caused him to think that there might be a dacoity at Shiroli and  
 which induced him to go to Shiroli with a police party. But his information  
 affords no ground of suspicion whatever against any of the accused, and we  
 have to see whether the evidence against the various accused is sufficient to  
 justify their conviction. The learned Sessions Judge and the assessors were  
 for the most part unanimous in believing the different witnesses, and this  
 Court always differs with reluctance from the unanimous opinion of the trial  
 Judge and the assessors as to the credibility of witnesses. In this case I am  
 prepared to assume that the witnesses who were regarded as honest by the  
 learned Sessions Judge and the assessors were in fact honest ; but as to some  
 of them I think they were not in a position to be certain of the facts to which  
 they deposed. I think that the risk of mistake on their part is in some cases  
 too great to be run.

[His Lordship then discussed the evidence against the accused and found  
 that the evidence against accused Nos. 1-5, 15 and 18 was not sufficiently  
 reliable.]

Mr. Desai has also raised a point of law which is occasioning a good deal  
 of trouble to the High Courts in India, and that is the question whether infor-  
 mation leading to the discovery of a fact and *prima facie* admissible under

s. 27 of the Indian Evidence Act is inadmissible having regard to the terms of s. 162 of the Criminal Procedure Code. That trouble started with the decision of the Privy Council in *Narayana Swami v. Emperor*.<sup>1</sup> In that case their Lordships pointed out that s. 162 of the Code of Criminal Procedure, which prohibits any statement made by any person to a police-officer in the course of an investigation under Chapter XIV from being used as evidence for any purpose, except as mentioned in the section, is wide enough to include a statement made to the police by a person who, either at the time of the statement, was, or afterwards became, an accused; and as far as I know, that view had always been acted upon by this Court. Their Lordships further pointed out that on that reading of s. 162 there would to some extent be a conflict between that section and s. 27 of the Indian Evidence Act, and they observed that the question might arise whether s. 162 *pro tanto* repeals the provisions of s. 27 of the Indian Evidence Act, or whether s. 27 of the Indian Evidence Act is saved by s. 1, sub-s. (2), of the Criminal Procedure Code, and their Lordships left that question open. Since that decision the matter has been considered by four of the High Courts in India. The High Court of Madras (*Subbiah Tevar, In re*)<sup>2</sup> and the High Court of Patna (*King-Emperor v. Mayadhar Pothal*)<sup>3</sup> have taken the view that s. 27 of the Indian Evidence Act is not affected by s. 162 of the Criminal Procedure Code, being saved by s. 1(2). On the other hand, a full bench of the Lahore High Court in *Hakam v. The Crown*<sup>4</sup> by a majority have held that s. 27 of the Indian Evidence Act is *pro tanto* repealed by s. 162 of the Criminal Procedure Code, and the same view has also been taken by a full bench of the Allahabad High Court in *Emperor v. Baldeo*.<sup>5</sup> Having read the various judgments of the other High Courts, some of which extend to a considerable length, I am reluctant to add to the number of judgments on the point; but the lower Courts in this province are entitled to guidance. I prefer the view taken by the High Courts of Madras and Patna to the view taken by the High Courts of Lahore and Allahabad.

Section 1 (2) of the Criminal Procedure Code reads :

"In the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force."

Most, if not all, of the learned Judges agree that s. 27 of the Indian Evidence Act is a special law in force at the date of the passing of the amended s. 162, and that point seems to me beyond question. It is a law applicable to a particular subject within s. 41 of the Indian Penal Code. But the view accepted in Lahore and Allahabad is that s. 162 amounts to a "specific provision to the contrary", because the prohibition therein is expressed in the most clear and emphatic terms. But surely much more than that is required. Section 1(2) enacts a rule of construction to be applied in the interpretation of the Code. That rule is that where there is a conflict between the Code and a special law, the special law is to prevail in the absence of a specific provision to the contrary. But the provision must be to the contrary of the rule of

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1 (1939) 41 Bom. L. R. 428,  
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2 [1939] Mad. 947.

R. 21.

3 (1939) I. L. R. 18 Pat. 450.

4 [1940] Lah. 242, F.B.

5 [1940] All. 396, F.B.

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construction, and not merely of the special law. The section presupposes a conflict, and a conflict is none the less a conflict because it is clear for all to see. Reliance has been placed on the use of the word "specific" rather than "express." I am myself inclined to think that "specific provision" is a stronger expression than "express provision," and means a provision clearly expressed. I do not see how a provision arising by implication only can be said to be specific. But if this is going too far, I am clearly of opinion that the language of the Code giving rise to the implication must at any rate be so directly contradictory to the special law that it can be affirmed with certainty that the legislature intended to override the special law. There is, however, nothing in the language of s. 162 which suggests that the legislature had in mind s. 27 of the Indian Evidence Act. The language of the two sections is quite distinct, and to a large extent the respective subject-matters are not identical. Section 162 deals with all statements made to a police-officer in the course of an investigation; s. 27 of the Indian Evidence Act merely deals with information received from a person accused of an offence in the custody of a police-officer which leads to a discovery. The two sections only overlap in respect of statements made to a police-officer in the course of an inquiry which lead to a discovery. It seems to me impossible to hold that s. 162 contains a specific provision that s. 27 of the Indian Evidence Act is not to prevail over it.

Another argument which appealed to the High Courts of Lahore and Allahabad is based on the history of the two sections. It is said that the legislature must have known when they amended s. 162 in 1923 that originally the subject-matter of s. 27 of the Indian Evidence Act had been included in the Code; that prior to 1893, when the terms of s. 162 were in conflict with s. 27 of the Indian Evidence Act, the latter section was expressly saved from the operation of the former section, and that the Court is bound to assume that the omission to insert in 1923 an express provision saving the operation of s. 27 was deliberate, more particularly as in the section as it existed from 1898 there was an express saving of s. 32 of the Indian Evidence Act. I do not suppose that any one seriously doubts that the omission of the legislature in 1923 to deal with s. 27 in one sense or another was due to the fact that it was not present to the minds of the legislators that the amendment of s. 162 would appreciably affect s. 27; but if the Court must deal with the matter pedantically, one may suggest that the omission to save s. 27 may have been due to a just appreciation by the legislature of the true effect of s. 1(2), and to a reluctance to insert an unnecessary saving clause in respect of s. 27, merely because the legislature of 1898 had inserted such a clause in the case of s. 32. This explanation, if not conspicuous for its probability, seems to me much more probable than the hypothesis that the legislature, realising the conflict between the amended s. 162 and s. 27, and intending to repeal the latter section *pro tanto*, and thereby to alter the law as it had existed for fifty years, nevertheless omitted any mention of s. 27. In my opinion to read s. 162 of the Criminal Procedure Code as overriding s. 27 of the Indian Evidence Act is to ignore the terms of s. 1(2) of the Code.

The point is really not of very much substance in the present case as against the accused whose appeals have been dismissed. But, as I have said, the



lower Courts are entitled to have a lead from this Court on a question which arises so frequently, particularly in dacoity cases, as to the admission of evidence under s. 27 of the Indian Evidence Act. I think that those Courts may safely proceed on the assumption that at present the law has not been altered by anything which the Privy Council said.

In the result, the appeals of accused Nos. 1, 2, 3, 4, 5, 15 and 18 will be allowed and the appeals of accused Nos. 8, 10, 12, 13, 14 and 16 will be dismissed.

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*Order varied.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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1940

December 4.

*Panchnama—Identification parade—Corroboration—Independent evidence.*

A panchnama is merely a record of what a panch sees. The only use to which it can properly be put is that when the panch goes into the witness box and swears to what he saw, the panchnama can be used as a contemporary record to refresh his memory.

If the police want to rely on a panchnama they must call a panch to prove it.

*Emperor v. Rustam Lam<sup>1</sup>, followed.*

A police-officer is not entitled to give evidence of what the panch told him that he saw, and that is what it comes to if a police-officer is allowed to put in the panchnama. A police witness may state that he held a panchnama and offer to produce the record if the accused asks for it, but he cannot bring it on record in his evidence-in-chief. If the police hold a panchnama, and do not offer to call the panch, an inference may be drawn against them from the fact that the panch is not submitted for cross-examination. The putting in of a panchnama without calling the panch is not only an infringement of the rules of evidence against the admission of hearsay evidence, but it is unfair to the accused, because it enables the police to get the advantage of evidence in corroboration without putting that evidence to the test of cross-examination.

*Emperor v. Rustam Lam<sup>1</sup>, referred to.*

#### THEFT.

The complainant Ramdas lived in a house known as Kansara Chawl on Kalkadevi Road in Bombay. He was a dealer in jewellery.

On September 14, 1939, one Nagar a friend of the complainant introduced the accused Mohanlal to him with the view of finding some work for the former and took the accused to the complainant's house. The business proposition did not materialise.

The complainant intended to leave Bombay for Surat for reasons of health. It was therefore arranged between the parties that the accused and one Kodarlal, a relative of the complainant, should live in two back rooms of the

\* Criminal Appeal No. 513 of 1940, from conviction and sentence passed by K. J. Khambata, Presidency

Magistrate, Fourth Court, Bombay.

<sup>1</sup> (1931) 34 Bom. L. R. 267.

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complainant's house during his absence. The complainant locked up the chief rooms of his tenement and went to Surat on September 18, 1939, leaving the accused and Kodarlal in charge of the house and in occupation of the two hind rooms.

The complainant returned to Bombay on October 23, 1939, at 3 p.m., and when he reached his house he found that the accused and Kodarlal had abandoned it and disappeared, that the lock that he had put was broken open, and that some articles were missing from his premises. He informed the police about it on the same day at 7.30 p.m., and was advised by the police not to meddle with his rooms that day. The next day the complainant made a search of his belongings, when he discovered that jewellery worth Rs. 7000 had also disappeared from a secret box in one of the cup-boards.

The police searched in vain for the accused.

On March 1, 1940, the accused voluntarily surrendered himself to the police.

On March 5, 1940, the police held an identification parade, when he was identified by a ghati named Gopal and a locksmith named Hasanali. A panchnama was made of the identification and signed by the panch.

The accused was charged with offences punishable under ss. 454, 380 and 109 of the Indian Penal Code.

At the trial, the investigating police-officer was examined as a witness, when he deposed :—

"On 5. 3. 40 I held an identification parade, at which the locksmith Hasanali and witness Gopal at once identified the accused.

"Panchnama of the identification parade, Ex. E."

Thus, the panchnama went on the record of the case. The panch was not examined as a witness.

Both Gopal and Hasanali were examined as witnesses, when each of them deposed :—

"I identified the accused at a parade."

The trying Magistrate convicted the accused of the offences charged and sentenced him to rigorous imprisonment for six months on each count and to pay a fine of Rs. 1000.

The accused appealed to the High Court.

*M. R. Vidyarthi*, and *S. A. Kher*, for the accused.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

BEAUMONT C. J. This is an appeal by the accused against his conviction under ss. 454 and 380 of the Indian Penal Code by the Presidency Magistrate, Fourth Court, Bombay.

The story of the complainant is that the accused was brought to his flat by a mutual friend on September 14, 1939, and on the 18th the complainant went to Surat, and left the accused and a relation of the complainant named Kodarlal in the flat. Part of the flat was locked up; the rest was left open. The complainant returned to Bombay on October 23, and then found the locks on the doors of the flat and cupboards broken, and some of his goods missing. He went round to the police at once and gave information. He gave a list of the articles which, he said, he had lost, which were articles of no great value, worth about Rs. 50 or Rs. 60 and he stated that he had no

suspicion against anybody. Police Sub-Inspector Harris went round to the flat and found that things were disturbed, and it looked as if there had been house-breaking. The complainant says, and that no doubt is true, that the police asked him not to touch anything because they hoped to find some fingerprints. The next day, the complainant says, after the police allowed him to touch his things, he looked into a secret drawer, and then discovered for the first time that he had lost some pearl necklaces and pearl bangles of the value of over Rs. 7,000. He says that when he went to Surat he left these articles in the secret drawer, and having discovered their loss, he made a supplemental statement to the police. The accused could not be found for some time, and eventually on March 1, 1940, he surrendered to the police, and he is charged with having stolen all these articles.

The learned Magistrate seems to have accepted the whole of the complainant's story, but a good deal of it seems to me to be, on the face of it, absurd. The complainant is a gentleman who has suffered from thieves before, according to his own story, and it is inconceivable that he would go off for a month to Surat, leaving valuable jewels in his flat in some secret drawer, the secret of which could no doubt be discovered by any thief, and with the accused whom, he says, he knew nothing about in occupation of his flat. If he had done so incredibly foolish a thing, I am quite certain that on his return from Surat and on discovering that his flat had been broken into, the first thing he would have done would have been to go to the secret drawer and find out whether the pearls were there. It is absurd to suggest that he never looked into the secret drawer until the next day, and only then discovered the loss of these pearls of very substantial value. I am perfectly certain that the pearls were not lost at all; but, on the other hand, probably somebody did break into the flat. I should think it unlikely that the whole thing was stage-managed, although that is conceivable. There is no doubt that when the police went to the flat, it showed signs of having been broken open.

Now, the evidence against the accused is, first of all, that he was admittedly left in the flat. He says that he remained there for some time. He wrote two letters, which are in evidence, asking the complainant for money to enable him to continue to live in the flat, and as the complainant did not send any money, he says that he left, throwing the key into the flat through a window. At any rate he was at one time in charge of the flat, and the evidence that he committed the house-breaking is that of two witnesses, Gopal, who was a bhaiya employed on the first floor of Kansara Chawl, the complainant's flat being on the third floor, and a locksmith named Hasanali. Gopal says that he had seen the accused and a ghati, who was a servant of the complainant, and whom he had known as a servant of the complainant for seven months previously. He saw these two people removing various articles from the flat, and he was asked by Hasanali, the locksmith, whether these two people were servants of the complainant, because they had asked him to break open certain locks in the flat. Hasanali says that the ghati called him up to the complainant's flat, where was the accused, and they asked him to make keys for some of the locks, but he said that he could not do that, but would break them open, and accordingly, he says, he did break open the locks. Now, if the accused and the ghati got the locks broken open, it is no doubt a fair

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 1940 point out that it is not the usual practice for house-breakers to send for an  
 — expert locksmith to help them in their work. I find it very difficult to sup-  
 EMPEROR pose that, if they were minded to break open the locks, two men would not  
 v. have done it without seeking the assistance of somebody who could afterwards  
 MOHANLAL identify them. But it is obvious that the value of the evidence of these two  
 BABABHAI witnesses, assuming their main story to be true, must depend on their identi-  
 — fication of the accused. So far as Gopal is concerned, his evidence is obviously  
 Beaumont C.J. wrong in respect of the ghati, because the complainant says that he never had  
 a ghati in his employ, and yet Gopal says that he knew him as the employee  
 of the complainant for seven months. It is difficult to see why, if the evi-  
 dence as to the ghati is entirely false, the evidence as to the accused should  
 be accepted as entirely true. There is no such criticism of Hasanali's evidence,  
 but he had not seen the accused before and the evidence of identification of  
 the accused is most unsatisfactory. Deputy Inspector Kale, who was in charge  
 of the case, says that he held an identification parade at which Hasanali and  
 Gopal at once identified the accused, and he then produced a panchnama of  
 the identification parade, which was put in as exhibit E.

Now, this Court pointed out some years ago in *Emperor v. Rustam Lam*<sup>1</sup> that if the police relied on a panchnama, they must call a panch to prove it, and that the practice of Presidency Magistrates in allowing a panchnama to be put in by a police witness was wrong. The object of having panch witnesses is to provide evidence which is independent of the police. In searches under Ch. VII of the Criminal Procedure Code or the City of Bombay Police Act it is necessary to call panchas, but s. 103(2) of the Code provides that they need not be called as witnesses unless they are specially summoned. That does not mean that the panchnama can be used if no panch is called. Apart from searches, it is, of course, not a rule of law or practice that police evidence must be corroborated; but where one is dealing with an identification parade, and where it is of vital consequence to show that the accused was duly identified, it is obviously desirable, as the police recognize themselves, to have some independent evidence that the parade was properly and fairly held, because there is nothing easier than for the police to stage an unfair identification parade, in which the witness is shown the accused before he identifies. I do not suggest that the police often hold unfair identification parades, but it is obviously desirable that there should be independent evidence to show that a parade has been properly held, and Deputy Inspector Kale recognized that in this case and summoned panchas; but if the prosecution wish to prove by independent testimony what happened at the parade, they must call the independent witness. The panchnama is merely a record of what a panch sees, and the only use to which it can properly be put is that when the panch goes into the witness box and swears as to what he saw, the panchnama can be used as a contemporary record to refresh his memory. But a police-officer is not entitled to give evidence of what the panch told him, that he saw, and that is what it comes to if a police-officer is allowed to put in the panchnama. A police witness may state that he held a panchnama and offer to produce

the record if the accused asks for it, but he cannot bring it on record in his evidence-in-chief. If the police hold a panchnama, and do not offer to call the panch, an inference may be drawn against them from the fact that the panch is not submitted for cross-examination. The putting in of a panchnama without calling the panch is not only an infringement of the rules of evidence against the admission of hearsay evidence, but it is unfair to the accused, because it enables the police to get the advantage of evidence in corroboration without putting that evidence to the test of cross-examination. Such cross-examination might show that the panch was nothing but a police agent, and that his evidence is worthless. If the practice of allowing the prosecution to put in a panchnama without calling the panch is still in force despite the decision of this Court, I hope that Magistrates will see that it is stopped.

Having regard to the extreme importance in this case of the identification of the accused by Gopal and Hasanali, and to the fact that evidence on this point was improperly admitted, the appeal must be allowed. I am not prepared to act on the uncorroborated testimony of the police-officer as to what took place at this identification parade, particularly as evidence in corroboration was available and not called.

The accused must, therefore, be acquitted. Fine, if paid, to be refunded.

*Appeal allowed.*

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#### APPELLATE CIVIL.

*Before Mr. Justice N. J. Wadia and Mr. Justice Divatia.*

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*Wanta lands—Amod Thakor—Proprietorship of half of river-beds and soil of roads bounded on one side by wanta lands—Proprietorship of roads, tanks, and waste area within wanta lands—Talukdari wanta, nature of—Bombay Land Revenue Code (Bom. V of 1879), Sec. 37—"Which are not the property of individuals"—"Are hereby declared to be the property of Government"—Interpretation.*

A talukdari wanta in Gujarat is neither an alienated nor an unalienated holding. It is a peculiar estate which continues to be the property of its holder under the British rule as it was in pre-British dynasties from ancient times. It was subjected to legislation from time to time.

A talukdar is neither an inamdar nor an occupant of his lands. His wanta is a freehold and not a leasehold. What was paid formerly as tribute and peshkush as a political levy is now converted into a fixed amount in lump as a revenue payment, but his proprietary right over all the lands comprised in the wanta was affirmed at the commencement of the British rule and has not since been taken away by any legal process.

\* First Appeal No. 99 of 1935, from the decision of C. D. Pandya, First Class Subordinate Judge at

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*The Collector of Ahmedabad v. Samaldas Bechardas*<sup>1</sup> and *Waghela Rajsanji v. Shekh Masludin*,<sup>2</sup> followed.

*Nathuram v. Secretary of State*,<sup>3</sup> not followed.

The existence of a highway or a public road is consistent with the ownership of a private person in the soil.

*Sir John Lade v. Shephard*,<sup>4</sup> *Harrison v. Duke of Rutland*,<sup>5</sup> and *City of London Land Tax Commissioners v. Central London Railway*,<sup>6</sup> followed.

There is a presumption that a highway, or waste lands adjoining thereto, belong to the owners of the soil of the adjoining lands. The site of the road must be presumed to belong to the adjoining proprietors half to one and half to the other up to the middle of the road. Where the property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or the river as the case may be.

*Nihal Chand v. Azmat Ali Khan*,<sup>7</sup> referred to.

Hence, the use of the road by the public for passage as of right is not inconsistent with the proprietorship of a private individual to the soil of the road. A road, therefore, cannot be said to be the property of Government merely because it is used by the public.

The owner of land abutting on a non-navigable river is entitled to the soil in the bed of the river *ad medium filum aquæ*.

*Baban Mayacha v. Nagu Shrivacha*,<sup>8</sup> *Venkata Lakshminarasamma v. The Secretary of State*<sup>9</sup> and *Secretary of State for India v. Bijoy Chand Mahatap*,<sup>10</sup> followed.

The words "which are not the property of individuals" in s. 37 of the Bombay Land Revenue Code, 1879, are not confined in their application to "all lands wherever situated" but also apply to roads, bridges, beds of the sea, lakes, tanks, etc. Similarly, the words "except in so far as any rights of such persons may be established" govern all the previous expressions and not merely lands.

The words "are hereby declared to be the property of Government" in s. 37 of the Code do not take away rights which existed when the section became law, e.g., wanta lands.

*Secretary of State v. Wasudeo*<sup>11</sup> and *Vinayakrao v. The Secretary of State for India*,<sup>12</sup> followed.

*Held*, on the evidence, that the Thakor of Amod is the full and absolute proprietor of half of the river-bed which is bounded on one side by his wanta lands, and of roads up to the middle line where wanta lands abut on them on one side, as also of roads, tanks and other waste areas which are within or bounded by his wanta lands.

The origin and growth of wanta tenure discussed.

SUIT for declaration and injunction.

The plaintiff, Nawab Sardar Narharsingji, was the Thakor of Amod, and his estate or thakarat was descendible according to the rule of lineal primogeniture. He sued for a declaration that he was the full and absolute proprietor of all the roads, tanks and other waste and unoccupied areas situate within the

- 1 (1872) 9 B. H. C. R. 205.
- 2 (1887) L. R. 14 I. A. 89.
- 3 (1929) 32 Bom. L. R. 907.
- 4 (1795) 2 Str. 1004.
- 5 [1893] 1 Q. B. 142, 155.
- 6 [1913] A. C. 364, 371-72.
- 7 (1885) I. L. R. 7 All. 362.

- 8 (1876) I. L. R. 2 Bom. 19, 40.
- 9 (1918) I. L. R. 41 Mad. 840.
- 10 (1918) I. L. R. 46 Cal. 390.
- 11 (1907) I.L.R. 31 Bom. 456, 460, s. c. 9 Bom. L. R. 719.
- 12 (1897) I. L. R. 23 Bom. 39.

limits of his thakarat lands and of the sites of the roads on the boundaries thereof, and also for an injunction perpetually restraining Government (defendant) from interfering with the plaintiff's rights.

The house of the plaintiff was established as long ago as 1266 A.D. when it was an absolute and independent kingdom. It flourished as such till 1750 A.D., when Damaji Gaekwar overran Gujarat and exacted tributes from the Sovereigns of Gujarat. The plaintiff's kingdom came to be gradually reduced to its present size in 1817 A.D., when it became a tributary State under the overlordship of the Peishwas. The State paid Rs. 8,506-8-0 per annum as jama and Rs. 3,000 per every three years as peshkush to the Peishwas. In 1817 A.D. the rights of the Peishwas were finally transferred to the British Government by the treaty of Poona.

On October 23, 1926, the Government of Bombay issued a Resolution, the effect of which was a denial of the plaintiff's rights as claimed.

It ran thus :—

"The Governor in Council is accordingly pleased to declare that the Government recognise that the Thakors of Amod and Kerwada are the hereditary proprietors of those portions of their estates which are on the udhad tenure and as such subject to the payment, as jama under the Gujarat Taluqdars' Act, of udhad jama and peshkush and that, while certain provisions of the Land Revenue Code and other laws are applicable to such portions, their status in respect thereto differs from that of an 'occupant' under the Land Revenue Code...

"The Governor in Council is not prepared to admit the claims of the Thakors to proprietary rights over roads and tanks in their estates, and he regrets therefore that he is unable to accede to this request."

On November 21, 1927, the plaintiff filed a suit for a declaration and injunction.

The defendant contended *inter alia* that the allegation of the plaintiff's ownership to roads, tanks and other waste and unoccupied lands was not correct, and that they vested in public and belonged to Government.

At the hearing the disputes between the parties were confined to 244 items distributed over twenty villages belonging to the plaintiff.

Of these, the Government admitted the plaintiff's claim as to some of the items.

Excepting the admitted items, the trial Court dismissed the plaintiff's claim, observing as follows :—

"Applying the principles of 39 Bom. 625 and 48 Bom. 613 to the present case it is clear that whatever may have been the rights of the plaintiff, if any, before the cession of the territory to the British territory in A.D. 1817, these rights ceased to exist from the moment of the cession to the British Government in A.D. 1817 except in so far as any of his rights have been recognized by the British Government."

The plaintiff appealed to the High Court.

K. M. Munshi, with D. V. Patel, and B. S. Patel, for the appellant.

B. G. Rao, Assistant Government Pleader, for the respondent.

**DIVANIA\*J.** This appeal arises in a suit filed by the appellant, who is the Thakor Saheb of Amod in the District of Broach, against the Secretary of State for India in Council. The reliefs prayed for were a declaration that the plaintiff was the full and absolute proprietor of all the roads, tanks and other waste and unoccupied areas within the limits of his estate, and an in-

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junction restraining the defendant from interfering with his rights.

The grounds on which the reliefs were sought are shortly these :—The talukdari estate of Amod was a very ancient one descendible according to the rule of primogeniture. Once upon a time the Thakor's ancestors held the gadi of Amod as independent kings but afterwards the Mahomedan and Maratha invasions in Gujarat reduced the size of that kingdom and tributes were exacted from the Thakors of Amod. Before 1817, when the British conquered the territories, the Thakors were paying to the Peshwa a tribute called the annual jama, which was fixed at about Rs. 8,506, as well as a triennial payment of Rs. 3,000 as peshkush. By the treaty of Poona in 1817 the Thakor's estate as well as the other parts of Gujarat came under the British rule, and the Thakor made to the British Government the same payment which he did to the former Government. After the introduction of the British rule various surveys were made of the Amod Taluka in Broach. But in all of them the Thakor's lands, which consisted of contiguous blocks of lands in twenty-two villages in the district, were kept intact and the Thakor was admitted to be the sole owner and full proprietor of the whole area of the lands in his possession subject only to the payment of the jama and the peshkush. At no time was it suggested that the roads, tanks and other waste lands in these areas belonged to the Government and the Thakor's proprietary rights over them were not disputed. In 1871 when the Broach Talukdars' Relief Act (XV of 1871) was passed, the Amod estate was put under the management of a Talukdari Settlement Officer, and during that management the first regular survey came to be made. At that time the suit lands had been distributed in three different talukas in the Broach District, and although Government officers tried to assert the rights of the Crown on all the unoccupied areas in the Thakor's estate, those contentions were ultimately given up. After the passing of the Gujarat Talukdars' Act in 1888 a regular detailed survey of all the lands of the Thakor's estate was made and concluded in about 1914. Some time after that, the revenue authorities took steps to cancel the entries in the survey records relating to waste areas in his estate. The plaintiff made several representations to the Government, which appointed a committee and finally decided by a Government Resolution of the Revenue Department dated August 25, 1926, that Government did not admit the plaintiff's claim to the proprietary rights over the roads and tanks in his estate. This Government Resolution, according to the plaint, afforded the cause of action for the present suit for a declaration of the plaintiff's title to roads, tanks and all the waste areas in his estate.

The defendant in his written statement denied the plaintiff's allegations that the suit lands were of the plaintiff's ownership and that they were in his possession or enjoyment. It was contended that the roads and tanks in dispute vested in the public and that all the lands in dispute belonged to the Government. It was further stated that the suit was barred by limitation.

On these pleadings the material issues raised were whether the plaintiff proved that he was the owner of the suit lands except those which were admitted by the defendant; whether the orders passed in the Government Resolution of August 25, 1926, relating to the suit lands were legal and proper; and whether the suit was in time.



Voluminous evidence, oral as well as documentary, has been led by both the parties. Before dealing with the evidence it is necessary to describe the nature of the estate held by the Thakors of Amod. There is no doubt that the Amod gadi was one of the old estates enjoyed by the Thakors of Amod since several centuries. The first authentic record to which we have been referred is the treaty of Surat in 1775 between the East India Company and Raghoba Peshwa of Poona printed in volume VII of Aitchison's Treaties. By art. 9 of this treaty Raghoba Peshwa assigned the revenues of Amod and all its districts, among other territories, to the East India Company for meeting the charges of military forces with which he was to be assisted. Thereupon Raghoba ordered the Zamindar of Amod to pay his revenues to the Company. Thereafter in 1782 by a subsequent treaty the East India Company re-transferred those territories to the Peshwa. Just before the Government of the Peshwa was overthrown, some of the territories belonging to that Government including Amod were transferred by the treaty of Poona in 1817 to the East India Company, and the Thakor once more came under the suzerainty of the East India Company and thereafter of the British Crown. At the date of this transfer the Thakor of Amod was paying a tribute for his lands which were known as the lands of wanta tenure. (For a judicial exposition of this tenure see *Dolasang Bhavsang v. The Collector of Kaira*.<sup>1</sup>) The nature of this tenure is very important for the purpose of deciding the questions involved in this litigation. It is, therefore, necessary to see before proceeding further what exactly is meant by the term "wanta". "Wanta" means a share and a "wantadar" means a sharer. The term was applied to a part of the lands held in absolute proprietorship by old Rajput Chiefs of Gujarat. The Mahomedans, after their invasion, deprived them of all but one-fourth share in their lands. That one-fourth share was allowed to be retained by them in consideration of keeping peace and order in their villages. These lands, which were retained by the former chiefs, became their wanta and continued to remain their absolute property, while the remaining three-fourths share called talpad became the property of the then Government. This proportion of shares, however, was not long preserved. A powerful wantadar would from time to time seize talpad lands and add them to his own wanta; a weak wantadar might lose a part of his wanta by encroachments of the holders of talpad lands; while a needy wantadar might part with his lands by alienation to others. In a majority of cases, the wantadars, or the Thakors as they were called, paid quit rent or salami as it was called to the Government. After the introduction of the British Government some wantadars allowed their wanta lands to be numbered and assessed for the payment of salami under the Summary Settlement Act (VII of 1863), while others continued to make a payment in lump for all their wanta lands. This payment was called udhad jamabandi, i.e. payment of revenue in lump, and the wanta was called udhad salami wanto. It is important to note that wanta is a characteristic of lands and not of the person who holds them. There is a class of landholders in Gujarat who are known from early British times as talukdars (the name seems to have been borrowed from the description of landed proprietors in Upper India who were called talukdars) and the lands

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held by them as such are known as lands of talukdari tenure. According to the Bombay Survey and Settlement Manual, Vol. I, "the leading characteristic of talukdari tenure is that a talukdar's estate is held neither in gift from the Crown (i.e. alienated), nor in occupancy (i.e. unalienated), but with full proprietary rights antedating the advent of the British rule and including the ownership of lands, minerals and trees." This description would also apply to wanta lands, but a talukdar and a wantadar are not convertible terms, as wanta holders are generally but not invariably talukdars. The Thakor of Amod is a wantadar as well as a talukdar. His holdings were originally in one taluka of the Broach District, but later on they were distributed in three talukas of Amod, Jambusar and Wagra of the same District. The total area of the Amod wanta estate is 14,567 acres and thirty-one gunthas for which the Thakor is paying to the Government Rs. 9,451-13-5 as udhad jama with peshkush. The lands in dispute in the suit are roads, tanks, village sites, creeks, river beds and other waste lands, all known as kharaba in the revenue phraseology. They comprise 244 items with a total area of 758 acres and 15 gunthas distributed in twenty-two villages. The largest compact area out of the suit lands is one big survey No. 354 which is sub-divided into 201 numbers and comprises an area of 5711 acres, 22 gunthas.

It is clear that whatever rights the Thakors of Amod might have enjoyed in pre-British days, they would not enjoy them under the British rule unless they were regranted to them after the commencement of the British rule in 1817 : *Secretary of State for India v. Bai Rajbai*<sup>1</sup> and *Vajesingji v. Secretary of State for India*.<sup>2</sup> It is clear on the evidence that the British Government did not recognize the Thakor of Amod as a chief paying tribute and holding his lands under a political tenure. The payment was regarded as of a civil nature, and under the judgment of the civil Court (exhibit No. 40) in 1819 the peshkush paid by the Thakor of Amod was treated as payment of a civil and not of a political nature and therefore enforceable in a civil Court. The status of the Thakor since 1817 can be described as that of a talukdar holding lands from the Government, neither as alienated or unalienated but of a peculiar type by which wanta lands were held in proprietorship for which a lump payment by way of revenue for all the lands was made to the Government. It appears that in 1863 an attempt was made by Government officers to realize this lump payment proportionately on the several lands held by the Thakor in different villages, but it was subsequently given up and the Thakor continued to pay his jama in a fixed lump sum for the whole of his estate. From 1865 the payment of peshkush, which was formerly triennial, was made annual. One important fact may be mentioned here that the lands of the Thakor, which were shown as wanta in the Government records since the advent of the British rule, were in 1867 entered in the revenue records under the heading of "Government lands appertaining to lump jamabandi". The Thakor protested against the change in nomenclature, and requested that they should be shown as wanta. The Government did not grant the Thakor's request but expressly stated that the Thakor's right of ownership of those lands did not stand to suffer thereby (exhibit No. 178).

1 (1915) L. R. 42 I. A. 229, 236,  
S.C. 17 Bom. L. R. 730.

2 (1924) I. L. R. 48 Bom. 613,  
S. C. 26 Bom. L. R. 1143, P.C.

We will now deal with the lands in dispute as they were treated since the British rule in the chronological order. In 1819 there was a survey of the Amod area which at that time included the three villages of Amod, Wadia and Ranipura, by an officer named Monier Williams, and the survey is known by his name. It was a detailed survey of the talpad lands in Amod area, but the wanta lands of the Thakor in Amod and another village named Buva were shown only by their boundaries in what is known as gol mapni or round survey. Exhibit No. 41 is the register prepared according to that survey. The area of the arable as well as non-arable lands of talpad was shown as 1051 kumbhas and 98 malas (100 kumbhas = 95 acres roughly). This area comprises 864 kumbhas and 55 malas arable, and 187 kumbhas and 45 malas non-arable or waste lands. The wanta of the Thakor was shown as 5,300 kumbhas and four malas. The arable and non-arable portions in the wanta were not separately shown, but only the total area was shown as including cultivable lands, village sites, roads, ponds, ditches, hollow lands, etc., and they were all said to form part of the wanta. They were not shown as belonging to the talpad, i.e. to the Government. Some other villages, where the Thakor's wanta lands were also situated, were surveyed in detail. But in Amod and Buva the wanta lands were only indicated by boundaries, and some big roads and kharabas, which came to notice, were mentioned therein (see the deposition of Gordhandas, exhibit 446).

Under s. 5 of Regulation II of 1814 a revenue register known as kayam kharda was required to be kept by the authorities. Exhibits Nos. 43, 44 and 46 are abstracts from these registers for 1829, 1831 and 1832. In 1829 the arable lands in the talpad portion are shown as 887 kumbhas and 96 malas and the talpad waste lands as 176 kumbhas and 46 malas both totalling 1064 kumbhas and 96 malas. The arable and non-arable portions of the wanta were not mentioned separately as was done for talpad or sarkari lands, but the total wanta was shown as 5300 kumbhas and 4 malas, i.e. the same area as appeared in the survey register of 1819. In 1832 the area of wanta lands seems to have increased as it is shown in lump as 6,033 kumbhas and 50 malas including waste lands. The details of the kharaba lands in talpad were given but not of the wanta. The next document is the kharda register of Amod of the year 1852-53. It is an important Government record in which for the first time we have got a detailed statement of all the arable and kharaba lands in the talpad as well as the wanta portions of Amod. Exhibit No. 45 is an extract from that register showing the non-arable lands in the talpad and the wanta. Column 2 contains the description of the lands, and column 3 states whether it is Government land belonging to the village, or wanta land having its assessment fixed in lump. Column 4 contains a description of the purpose for which the land was used in the case of talpad land, while it simply shows the name of the Thakor in the case of wanta lands. Roads in the talpad portions were shown as passage or public passage while roads in wanta are simply mentioned as in the wanta of the Thakor. The total kharaba in the talpad comes to 91 kumbhas and 40½ malas while that in wanta is 1873 kumbhas and 43 malas, which is subsequently corrected as 1846 kumbhas and 35 malas as 27 kumbhas and 8 malas were removed in arable portion. This register is from time to time corrected and made up to

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As stated above, the area of Amod included the villages of Amod, Wadia and Ranipura and only a boundary survey thereof was made in 1819. In 1865 the Thakor requested the survey authorities to make a detailed survey of the same by showing the three villages separately and deducting the kharaba portion of the wanta from its arable portion. Exhibit No. 493 is a reply of the survey officer stating that the survey department was willing to undertake the work if the expenses were paid by the Thakor. But nothing further seems to have been done in the matter.

In the same year the Bombay Survey and Settlement Act (I of 1865) was enacted. Section 4 empowered the Government to direct extension of a survey to any part of the Presidency for the settlement of land revenue and also to record and preserve proprietary and other rights connected with the soil. Under s. 34 the revenue management of an estate not belonging to the Government may be temporarily taken over by the Government. By s. 49 a survey could be extended to alienated villages for defining the village boundaries and for other purposes on the application of the holder. This Act did not strictly apply to wanta lands paying revenue in a fixed lump sum, its object being as stated in the preamble to equalise the assessment of lands. But it appears that in 1871 when the Broach Talukdars' Relief Act (India Act XV of 1871) was passed, the Thakor's estate was placed, and it remained from 1872 to 1896, under the management of a Talukdari Settlement Officer who asked the survey department to undertake a survey of that estate under the Act of 1865. The survey was then being conducted in the Broach District by Mr. Beyts, who was the Superintendent of Survey and Revenue Assessment in Gujarat, and it is called Beyts Survey after him. He enquired into the assessment rates in the Amod taluka and made a long report, an extract of which is exhibit No. 409. He expressed his opinion that roads in the wanta undoubtedly belonged to the State and that it was unnecessary to enquire about it. As to village sites and tanks, he expressed his opinion as follows :—

"My impression is, and I would advance it with much deference, that no desire to oblige these Thakors will be found an adequate motive for a retrogressive step of the nature which the Talukdari Settlement Officer is inclined to support. It is one thing to treat ancient rights that have never been laid aside with tenderness, and another to create antiquated privileges of which no public necessity can be advanced as the excuse.

"The wantadars, big and small, should be told, briefly and firmly, that they as well as their cultivators will not be disturbed in what they possess. The usufruct of the village site, its temple, its field of ease, and tank, belongs undoubtedly to the whole community, and the property is by the common law of the land vested in the Sovereign."

It is pertinent to note here that his view about the village site in the wanta was not accepted by Government which directed that the right or otherwise of the Thakor to village sites should not be in any way taken up or decided by the revenue survey.

Exhibit 516 is the summary and description of the talpad as well as wanta lands at Amod in 1878 according to the revenue survey conducted by Mr. Beyts. Exhibit 512 is a similar summary in the same year of the compact and big wanta survey No. 354 of the Thakor in Amod. The areas of the lands in this and subsequent records are henceforth entered in acres and gunthas. In exhibit No. 516 the total area of the numbered lands (362), both arable and kharaba portions in the talpad and wanta was shown as 6748 acres and 4 gunthas, out of which 287 acres and 16 gunthas is the kharaba of the whole village, the remaining 6460 acres and 20 gunthas being the cultivable portion. To this total of 6748 acres and 4 gunthas is added the area of 370 acres and 28 gunthas which comprised unnumbered waste lands like village sites, creek and roads. The grand total of all the lands is 7118 acres and 32 gunthas. Survey No. 354 of the Thakor is included in the numbered lands shown in exhibit 516, and its total area is separately shown in exhibit 512 as 5711 acres and 22 gunthas out of which 238 acres and 6 gunthas is the kharaba area of that number. This latter area included roads, ponds, wells, creek, cemetery, building site (of the village of Wadia) etc. Thus the roads and other non-arable portions of survey No. 354 were shown not as part of any unnumbered talpad kharaba lands measuring 370 acres and 28 gunthas in exhibit 516 but as part of the wanta owned by the Thakor. Another material point to note is that the village site of 64 acres and 6 gunthas, which is the site of the town of Amod, was shown in 1878 as the unnumbered Government land on the opinion of Mr. Beyts that village sites did not belong to the Thakor. But as stated above, that opinion was not accepted by the Government, and the claim of the Thakor to that village site, which was put forth by him in a petition to the Government in 1883, was at last accepted in 1897, and an endorsement was, therefore, made in exhibit 516 on December 23, 1903, entering the order of the Government to separate that area from the talpad portion and to include it in the Thakor's wanta. Since then the Thakor's right to the village site of Amod town has been accepted, and it is not, therefore, questioned in this suit. The decision of the Government stating the grounds on which the village site was held to be Thakor's is not on the record of this suit. It is, however, referred to in exhibit No. 66 as having been made in 1897. The Thakor's petitions in 1883 and 1894 are on the record as Appendix 2 to a printed memorial to the Government (exhibit 184) in which he pressed his claim for the village site of Amod and contested the Government demand for an additional salami of two annas in a rupee on his lands. Exhibit No. 185 is also the application by the Thakor in which the history of the dispute is given. Both requests were temporarily turned down by a Government Resolution of December 15, 1883, which contained, however, two important statements that the Thakor's title to the waste lands held by his ancestors in 1818 and 1819 must be admitted and the excess lands should be subjected to a quit rent of two annas in a rupee and that the question of the proprietorship of wanta sites was not between Government and the

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 — was levied according to the recommendation of Mr. Beyts and the Thakor's  
 NARHAR- request about which was turned down, was abolished in 1888, and the amount  
 SINGJI levied was refunded to the Thakor (exhibit 182). Thus the opinion of  
 ISHVARISINGJI Mr. Beyts about the ownership of the village site as well as the liability of the  
 v. Thakor to pay additional assessment for the alleged encroachment of Govern-  
 SECRETARY ment lands and their inclusion in the wanta was not accepted, and the Thakor  
 OF STATE was allowed to remain in possession of all his wanta lands held by him at that  
 — time without any addition in his udhad jamabandi. The same exhibit in  
 Divatia J. Appendix 4 contains an order by the Collector in 1885 in a dispute about the  
 — ownership of a road in the wanta. It was held that the road belonged to the  
 Thakor who could close it altogether if he liked.

We now come to two enactments which have a material bearing on the questions before us. In 1879, the previous laws relating to the land revenue administration were codified in the Bombay Land Revenue Code, and in 1888 the Gujarat Talukdars' Act was passed for the revenue administration of the estates held by talukdars in Gujarat. The term "talukdar" was described as including, among other persons, a Thakor, and it was further described to include any class of holders of unalienated estates upon which the land revenue is fixed by a lump assessment to whom the Government extends the provisions of part II of the Act. That part in s. 4 authorised the Government to direct a revenue or a revised revenue survey of any talukdari estate under the provisions of the Bombay Land Revenue Code applicable to such surveys. Section 5 authorised the preparation by the survey officer of a settlement register containing several specified particulars. Under ss. 6 and 7 disputes concerning matters to be entered in the settlement register were to be determined by the survey officer. The register was to be corrected from time to time by that officer or the Collector, but no order or decision by the survey officer or Collector was conclusive in a civil suit between the parties. Under s. 8 no suit lay against the Government to set aside any decision or order of the survey officer or Collector. Then, by s. 33 certain sections of the Bombay Land Revenue Code were excluded from application to an estate to which this Act applied. Section 37 of the Bombay Land Revenue Code is not one of the excluded sections, and it, therefore, applies, and is mainly relied on by the defendant in this suit. The word "talukdar" was to be substituted for the word "occupant", and the words "talukdari holding" for the word "occupancy" in the Bombay Land Revenue Code in so far as it applied to talukdari estates.

To resume the thread of the narrative, a detailed crop register (pahani patrak) of cultivated as well as uncultivated lands of the Thakor's estate in Amod was prepared in 1886-90 when it was under the management of the Talukdari Settlement Officer. It was not prepared by the Government Officers but by the officers of the estate. It is exhibit 160 and it contains a description of the nature of the lands, their area, names of tenants, and the nature of the crops. The area of the cultivated and waste portions of each number is separately given. The cultivated portion is described as either darbari, i.e. belonging to the Thakor, or inami, i.e. given to a person in gift

by the Thakor. The uncultivated portion is described as waste land in column 4. At the end of the register all the roads situated in the wanta portion were described with their area. Exhibits 168 and 172 are similar registers for the other two villages of Wadia and Ranipura. Between 1898 and 1904 the survey department conducted a revision survey of Government lands in which the old measurements were mostly confirmed. In 1904 there was correspondence (exhibit 559) between the Thakor and the Mamlatdar of Amod about a road through the Thakor's wanta land from the town of Amod to the burning ground outside. The Mamlatdar thanked the Thakor for giving his thirty feet land for the road and assured him that when the road was diverted and the land fell into disuse, the Thakor would have the right over the same. It stated further that so long as the road existed, it would be used for public purposes and there should be no obstruction from the Thakor in the thirty feet road. In 1911, 2 acres and 38 gunthas out of the roads of the wanta in the Thakor's survey No. 354 were acquired for constructing a railway and compensation at the rate of Rs. 160 per acre was given to him (exhibit 173). Witness Gordhandas (exhibit 446) speaks of the area acquired as gochar or pasture land, but exhibit 173 describes it as a part of road. In the same year the Government granted the Thakor's request to separate the villages of Wadia and Ranipura from the Amod area, and since then they are shown separately from Amod.

In 1912, the survey department began the preparation of a detailed survey of the Thakor's estate under the provisions of s. 4 of the Gujarat Talukdars' Act for the purpose of compilation of the settlement register. The Thakor was unwilling to have his estate surveyed as he was afraid that if his wanta measured more than what it was in the survey of 1874, he would be deprived of the excess, but the Survey Settlement Officer assured him that he would not be deprived of any excess over the recorded area (exhibit 424). Soon after the survey began, the question arose as to how the roads and tanks in the wantas of the talukdars were to be shown. The Assistant Survey Settlement Officer, Khan Bahadur P. R. Mehta, in his letter of April 26, 1913, (exhibit 71), expressed his opinion thus:—In the previous kayam kharda the tanks were shown at the end of the general summary of the village lands and, therefore, they appeared as Government unassessed unalienated lands. However, small tanks when they are situated in the middle of the wantas or do not adjoin unalienated lands were the property of the wantadars and should be shown as such. As to roads, he divided them in three classes, (a) a small road beginning and ending in wanta, (b) a public road passing from one village to another, and (c) a road running on the boundary of a wanta. He was of opinion that the roads of class (a) should be included in the wanta. The other roads should not be included but the trees growing on half of these roads on the wanta side should be shown as the property of the wantadars because of the past practice. Roads passing through wantas should not be shown as of wantadars as otherwise they would obstruct and try to close them. In the next year, registers known as Jamabandi Feisal Patrahs for Wadia, Ranipura and the village site of Amod were prepared (exhibits 208 to 211). The settlement registers were not ready for nearly ten years, and were completed in 1923. Exhibit 395 is the settlement register pertaining

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to the whole area comprised in the big survey No. 354 which included Wadia, Ranipura and Amod. In the Wadia register 1726 acres and 34 gunthas and 44 acres and 23 gunthas were shown as darbari, i.e. Thakor's, arable and kharaba lands, respectively, while the village site (16 acres and 8 gunthas), river (93 acres and 4 gunthas) and roads (50 acres and 22 gunthas) were not shown as darbari. In the Ranipura register 830 acres and 32 gunthas and 8 acres and 34 gunthas were shown as darbari arable and kharaba lands, while the village site (4 acres and 17 gunthas), (river 29 acres and 11 gunthas), small roads (36 acres and 22 gunthas) and big roads (10 acres and 29 gunthas) were not shown as darbari. Lastly in the Amod register 1631 acres and 13 gunthas and 113 acres and 13 gunthas were shown as darbari arable and kharaba lands, and the village site (63 acres and 35 gunthas), creek called Batrisi Khadi (13 acres and 5 gunthas) and roads (36 acres and 33 gunthas) were not shown as darbari. It is not explained why the village site of Amod, which was held to be of the Thakor's proprietorship in 1897, was not shown as darbari.

In the meanwhile, the Settlement Commissioner started correspondence at the end of 1922 for re-opening the question about the ownership of the roads in wantas (exhibit 73.) He questioned Khan Bahadur Mehta's opinion about the roads in class (a) being regarded as the property of the Thakor. In the Commissioner's opinion when a road was used by the public for the prescribed term of years, the right of the public became indefeasible. That was also, according to him, the effect of s. 37 of the Bombay Land Revenue Code, where the word "Government" was used as equivalent to the public. So that a public road vested in the Government as trustee for the public. He did not think it necessary to consider whether it was or was not private property at some period in the past. In his opinion all roads used by the public in the wanta should be shown as Government property. As to trees standing on these roads also there was no reason why they should not belong to Government if the roads did. The Revenue Commissioner, N. D., accepted this opinion and cancelled Khan Bahadur Mehta's directions about the roads of class (a) and the trees (exhibit 70). Thereafter, the Collector reported that Khan Bahadur Mehta's directions about the tanks should also be cancelled on the same grounds as those about the trees (except in Amod) and that the previous order of his predecessor in 1915 about the trees be also cancelled. The Commissioner accepted that view and directed that tanks should also be shown as Government property (exhibit 69). The Thakor and other talukdars thereupon raised an agitation against these orders and ultimately Government published a Resolution in 1923 appointing a Committee to consider whether the entries made in village forms lately introduced were detrimental to the rights of talukdars (exhibit 75). The Commissioner, N. D., however, in 1924 recommended to the Government to accept the Collector's view that roads which were not through roads but merely afforded access to none but wanta lands along with the trees thereon should be regarded as the talukdar's. The rest must be held to be Government property (exhibit 74). Finally, on August 25, 1926, Government issued a Resolution giving its decision on the questions before us to this effect :—The Government recognized the Thakor of Amod as the hereditary proprietor of those portions of his wanta estates which were



on the udhad tenure and as such subject to the payment of udhad jama and peshkush, but the Government was not prepared to admit the claims of the Thakor to proprietary rights over roads and tanks in his estate. It is this Resolution which is stated by the plaintiff Thakor as his cause of action in the present suit for a declaration and injunction against the Government.

Before beginning the discussion of the evidence it is necessary to deal with the provisions of law which bear on it. The main point of law arising in this suit is the application of s. 37 of the Bombay Land Revenue Code to the suit lands. Sub-section (1) of that section runs thus :—

“ All public roads, lanes and paths, the bridges, ditches, dikes, and fences, on, or beside, the same, the bed of the sea and of harbours and creeks below high-water-mark, and of rivers, streams, nallas, lakes, and tanks, and all canals, and water-courses, and all standing and flowing water, and all lands wherever situated, which are not the property of individuals, or of aggregate of persons legally capable of holding property, and except in so far as any rights of such persons may be established in or over the same, and except as may be otherwise provided in any law for the time being in force are and are hereby declared to be, with all rights in or over the same, or appertaining thereto, the property of Government ; and it shall be lawful for the Collector, subject to the orders of the Commissioner, to dispose of them in such manner as he may deem fit, or as may be authorized by general rules sanctioned by Government, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting.”

The plaintiff's contention is that the suit lands being his property and his rights over it having been established since ancient times, it is covered by the exception in that section. On the other hand, the defendant's contention is that whatever lands are used by the public are Government lands under s. 37, and that the exception does not apply to such lands. It is necessary, therefore, to construe that section, and in doing so, it would be useful to trace the history of its enactment. The earliest enactment in Bombay with regard to waste lands was s. 59 of Regulation I of 1808 which refers to the practice of making general grants to individuals for bringing waste lands into cultivation. This provision, however, applied to the Island of Salsette alone. Subsequent to that, there was an enactment of a general nature in Bombay Regulation III of 1814. The preamble to that Regulation stated, among other things, that “ the Ruling Power of the provinces now subject to the Government of Bombay has, in conformity to the ancient usages of the country, reserved to itself, and has exercised the actual proprietary right of lands of every description.” Previous to that there was an enactment in the Madras Presidency, Regulation XXXI of 1802, the preamble of which was to the same effect as this Bombay Regulation. The preamble in the Madras Regulation was discussed by the Privy Council in *The Collector of Trichinopoly v. Lekkamani*.<sup>1</sup> It was observed (p. 309) :—

“ The object of the Reg. XXXI of 1802 was merely the protection of the revenue from invalid lakiraj grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue ; it was not intended to confer upon Government any title which did not then exist.”

The preamble in the Bombay Regulation has been considered in two cases of our High Court. Referring to this preamble it has been observed in *The*

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<sup>1</sup> (1874) L. R. 1 I. A. 282.

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"The correctness of this statement is very questionable. The reports of Elphinstone, Chaplin, Grant Duff, Robertson, and others, indicate very clearly that a large portion of the ryots, and especially the mirasdars, are, according to the ancient usage of the country, proprietors of their estates, subject to the payment of a fixed land-tax to Government. The subject will be found discussed at considerable length in *Sooryabhan v. Bukajee and another*.<sup>2</sup> But, at any rate, the statement in the preamble of Regulation III of 1814 is consistent with the alienation of its proprietary rights by Government, or with its recognition of the existence of proprietary rights in individuals, in particular instances, whether before or subsequently to the Regulation."

In *Babon Mayacha v. Nagu Shrivacha*,<sup>3</sup> the history of legislation about Government rights over waste lands in the Bombay Presidency is given at pages 37-39, and reference is made to this preamble as a more ambitious assertion of the proprietary right of the State in lands. It is held that that preamble should receive the same construction as that given to the similar preamble in Madras Regulation XXXI of 1802 by the Privy Council in *The Collector of Trichinopoly v. Lekkamani*,<sup>4</sup> and the opinion is expressed that "the more moderate proposition (that the proprietary right to waste land is *prima facie* vested in Government), contained or implied in Bombay Regulations I of 1808, s. 59, and XVII of 1827, s. 7, is reasonable and founded upon truth."

The next provision is contained in s. 7 of Bombay Regulation XVII of 1827. It is as follows :—

"Uncultivated land not exempt from assessment may be disposed of, with the Collector's sanction, for the benefit of the revenue.

"Provided, however, that such disposal shall not in any way affect the claim to preference, the right of occupation, or any other rights which individuals may have over such land, as the same may, when contested, be established in a Court of justice."

Thereafter in 1868, so far as the lands in towns and cities were concerned, it was provided by s. 11 of the City Survey Act (IV of 1868) that "in towns and cities all roads and lanes, and all open spaces not in the occupation of any person, and not proved to be the property of any person, vest in Government."

Lastly comes s. 37 of the Bombay Land Revenue Code in 1879 which embodies almost the same idea in different language. It has been contended on behalf of the defendant that the words "which are not the property of individuals" etc. refer only to "all lands wherever situated", and have no reference to all the previous expressions. That construction seems to us to be erroneous. The words "which are not the property of individuals" etc. would, in our opinion, apply to roads, bridges, beds of the sea, lakes, tanks etc. We do not think that the Legislature could have intended that only lands are capable of being owned by individuals and not roads, bridges, ditches, nallas, lakes, tanks, canals etc. The words "except in so far as any rights of such persons may be established" will also similarly govern all the previous expressions and not merely lands. It is next contended, however, that in any

1 (1876) I. L. R. 1 Bom. 352.

2 (1855) 2 Morris 189.

3 (1876) I. L. R. 2 Bom. 19.

4 (1874) L. R. 1 I. A. 282.

case the words "which are not the property of individuals" etc. do not apply to the opening words of the section, viz., "All public roads, lanes and paths," because the adjective "public" would be inconsistent with private ownership in them. This contention is urged on the basis that roads etc. which are used by the public must be taken to be Government property. But that construction, in our opinion, is based on the erroneous view that there cannot be any public right over private property.

That the existence of a highway or a public road is consistent with the ownership of a private person in the soil can be deduced from the English as well as the Indian law. It is held in *Sir John Lede v. Shepherd*<sup>1</sup> that by setting out a highway the owner does not part with the property of the soil. In *Harrison v. Duke of Rutland*<sup>2</sup> it is held as follows (p. 155) :—

"The soil of a highway belongs prima facie to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side ad medium filum of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions."

See also *City of London Land Tax Commissioners v. Central London Railway*.<sup>3</sup> It is observed in The Law relating to Highways by Glen at page 30 :—

"The owner of the land who dedicates part of it as a public way may enjoy all rights not inconsistent with the dedication."

For distinction between a right of easement and the ownership of a highway see Pratt and Mackenzie's Law of Highways, 18th Edn., p. 2. The law is also summarized in volume XVI of Halsbury's Laws of England, Hailsham Edition, at pages 240-241, paragraphs 290-291, as follows :—

"The public right in a highway being a right of passage only, an owner who expressly dedicates, or is presumed to have dedicated, land as a public highway retains at common law his property in the soil, and can transfer it by conveyance or lease to others.

"There is a general presumption that the owner of land of whatever tenure adjoining a highway is owner also of the soil of one half of the highway, and a similar presumption arises in the case of a private or occupation road."

Under the Indian law also there is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land [*Nihal Chand v. Azmat Ali Khan*.<sup>4</sup>] The site of the road must be presumed to belong to the adjoining proprietors half to one and half to the other up to the middle of the road. Where the property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or the river, as the case may be.

It would follow, therefore, that the use of the road by the public for passage as of right is not inconsistent with the proprietorship of a private individual to the soil of road, and that, therefore, a road cannot be said to be the property of the Government because it is used by the public. Moreover, s. 37 uses the words "are hereby declared to be the property of Government." This ex-

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1 (1795) 2 Str. 1004.

2 [1893] 1 Q. B. 142.

3 [1913] A. C. 364, 371-72.

4 (1885) 11 L. R. 7 All. 362.

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pression is construed in *Secretary of State v. Wasudeo*<sup>1</sup> and the relevant remarks are as follows (pp. 460-61) :—

"But it was said that section 37 of the Land Revenue Code was a bar to the right claimed by the respondents. That section, however, has been held by this Court in *Hanmantrav v. The Secretary of State for India*<sup>2</sup> and in *Surannanna v. Secretary of State for India*<sup>3</sup> not to take away rights which existed when it became law. No doubt the words in the section are 'are and are hereby declared to be the property of Government;' and there are authorities, according to which, in the case of a law which is in its nature declaratory, 'the argument that it must not be construed so as to take away previous rights is not applicable.' See the judgment of Pollock, C. B., in *Attorney-General v. Theobald*<sup>4</sup> citing *Att.-Gen. v. Marquis of Hertford*.<sup>5</sup> But in *Harding v. Commissioners of Stamp for Queensland*<sup>6</sup> the Judicial Committee of the Privy Council, in dealing with the argument that the expression 'it is declared' in an enactment is *prima facie* retrospective, observed that 'the use of the expression "it is declared" to introduce new rules of law is not incorrect, and is far from uncommon. The nature of the Act must be determined from its provisions.' Section 37 itself provides that the ownership of Government, thereby declared, is subject 'to the rights of individuals legally existing.' Before the Land Revenue Code came into force, the law relating to the ownership of such lands was presumably the common law, according to which, 'where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case or book of authority to shew that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake' (*Per* Lord Blackburn in *Bristow v. Cormican*)<sup>7</sup>. . . Such appropriation to the Khots of the soil must be held to have been made when they were constituted hereditary farmers of *the whole village*, with the right to bring into cultivation all waste or uncultivated land in the village. Section 37 of the Land Revenue Code declares that Government are *the owners* of such lands. So they had been before that section became law, and so they are now. But that is not decisive of the right now claimed by Government so as to deprive the respondent Khots of the right acquired by them in virtue of the khotship to cultivate the lands."

In our opinion, these remarks would apply with greater force to the wanted lands of the plaintiff. In this connection we may lastly refer to a decision of our Court in *Vinayakrao v. The Secretary of State for India*,<sup>8</sup> which is useful for two purposes, namely, the interpretation of s. 37 and the effect of a survey on title to lands. The dispute there was, among other things, about two plots of land, which were part of a village granted in inam to the inamdar. At the time when the village was surveyed, those plots were not given survey numbers, and the lower Court held that they had become part of the village site and belonged to the Government. It was held that s. 61 of the Bombay Land Revenue Code did not empower Government to confiscate any land belonging to an inamdar and confer it on another person, and the mere omission to number a land could not convert it into a village site or take away any existing rights. It was observed by Ranade J. (p. 45) :—

1 (1907) I. L. R. 31 Bom. 456,  
s. c. 9 Bom. L. R. 719.

2 (1900) I. L. R. 25 Bom. 287, 299,  
s. c. 2 Bom. L. R. 111

3 (1900) I. L. R. 24 Bom. 435,  
s. c. 2 Bom. L. R. 261.

4 (1890) 24 Q. B. D. 557, 559.

5 (1849) 3 Ex 670.

6 [1898] A. C. 769, 775.

7 (1878) 3 App. Cas. 641, 666.

8 (1897) I. L. R. 23 Bom. 39.

"If at a survey certain lands are not numbered or assessed by reason of their being kharab, it does not follow that the ownership of such land is thereby injuriously affected or curtailed. Numbering or surveying do not by themselves create or destroy rights."

On similar grounds it was held that the bed of a stream in the village also belonged to the inamdar and that the owners of land on both sides were proprietors of the bed of the stream. Parsons J. observed (p. 44) :—

"section 37 deals only with what is not the property of individuals, and can have no application to the bed of a rivulet which flows through the land of any individual, for it would be the property of that individual who owned the land upon its banks."

This decision has an important bearing on the questions involved in this appeal, as the lower Court has based its finding on the entries in the various survey and revenue registers and held that the roads, tanks, etc. in dispute did not belong to the plaintiff, as the survey officers had not given them survey numbers at the various surveys and thereby decided that they did not belong to the plaintiff's estate.

We will now deal with the appreciation of the evidence by the lower Court and the reasons given by it for holding that the plaintiff is not entitled to the declaration sought except as to the items admitted by the defendant.

The learned Judge below seems to be of the opinion that the British Government never accepted the title of the Thakors to the lands in suit from the beginning. He observes that from 1819 the Bombay Government refused to recognize the alleged proprietary rights of the plaintiff's ancestors and their claims as tributary chiefs. That is no doubt true with regard to the Thakor's status as a tributary chief, but there is nothing to show that the Government from the beginning refused to recognize the Thakor as proprietor of all the lands contained in his wanta in the various villages in the Broach District. According to the learned Judge, the fact that the wanta portion of Amod was measured by a round survey only in 1819 by Monier Williams, whereas the rest of the lands at Amod were measured by a detailed survey did not show that the Thakor's title to the wanta was accepted. It is true that that survey was not meant to determine title to any estate. In fact it was not conducted under any legal enactment. But the fact remains that the lands in dispute were shown as forming part of the wanta lands and were comprised in the total area of 5,300 kumbhas and 4 malas forming the wanta portion. It is the plaintiff's case that in all subsequent surveys they have been continued to be shown as part of the wanta although the area of the wanta has somewhat varied from time to time, and that, therefore, the title which his ancestors had from the beginning over them had not been legally taken away by the Government at any time. Exhibit 41 does not say, either expressly or impliedly, that there was any refusal by the Government to recognize the Thakor's title to these lands. The learned Judge further observes that if the plaintiff had been recognized as a tributary chief, his lands in other villages except Amod and Butva would not have been surveyed in detail in 1819. But the plaintiff's claim in the present suit is not based upon his status as a tributary chief. It is admitted that his ancestors ceased to be tributary chiefs holding a political tenure under the British Crown, whatever might have been their

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 1940 27 of Bombay Regulation I of 1823 which was enacted for defining the cir-  
 — cumstances that constitute a title to hold land exempt, either wholly or par-  
 NARHAR- tially, from the payment of revenue, and prescribing the rules of limitation  
 SINGJI in regard to actions of various descriptions. It is provided in cl. (2) of s. 3  
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‘ Whenever land has been enjoyed, but not under a deed or writing, wholly or partially exempt from the payment of the public revenue, for more than sixty years in succession by any person, his heirs or others, deriving right from him, such enjoyment, provided it has been under some tenure recognised by the custom of the country in which the land is situated; and more particularly under any of those specified in appendix A (wanta is the first to be included in the list of tenures in appendix A), shall be considered as a sufficient title to the exemption.”

Then it is provided in cl. (3) that—

“ enjoyment of such exemption for twelve years, antecedent to the date when the territory in which the land is situated, came into the possession of the British Government, shall be considered as equivalent to enjoyment for 60 years, in terms of the preceding clause.”

Section 27 provides that—

“ Whenever lands, houses, hereditary offices or other immoveable property, have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him, his heirs, or others deriving right from him, such possession shall be received as proof of a sufficient right of property in the same.”

These provisions were reaffirmed in the subsequent Regulations V and XVII of 1827. Relying upon them the plaintiff contends that all the suit lands being part of the wanta, which was in existence before the Regulation of 1823 came into force, and the wanta having been enjoyed by him from ancient times, his title to all the lands included in the wanta has been affirmed by this Regulation, and since then he has not been legally deprived of his rights to these lands. It may be stated here that the plaintiff accepts the position that if the public has acquired any rights over the suit lands by long user, his rights in them will be subject to the rights in favour of the public, but that, subject to these rights of the public, he continues to be the proprietor of the lands.

The learned Judge below refers to the various surveys from time to time as not supporting the plaintiff's case, and he principally relies upon the remarks of Mr. Beyts in exhibit 409 as clearly repudiating the Thakor's right to the ownership of roads, tanks, etc. But as remarked above, these were only Mr. Beyts's opinions as opposed in some respects to the opinion of the Talukdari Settlement Officer, and his opinions were not wholly accepted by the Government. There is nothing to show that acting upon his opinion the Government decided that the suit lands did not belong to the Thakor. As we have seen above, exhibit 45, which is a Government record of the lands from 1852 to 1874, showed all the wanta lands in detail as of the Thakor. A clear distinction is there made with regard to roads, tanks, etc. in the talpad and in the wanta, and the latter are shown in the name of the Thakor.

The lower Court further relies upon the expression “ Government lump Jamabandi ” as it appears in various Government records against the plaintiff's lands, but there again, as has been shown above, when the plaintiff pro-

tested against the use of that expression, it was pointed out to him that it did not imply that any part of the wanta was taken as Government property. On the other hand, the payment of compensation to the Thakor for acquisition of parts of a road in the wanta in 1871 and in 1911 would suggest that the Thakor's title to the roads in the wanta was not disputed by the Government.

Then the learned Judge relies upon the fact that certain roads in the wanta had been constructed, and some repaired, by the local board from 1908 to 1923 under the Local Boards Act. It is true that some of the roads in the wanta were constructed by the local board while some others were only repaired. The evidence does not show the circumstances in which these roads came to be constructed by the local board, but the plaintiff has admitted before us that the roads constructed by the local board in his wanta would now belong to the local board under s. 48 of the Bombay Local Boards Act of 1923 which says that every road, building or other work constructed by a local board shall vest in such local board. But as to the roads which were only repaired by the local board, there is nothing in the Act to vest the ownership of them in the local board. Such power to repair a private road might be implied in s. 50, cl. (n), of that Act.

Then the learned Judge relies upon the contents of a letter, exhibit 493, by the Assistant Survey Superintendent to the plaintiff's ancestors as showing that the latter did not regard kharabas as their property but were anxious to have them separately stated and deducted and to have their estate surveyed. The interpretation put by the learned Judge on this letter is erroneous. What the Thakor really desired was that a survey might be introduced in his villages and the arable lands and the kharabas may be separately shown therein. What he meant was that the former survey was only a *round survey* and in the new survey the kharaba was to be deducted and separately shown from the arable portion. The letter, exhibit 559 of 1904, has also been erroneously interpreted by the learned Judge. It does not mean that the plaintiff had lost all his right to that road in that year. On the other hand, the letter assures the Thakor that when the road was diverted and the land fell into disuse, the Thakor would have the right over the same, and so long as the road existed, it would be used for public purposes. That rather supports the plaintiff's case than the defendant's.

The learned Judge seems to place much reliance upon exhibit 160 and the other pahani patraks of the Thakor's villages for 1886-87. He treats them as if they were a record of the Government. But that is not so. They were prepared by the officers of the plaintiff's estate which was at that time under the management of the Talukdari Settlement Officer. Various lands there were shown under the column "Darbari or Inami" which meant belonging to the Darbar, i.e. the Thakor, or inami, i.e. given in gift by the Thakor to another person. In the principal register, exhibit 160, which relates mainly to the lands comprised in the big wanta survey No. 354, the area of the cultivated and uncultivated portion of each survey number is separately shown at the end of the register. There is a summary of the various roads, creek, and river bed in that wanta. Simply because of the fact that the word "Darbari" is not shown in column 4 against these roads etc., the learned Judge comes to the conclusion that they were not meant to be shown as belonging to the

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plaintiff's estate. But that is really not so. At the end of the summary, the area of these roads, creeks, etc. is added up as 137 acres and 10 gunthas, and that area is again added to the total area of the lands in that survey number and the grand total is stated as 3904 acres and 34 gunthas, which was the total area of all the lands including the kharaba portions in survey No. 354. There is nothing to show, therefore, that the roads, creek, etc. were admitted as belonging to the Government in this register. On the other hand, the creek known as "Batrisi creek" covering an area of 17 acres and 7 gunthas comprised in this summary has been now admitted before us by the defendant as belonging to the plaintiff.

The learned Judge concludes his appreciation of the evidence as follows (paragraph 76 of the judgment) :—

"It is clear from all these considerations that the plaintiff has no inherent right to the ownership of the suit items either as a tributary chief of the pre-British period or as holder of the Udhad-Jamabandhi wanta, nor have any such extraordinary rights been recognized by the British Government at the time of the survey by Mr. Monier Williams in A.D. 1819 or by Mr. Beyts in 1864-74 or in the subsequent surveys referred to by plaintiff in his plaint."

In our opinion, the learned Judge has appreciated the evidence from a wrong stand-point. It is not the question whether the various survey officers have recognized the Thakor's right to the suit lands. The real question is whether that right has ever been definitely negatived by any decision of the Government. The opinions and decisions of the survey and revenue officers as well as the entries in the survey records have, as has been shown before, no legal force as decisions of the Government negativing the Thakor's right. The really important point is that the suit lands have been included in the wanta portions as described in the revenue and survey records. It was not till the time of the detailed survey that the question arose as to how the roads, tanks, etc. were to be shown in the settlement registers. Even then Khan Bahadur Mehta was of the opinion that small roads beginning and ending in the wanta should be included in the wanta, and that small tanks situated in the middle of the wanta and not adjoining unalienated lands were also the property of the wantadars. He was also of the opinion that the trees growing on half of the road on the wanta side were the property of the wantadars. In this practice he was supported by the Collector of Broach, but his opinion was later on overruled by the Commissioner, N. D., and it was then that the matter was taken up by the Government which finally issued a Government Resolution negativing the Thakor's right to the roads and tanks in the wanta. That shows that there was difference of opinion even among Government officers themselves as to whether the suit lands should be regarded as part of the wanta or not, and ultimately the view prevailed that those portions of the wanta which were used by the public should be held as belonging to the Government. But it left out of account the nature of the right which the wanta-holders claimed in their lands from very ancient times and which was accepted by the British Government.

It is necessary, therefore, to examine the legal basis of the right of the wanta-holders since the advent of the British rule. •A talukdari wanta in Gujarat is neither an alienated nor an unalienated holding. It is a



peculiar estate which continues to be the property of its holder under the British rule as it was in pre-British dynasties from ancient times. It was subjected to legislation from time to time. Bombay Regulation I of 1823 recognized the holder of the wanta as having a legal right to the lands comprised therein on payment of the fixed amount of revenue, and under s. 27 of that Regulation the possession of these wanta lands for thirty years was regarded as proof of a sufficient right of property in the same. This would show that the British Government recognized the wanta tenure and the right of its holder to the lands included in it. These land-holders found themselves in very embarrassed circumstances by sales and mortgages of their estates, and at one time their condition became so grave, especially in the Ahmedabad District, that Government in order to save them from extinction thought fit to give legislative protection to this class of very old landed proprietors who had passed through many vicissitudes partly on account of successive conquests of their territories but mostly on account of their own improvidence. The enactment of the Ahmedabad Talukdars Act (Bom. VI of 1862) was the first attempt by the British Government to ameliorate their condition by taking over for a limited period the management of their indebted estates, exempting the holders of such estates from arrests, providing for a scheme for the settlement of their debts and disabling them from incurring fresh debts binding on their estates during the management. It was probably thought that such legislative interference with a class of persons who were really absolute proprietors of their estates could not be justified unless they were described as having a lesser interest than proprietorship, and the preamble of the Act, therefore, began with stating that "the Talukdari estates are now only held on leasehold tenure determinable at the pleasure of Government." This recital, besides being incorrect, was inconsistent with the provisions of the Act itself, especially s. 20, under which they were meant to be restored to their position of absolute proprietors of their estates on the termination of the management. An interesting account of how they were purposely described as lease-holders for the purpose of saving them from the clutches of their creditors and thereafter to re-invest them with their real proprietary rights is to be found at pages 11 to 15 of Peile's Account of the Talookdars in the Ahmedabad Zillah (Selection No. CVI—New Series). This part of the preamble was doubted by our High Court in *The Collector of Ahmedabad v. Samaldas Bechardas*.<sup>1</sup> It has also been criticized in a judgment of our High Court quoted at p. 91 in *Waghela Rajsanji v. Shekh Masludin*<sup>2</sup> as being notoriously contrary to historical truth and not consistent with the concluding portion of s. 7 of the Act. The implied approval with which it is quoted in *Nathuram v. Secretary of State*<sup>3</sup> is not justified in view of this criticism.

In 1871, a similar Act (India Act XV of 1871) with a similar object was passed for the Talukdars of Broach which was, however, repealed by the Broach and Kaira Incumbered Estates Act (India Act XIV of 1877) which was in turn largely repealed by the Broach and Kaira Incumbered Estates Act (XXI of 1881). The object of this Act was also to relieve the im-

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<sup>1</sup> (1872) 9 B. H. C. R. 205.

<sup>3</sup> (1929) 32 Bom. L. R. 907.

<sup>2</sup> (1887) L. R. 14 I. A. 89.

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pecunious talukdars by taking over the management of their estates and the settlement of their debts. Finally, the Gujarat Talukdars' Act (Bom. VI of 1888) was enacted and applied to all the talukdars of Gujarat. As their estates could not be strictly regarded either as alienated or unalienated, a doubt arose as to the applicability of the Bombay Land Revenue Code to them, and its preamble, therefore, stated that the Act was enacted to remove those doubts. As the Record of Rights Act did not apply to talukdari lands, a provision similar to that Act was made in s. 5 for the preparation of settlement registers and certain provisions of the Bombay Land Revenue Code were, by s. 33, excluded from application to talukdari lands.

This account will make it clear that a talukdar is neither an inamdar nor an occupant of his lands. His wanta is a freehold and not a leasehold. What was paid formerly as tribute and peshkush as a political levy is now converted into a fixed amount in lump as a revenue payment, but his proprietary right over all the lands comprised in the wanta was affirmed at the commencement of the British rule and has not since been taken away by any legal process.

In 1878 Mr. Beyts considered it unnecessary to enquire into the claims of the Thakor over roads and grazing grounds in face of alleged wholesale encroachments on Government waste lands. But in 1912 the Survey Settlement Officer assured the Thakor that he would not be deprived of any excess if his wanta measured more than the recorded area (exhibit 424). Thus the recorded area which, as we have shown above, originally included the roads, tanks, etc., had been accepted as the Thakor's property.

Conflicting opinions were no doubt held by Government officers from time to time as to the nature of the right. Officers like Mr. Beyts were inclined to treat some of the rights which the talukdars claimed for their wanta lands, for example, rights to village sites, as "antiquated privileges of which no public necessity can be advanced as an excuse." Some Talukdari Settlement Officers were of the opinion that their ancient rights should be respected. But the tendency to treat them more like holders of unalienated lands than absolute proprietors of their wantas was apparent on the part of zealous revenue officers. That whatever was used by the public inside the wantas belonged to the community and therefore to the Government, became a common belief in the revenue department. The distinction between the rights of the public and the rights of the Government and the capacity of the public to acquire rights over private as much as over Government property were not taken into consideration in forming their opinions.

We will now deal with the various items in suit in the light of the evidence and the legal position as discussed above. Originally there were 244 items in suit distributed over twenty villages. During the pendency of the suit, however, the defendant admitted the plaintiff's title to several items out of them in the statement, exhibit 198, which was in reply to the plaintiff's statement, exhibit 189, containing the list of the properties claimed by the plaintiffs. One or two more items were admitted by the Government by their statement, exhibit 278. In their statement, exhibit 279, the Government conditioned some of their admissions in some of the former items by stating that those lands were subject to the right of the public to the use of them. But the learned Judge below did not accept the subsequent conditional retraction, and

this statement, therefore, may be left out of account. It appears that by their statement, exhibit 198, Government admitted 98 items out of 244. Out of the items 1 to 60 in Amod, Government admitted items 1 and 3 to 46 by exhibit 198. Item No. 2 is a big creek known as Batrisi Khadi, covering an area of 13 acres and 5 gunthas. The learned Judge held that the plaintiff had not proved his title over the same, and relying on the Feisal Patrak, exhibit No. 255, he held that it belonged to the Government. The plaintiff's case is that the area of this creek is included in the originally recorded area of the wanta and that he has also been in possession and enjoyment of it from the beginning. He further points out that the area of 197 acres and 15 gunthas shown in the Feisal Patrak, exhibit No. 255, referred to another creek situated to the south-west and not the Batrisi creek, and that the lower Court was under a clear misapprehension in confusing it with the creek mentioned in that exhibit. He produced evidence to show that the villagers had passed leases to him from time to time for parts of the Batrisi Khadi and that fees were levied by the Thakor from the people for the use of earth from the Khadi. It is, however, unnecessary to refer to this evidence in detail as during the course of the argument before us the learned Assistant Government Pleader on behalf of the defendant conceded the plaintiff's title to this Khadi. Items Nos. 3 to 46, which have been conceded by the Government in the lower Court, are roads for passage situated inside the survey numbers in the wanta. The reason for making this concession seems to be this :—In the latest survey the survey officers included small roads of passage which ran through the fields in the respective survey numbers themselves, but for big roads they did not give any survey numbers but showed them between the numbered fields. These latter roads were called *hade pakadela marag*, i.e. boundary roads. As the plaintiff's title to all the roads in the wanta was denied, he prayed for relief for the passages situated in the fields, and the defendant conceded the plaintiff's title to all the small roads for passage through the numbered fields. Such roads in the Amod area are items Nos. 3 to 46. But Government did not concede the plaintiff's right with regard to the boundary roads even though both sides of them were flanked by fields inside the wanta. These latter roads are items Nos. 47 to 59. Item No. 47 is what is known as the Achhod Road situated in survey No. 354. In exhibit No. 45, the Government register of lands for 1852, this road is shown under item No. 643 in the wanta land in the name of the Thakor and not shown for public passage such as the roads in the talpad area were shown. In the plan, exhibit No. 92, which shows Beyts's survey, this road is shown as in survey No. 354, but it is not given any number. In exhibit No. 512, the register for 1878, it is included among the roads of the total area of 50 acres and 22 gunthas situated in the kharaba of the wanta. In exhibit No. 395, the settlement register of 1923, this road is included in the passage, 36 acres and 33 gunthas, but not shown as the plaintiff's. It is conceded on behalf of the plaintiff before us that people have used this road for passage at least from 1852, but he says that it was originally a part of his holding, and therefore, s. 37 of the Bombay Land Revenue Code does not apply to it and make it the property of the Government, even though people might have acquired rights of way over it. There does not seem to be any clear evidence whether this road was repaired by any

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 1940 by the local board, it would not vest in the local board for that reason.  
 — Item No. 48 is a road from Amod to Khar. The same arguments urged  
 NARHAR- for item No. 47 apply to this road also except that it was not shown in Beyts's  
 SINGJI survey. Item No. 49 is a road from Khar joining the road in item No. 48,  
 ISEVARSINGJI and item No. 50 is another road. The same arguments apply to these two  
 v. roads as those urged for item No. 48. Item No. 51 is a narrow passage for  
 SECRETARY going to agricultural area, and it is part of a long old road known as Amod  
 OF STATE Jambusar road. It is shown as item No. 790 in exhibit No. 45 as belonging  
 — Divatia J. to the Thakor's wanta. Items Nos. 52, 53 and 54 are continuations of the  
 — road in item No. 51 and the same arguments apply to them. Item No. 55 is

a road between two survey numbers of the wanta, and item No. 56 is also a similar road. The defendant's advocate has admitted the plaintiff's title to these two items, Nos. 55 and 56, during the course of argument before us.

As to items Nos. 57, 58 and 59, the plaintiff has not pressed his case before us, as item No. 57 is outside survey No. 354, item No. 58 is a public road to Broach constructed by the local board, and item No. 59 is the Palej road also constructed by the local board. It may be noted here that it was a part of the road in item No. 58 which was acquired in 1871 and compensation therefor was paid to the Thakor as stated before. Item No. 60 is the railway line and it is not claimed by the plaintiff.

We next come to the disputed items in the village of Wadia. This village is a part of the big survey No. 354 and the kharaba area thereof is 204 acres and 17 gunthas. Kharaba lands out of this area measuring 44 acres and 23 gunthas have been admitted by the defendant as of the plaintiff's ownership in exhibits 198 and 278. The remaining items are the village site, the roads and the river. The village site measures 16 acres and 8 gunthas. The defendant contended in the trial Court that it did not belong to the plaintiff, although, as we have seen above, the plaintiff's title to the village site of Amod had been admitted by the Government long ago and was not put in issue in this suit. The plaintiff's case is that this village site stands on a better footing than the village site of Amod. In exhibit No. 45 of 1852 it is item No. 981 shown as belonging to the Thakor. In Beyts's survey of 1878, its area, which was then 6 acres and 10 gunthas, was shown as situated in the wanta. It was in 1913 that this village was separated from Amod. In the settlement register, exhibit No. 395, however, the village site was not shown as the plaintiff's kharaba. There is no reason why this village site should not belong to the plaintiff just as the village site of Amod. But it is not necessary to pursue this point further as the defendant's advocate finally conceded the plaintiff's title to it before us. As to the roads which cover an area of 50 acres and 20 gunthas, they are items Nos. 938 and 948 in exhibit No. 45 of 1852. They are known as Amod Wadia road and Amod Bozadra road. They are referred to by the plaintiff's witness Purshottam, exhibit No. 389, in paragraphs 79 to 86 of his deposition. These roads would also belong to the plaintiff subject to the rights of the public for passage, if any. The last item in Wadia is the area of the river bed comprising 93 acres and 4 gunthas. This item will be treated separately at the end as the plaintiff does not claim it as part of his wanta but on his rights under the common law.

Then with regard to the plaintiff's lands in the village of Ranipura, the defendant has admitted the plaintiff's title to items Nos. 1, 2, 4 and 6 out of the total area of 8 acres and 34 gunthas. Item No. 6, which is a local board bungalow, has been admitted by the plaintiff as not belonging to him. Items Nos. 3 and 5, which are a road and a burial place, had been conditionally admitted by the defendant in exhibit No. 279, but the learned Judge has held them as unconditionally belonging to the plaintiff. The remaining items are the village site of Ranipura measuring 4 acres and 17 gunthas. This village was populated on its present village site after 1917 when the former village site situated in another place of the wanta was abandoned. It is clear on the evidence that this new village was populated on the plaintiff's fields in the wanta, and during the course of arguments before us the defendant's advocate conceded the plaintiff's ownership over it. There is another item in dispute, namely, the bed of the river measuring 29 acres and 11 gunthas which we will take up separately at the end. The roads in Ranipura, measuring 36 acres and 22 gunthas and 10 acres and 24 gunthas, stand almost on the same footing as the roads in Wadia, with the general condition applying to both of them, namely, that the portions of these roads constructed by the local board have been admitted by the plaintiff as vesting in the local board, and the plaintiff has further admitted the right of the public of passage over them if such right is proved.

These three villages comprise the plaintiff's land in the big survey No. 354. The remaining lands in dispute are situated in various villages as shown in paragraph 82 of the lower Court's judgment. It is not necessary to deal with them in detail. The plaintiff's contention with regard to them is the same as it was with regard to the lands in survey No. 354, namely, that they are his property subject to the right of the public, if any, for passage.

I may summarize here the contentions as well as the admissions made by Mr. Munshi on behalf of the plaintiff-appellant with regard to roads, tanks and creeks in general :—

(1) The plaintiff admits that the road from Palej to Jambusar, item No. 59, and the road from Broach to Jambusar, item No. 58, and the road L to M in the plan, bounded on one side by Ranipura Survey Nos. 11, 12, 30, 31, 32, 27, 23 and on the other by Survey Nos. 10, 41, 40, 39, 38, 37, 33, 34, 35 and 36, vest in the local board as they have been constructed by it and the plaintiff does not claim ownership over them.

(2) Roads passing through wanta lands and going beyond belong to the plaintiff subject to the rights of the public to pass and re-pass over them as highways.

(3) Roads which end in the wanta to the extent to which they are in the wanta land, whether numbered or not, belong to the plaintiff subject to the right of the public, if any.

(4) The plaintiff is the owner of the soil and sub-soil of the road when it is bounded on both sides by his wanta lands, and only to the extent to which it is so bounded.

(5) The plaintiff is the owner of the soil and sub-soil of the road on which the wanta land abuts up to the middle of the road when the property on the other side is not the wanta land of the plaintiff.

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A. C. J. Then with regard to the tanks, the plaintiff's contention is that if a tank is in  
 1940 a survey number or is surrounded by wanta land, it belongs to the plaintiff.  
 With regard to the creeks or khadis, the creeks in the other villages are  
 NARHAR- on the same line as the Batrisi Khadi which has been conceded by the de-  
 SINGJI fendant as of the plaintiff's ownership.

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 v. We think that these contentions as well as admissions accord with the  
 SECRETARY view which we have taken of the evidence as well as the legal rights of the  
 OF STATE plaintiff in the suit property, and that the plaintiff, therefore, would be en-  
 titled to a declaration with regard to those items which would be found to  
 Dwatia J. be of his ownership according to these tests.

There remains now the last item of the bed of the river at two places. The area of the river bed in Wadia is 93 acres and 4 gunthas, and in Ranipura 29 acres and 11 gunthas. It is conceded by the plaintiff that the river is not included in the wanta kharaba at any time but he claims it on his rights under the common law on the ground that the lands of the two villages of Wadia and Ranipura abut on one side of these rivers. It may be stated here that the plaintiff's title to the river, if any, is not negated by the Government Resolution, exhibit 35, which is the cause of action for the present suit; but the plaintiff has asked for a declaration of his rights with regard to the river-bed as all his rights to roads, tanks, etc. in the wanta were denied. The plaintiff claims half the bed of the river in so far as it touches the plaintiff's wanta on one side of the river, there being Government land on the other side. In the private survey of the plaintiff's estate, exhibit 160, half the river-bed was shown in the area of the estate, but it is not mentioned in the other record of the suit. For his common law rights, the plaintiff relies on the full bench decision of the Madras High Court in *Venkata Lakshminarasamma v. The Secretary of State*.<sup>1</sup> The decision in that case is that in the case of a grant of land bounded by a non-navigable river, the presumption is that the grant passes to the grantee the bed of the river *ad medium filum aquae*, and that the onus of showing the contrary is on the grantor. The decision in *Babon Mayacha v. Nagu Shrawucha*<sup>2</sup> has been followed in this case. We think that the presumption referred to in this decision has not been rebutted on behalf of the defendant. There is nothing to show that the plaintiff has been deprived of this right by the Government. As has been observed above, under s. 37 the bed of the river would not belong to Government if it is proved that it is of the plaintiff's ownership. According to the decision in *Secretary of State v. Wasudeo*,<sup>3</sup> quoted above, s. 37 saves the common law rights of private persons which existed at the date when it came into force. If, therefore, the plaintiff had the right to the river-bed in common law, there is nothing in s. 37 to deprive him of the same. The decision in *Secretary of State for India v. Bijoy Chand Makatap*<sup>4</sup> is also in the plaintiff's favour. It is held there that by the common law of the country, the right to the soil of a river when flowing within the estates of different proprietors belongs to the riparian owners up to the middle thread. The plaintiff would, therefore, be entitled to a declaration with regard to

1 (1918) I. L. R. 41 Mad. 840, F.B.

2 (1876) I. L. R. 2 Bom. 19, 40.

3 (1907) I. L. R. 31 Bom. 456.

s.c. 9 Bom. L. R. 719.

4 (1918) I. L. R. 46 Cal. 390.

half the bed of the river in these two villages.

The only point that remains now is the defence of limitation, and in view of the discussion of the evidence, it is not necessary to dwell on it at length. The lower Court held that the plaintiff's suit was time-barred under art. 120 of the Indian Limitation Act as his rights to the lands in suit were negatived by the Government long before the suit was filed. In fact, according to the lower Court, they were not recognised at all. We have, however, held on the evidence that the Thakor's title to the suit lands was not definitely denied by the Government till 1926 when the Government Resolution was issued denying the plaintiff's claim to the roads and tanks. Before that, as we have stated above, there were various opinions expressed by Government officers and entries made in the revenue and survey records. We do not think that those entries made before the detailed survey began in 1913 expressly negative the plaintiff's right. But even assuming it to be so, those entries, as held above, cannot be regarded as amounting to decisions about title one way or the other. In our opinion, the plaintiff's cause of action arose only when after the protracted correspondence relating to the manner in which the entries were to be made in the settlement registers it was finally decided by the Government Resolution that those entries should not declare the plaintiff's right to the roads and tanks, etc. The decisions in *Surannanna v. Secretary of State for India*<sup>1</sup> and *Sursingji Dajiraj v. Secretary of State*<sup>2</sup> are in favour of the plaintiff's contention that the cause of action did not arise before 1926. The suit, therefore, filed in 1927 is in time.

We will now ask the learned advocates on both sides to prepare a statement showing the various items which would be found as of the plaintiff's ownership, whether with or without the right of the public over them, in the light of our decision.

*July 26.* The learned advocates on both sides have prepared a statement in the light of our decision and we now proceed to pass the decree in the appeal.

The decree of the lower Court is set aside and the following decree is substituted in its place :—

The plaintiff is declared to be the full and absolute proprietor of (a) the river-bed *ad mid filum* in Wadia and Ranipura, (b) all the roads, tanks and other waste areas which are within or bounded by his wanta lands, (c) the roads up to the middle line where wanta lands abut on them on one side, and (d) in particular the items mentioned in the schedule attached, (e) the items regarding which declaration has been granted by the trial Court in the plaintiff's favour, and (f) the items admitted by exhibit 279.

The plaintiff is granted an injunction against the defendant restraining the latter and his servants and agents from interfering with the rights of the plaintiff declared above.

The defendant should pay the plaintiff's costs of the appeal and the trial Court, including the costs from the date of the filing of the suit to September 29, 1933.

*Decree set aside.*

<sup>1</sup> (1900) I. L. R. 24 Bom. 435,  
s. c. 2 Bom. L. R. 261.

<sup>2</sup> (1926) 28 Bom. L. R. 1213.

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SHEIKH ALI

v.

ABDUL KARIM

HAJI YOONUS SHEKH MOHIDDIN NADKAR

v.

SHEKH HASAN

ISHAMUDDIN VALAD SHABUDDIN JAMADAR

v.

ABDUL KARIM

SHEKH AHAMAD

v.

SHERIFA JAVJE SHEKH USMAN TARE.\*

*Indian Limitation Act (IX of 1908), Art. 148—Indian Limitation Act (XV of 1877), Art. 148, Secs. 19, 28—Indian Limitation Act (IX of 1871), Art. 148, Secs. 20, 29—Indian Limitation Act (XIV of 1859), Sec. 1, cl. (15)—Bombay Regulation V of 1827, Sec. 8, cl. 1—Mortgage—Redemption—Right to redemption barred under Act of 1859—Right whether revived owing to s. 2 of Act of 1871—Acknowledgment by pleader—Such acknowledgment whether valid under Acts of 1859 and 1871—Acknowledgment valid under Acts of 1877 and 1908 whether revives mortgage—Mortgage suit—Law of limitation applicable to such suit.*

The plaintiffs' ancestors mortgaged their lands to the predecessor-in-title of the defendants in October, 1791. One of the mortgagors sued in 1849 to redeem the mortgage in which suit the pleader of the mortgagee put in a statement signed by him of the account of the mortgaged property. In 1863 another of the mortgagors sued to redeem a portion of the mortgaged property, and in the appeal arising in that case the mortgagee's pleader put in in 1867 a memorandum of appeal signed by him in which the existence of the mortgage and the relationship between the parties as mortgagors and mortgagees was admitted as subsisting. The plaintiffs having sued to redeem the mortgage in 1933; the defendants con-

\* Second Appeals No. 426, to 430 of 1936, from the decision of N. R. Gundil, District Judge at Ratnagiri, in Appeals Nos. 104, 249, 106, 107 and 108 of 1934, confirming the decrees passed by G. V. Vaidya, Second Class Subordinate Judge at Dapoli,

in Civil Suits Nos. 40 of 1933, 39 of 1933, 133 of 1933, 41 of 1933, and reversing the decree passed by P. H. Gunjal, Second Class Subordinate Judge at Dapoli, in Civil Suit No. 115 of 1933.



tended that the mortgagors had lost their right to redeem and their title to the property mortgaged was extinguished :—

*Held*, (1) that the law of limitation applicable to the suit was the law in force at the date of its institution, provided that neither the right to the property in question had been extinguished nor the right to sue in respect of it barred before that law came into force ;

(2) that the mortgage in suit being of the year 1791 was governed by s. 1, cl. (15), of the Indian Limitation Act, 1859, read with s. 1 of the Amending Act XI of 1861, according to which a suit for redemption of the mortgage was barred after January 1, 1862 ;

(3) that the suit having been already barred attracted the application of s. 2 of the Indian Limitation Act of 1877 as well as s. 6 of the General Clauses Act, 1897, which prevented the Act of 1877 from affecting any title acquired or reviving any right to sue barred under the Act or under any enactment thereby repealed ;

(4) that the alleged acknowledgment of 1849 did not save limitation, because under s. 1, cl. (15), of the Act of 1859 the acknowledgment should have been signed by the mortgagee or some person claiming under him, and an acknowledgment signed by his pleader as the agent of the mortgagee was of no avail ;

(5) that in any case the present suit having become barred at the date the Limitation Act of 1877 came into force and the right to sue having been lost under its s. 2, it could not be revived even though the acknowledgments of 1849 and 1867 were good under the Limitation Act of 1908 when the suit was brought :

*Lala Soni Ram v. Kanhaiya Lal*,<sup>1</sup> *Mohesh Lal v. Busunt Kumaree*,<sup>2</sup> *Zaib-un-nissa Bibi v. The Maharaja of Benares*,<sup>3</sup> and *Amarchand v. Narayan*,<sup>4</sup> distinguished ;

*Fatimatulnissa Begum v. Soonder Das*,<sup>5</sup> *Gopeshwar Pal v. Jibon Chandra Chandra*,<sup>6</sup> *Narayan v. Govind*,<sup>7</sup> and *Dhondi v. Lakshman*,<sup>8</sup> followed ;

(6) that the suit was therefore barred by limitation.

SUIT to redeem mortgage.

The property mortgaged, which consisted of an eight annas khòti takshim in the village of Sanglat in the Ratnagiri district, belonged originally to three Mahomedan brothers, viz., Isaji, Ibrahimji and Dalvaiji.

In October 1791, Mahomed Saleh, the grandson of Isaji, Abdul Gani, the son of Ibrahimji, and Shaikh Usman, the grandson of Dalvaiji, mortgaged the property with possession for a period of seven years to one Narayan alias Naro Damle.

In 1848 one of the mortgagors filed a suit to redeem the mortgage of 1791 (suit No. 345 of 1848). In that suit one Daji Gopal Joshi, the pleader of the mortgagee, put in a statement of accounts (exhibit 92) signed by himself, on June 21, 1849. \*It stated :—

“Account—one-half of the whole village of Mouje Sanglat... is in vahiwat of the heirs—sons of deceased mortgagee khot of the said village Naro Balla Damle, under mortgage from Nadkar khots. Details of the amount due to Damles on the mortgage of that village :—

1 (1913) L. R. 40 I. A. 74,  
s. c. 16 Bom. L. R. 489.

2 (1880) I. L. R. 6 Cal. 340.

3 (1911) I. L. R. 34 All. 109.

4 (1932) 34 Bom. L. R. 953.

5 (1900) L. R. 27 I. A. 103.

6 (1914) I.L.R. 41 Cal. 1125, S.B.

7 (1927) 29 Bom. L. R. 1563.

8 (1929) 31 Bom. L. R. 1287.

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Rs. 1118-8-0. Deed in respect of Rs. 600 of Shake 1793, Ashwin Shud 15 ... passed by debtors Abdul Gani wd. Ibrahimji, Mahomed Sale wd. Shekh Mahammad, and Shekh Usman wd. Shekh Ahmed Nadkar.  
(*Sd.*) DAJI GOPAL JOSHI, pleader for defendants."

In 1863 one Shaikh Ibrahim, a grandson of Abdul Gani, brought a suit (No. 1361 of 1863) to redeem the mortgage of 1791 from Naro's five sons and obtained a decree for redemption on payment to the mortgagees a sum of Rs. 1,035. No time was fixed for the payment, nor did the decree contain any clause for foreclosure in case of default. The mortgagees appealed to the District Court (appeal No. 137 of 1865) with the result that the redemption price was increased to Rs. 2,176. The mortgagees preferred a second appeal (No. 123 of 1867) to the High Court. In the memorandum of that appeal (Exh. 90), signed by the mortgagees' pleader and dated January 28, 1867, in which there was clear admission of the mortgage of 1791, it was stated :—

"(1) The Joint Judge having found from the admission of the plaintiffs in Ex. 107 that the property in dispute was not redeemable till the incumbrances effected by all the Nadkars were paid off erred in not taking into account the incumbrances enumerated in ...

(3) The Joint Judge erred in not awarding the money due on Ex. Nos. 16 and 17 executed in favour of the defendants by the heirs and representatives of one of the three original mortgagors.

(5) The Joint Judge erred in decreeing the redemption of the property in dispute before all the claims of the defendant were paid off.

(6) The Joint Judge erred in not awarding all the liens of the defendants on the property created by the writing of one of the original mortgagors or his representatives by No. 16."

On April 27, 1921, the descendants of the mortgagee sold a portion of the mortgaged property to Abdul Rahiman and Abdul Karim; and on April 19, 1922, they sold another portion of it to Abdul Karim.

In 1933, between February 14 and June 21, the representatives of the mortgagors filed six suits to redeem the mortgage of 1791. Five of the suits were heard by one Subordinate Judge, who held that they were barred by limitation, observing as follows :—

"The mortgage being of the year 1791 A.D. as alleged, its redemption would be barred after the lapse of sixty years, i.e. after 1851 A.D. Even supposing that there was a period of seven years in the mortgage that period would be extended at the most to 1858 ... The mortgage has been extinguished and the Damles became full owners of the property in the year 1877 when the execution of the decree for redemption passed in suit No. 1361 of 1863 became barred by limitation. The sale deed passed by Damles to Abdul Karim also recites that the property has been in their possession and enjoyment as owners since many years. From the facts stated by me above it appears that they became full owners of the property, the mortgage, if any, having been long since extinguished."

In the sixth suit, the trial Judge took a different view and decreed redemption of the mortgage.

There were appeals in all the cases to the District Judge, who heard them together, and came to the conclusion that the suit was barred by limitation, for the following reasons :—

"The first enactment of limitation was Regulation V of 1827. Section 8, cl. 1, of the Regulation clearly laid down that no length of time prevented a Court from entertaining a suit to redeem a mortgage, unless the property was held by a bona

fide possessor as proprietor for a period of thirty years. This Regulation was in force in 1858, and, therefore, it was an error to say that a suit for redemption of the mortgage of 1791 became time-barred either in 1851 or in 1858. The next piece of legislation was Act XIV of 1859. Section 1, cl. 15 of the Act for the first time prescribed a period of sixty years for a suit for recovering immoveable property from a mortgagee, the period starting from the date of the mortgage. Under this provision a suit for redemption of the mortgage in question in these suits became barred on the date when Act XIV of 1859 came into force. But the hardship which the Act created in respect of old mortgages which had been allowed to stand without redemption for over sixty years by virtue of Regulation V of 1827 was removed by the amending Act XI of 1861, s. 1 of which gave a grace period till January 1, 1862, for entertaining suits to redeem such mortgages. Therefore, correctly speaking, a suit for redemption of the mortgage in the present case became barred on January 2, 1862 ... A suit of redemption which became so time-barred could not be revived by anything contained in the later enactments. I shall, however, notice only s. 29 of Act IX of 1871 which provided that on the determination of the period thereby limited to any person for instituting a suit for possession of any land, etc., his right to such land shall be extinguished. The expression 'land' was replaced by 'property' in s. 28 of Act XV of 1877. It will follow therefore that at the date of the present suits, a suit for redemption was barred, and also the appellants' right to the 'property', that is to say, the Khoti takshim in question had become extinguished.

The next point is whether Ex. 92, the statement of account produced in the suit of 1848 is a valid acknowledgment capable of giving a fresh start of limitation. Now Regulation V of 1827 gave no recognition to any acknowledgment of liability on a mortgage, for the simple reason that it did not prescribe any period of limitation for a suit to redeem a mortgage. The statement of account therefore had no legal effect when it was produced in 1849. The first provision as to acknowledgments of liability was enacted in Act XIV of 1859 by s. 1, cl. 15, which prescribed a period of sixty years for a suit to redeem a mortgage, the time starting from the date of the mortgage, or from the date of the acknowledgment in writing, if given in the meanwhile, by the mortgagee or some person claiming under him. If Ex. 92 could be regarded as an acknowledgment within the meaning of this section, then undoubtedly the mortgagors were entitled to claim a fresh period of limitation for sixty years starting from 1849. But equally undoubtedly the acknowledgment did not answer the requirements of that section. For, the latter did not recognise the validity of an acknowledgment by *an agent* such as Damle's pleader was. Therefore Ex. 92 was incapable of extending the period of limitation, with the result that a suit to redeem the mortgage of 1791 became barred after the expiry of the grace period allowed by amending Act XI of 1861. For the first time an agent's acknowledgment came to obtain a limited recognition in s. 20(a) of Act IX of 1871, that is to say, for the purpose of reviving a debt or legacy. With respect to a mortgage, however, the law remained unchanged, for art. 148 of the second schedule of that Act permitted a fresh start of limitation only in case of an acknowledgment in writing given by the mortgagee or some person claiming under him. Finally by s. 19 of Act XV of 1877 an agent's acknowledgment obtained full recognition as if it was an acknowledgment given by the principal himself. But when this provision came into force a suit to redeem the mortgage of 1791 had become already time-barred; and it goes without saying that it could not be revived by the later enactment.

The second document relied on in this connection is Exh. 90, which is a copy of the appeal memo in the second appeal filed by the Damles from the appellate decree in suit No. 1361 of 1863. It is open to the same objection as Exh. 92, because the appeal memo. was prepared and signed by the pleader and not by the Damles. Moreover, a suit being time-barred in 1862 the equity of redemption could not be revived by any subsequent acknowledgments, for in order to be valid, it must be given before the period of limitation expires."

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|                                                     |                                                                    |                                                                                                                                                                                           |
|-----------------------------------------------------|--------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A. C. J.<br>1940                                    | There were appeals to the High Court in five out of the six cases. |                                                                                                                                                                                           |
| YUNUS<br>MOHIDDIN<br>NADKAR<br>v.<br>SHEKH<br>HASAN | S. A. No. 426 OF 1936.                                             | { <i>H. C. Coyajee</i> , with <i>M. G. Chitale</i> , for the appellants.<br><i>A. G. Desai</i> , with <i>A. S. Navalkar</i> , for respondent No. 2.                                       |
|                                                     | S. A. No. 427 OF 1936.                                             | { <i>H. C. Coyajee</i> , with <i>M. G. Chitale</i> , for the appellant.<br><i>A. G. Desai</i> , for the respondents.                                                                      |
|                                                     | S. A. No. 428 OF 1936.                                             | { <i>H. C. Coyajee</i> , with <i>M. G. Chitale</i> , for the appellants.<br><i>A. G. Desai</i> , for respondents Nos. 2 and 3.                                                            |
|                                                     | S. A. No. 429 OF 1936.                                             | { <i>H. C. Coyajee</i> , with <i>M. G. Chitale</i> , for the appellant.<br><i>A. G. Desai</i> , for respondents Nos. 1, 2 and 5.                                                          |
|                                                     | S. A. No. 430 OF 1936.                                             | { <i>H. C. Coyajee</i> , with <i>M. G. Chitale</i> , for appellants Nos. 1, 2 and 4 to 9.<br><i>A. G. Desai</i> , for respondents Nos. 7, 8 and 11.<br>Respondent No. 5 present in Court. |

DIVATIA J. These are companion appeals preferred by the appellants who are some of the original plaintiffs in suits to recover possession of certain property and for an injunction against the defendants restraining them from recovering the income of the suit lands. The suit property formed certain fractions of an eight annas khoti taxim in the village of Sanglat in the Ratnagiri district. This eight annas taxim was at one time owned by three Mahomedan brothers. In October, 1791, some of the descendants of these three brothers mortgaged this taxim to one Narayan or Nard Damle. The deed of mortgage is not in evidence, but the mortgage has been admitted by the parties. In 1849, one of the persons interested in the mortgaged property filed a redemption suit, but nothing appears on the record with regard to this suit except a statement of account of the mortgaged property in 1849 signed by the pleader of the mortgagee (exhibit 92). Then in 1863, Shaikh Ibrahim, father of defendant No. 1 in Second Appeal No. 426, filed Suit No. 1361 of 1863 to redeem a portion of the mortgaged property from the son of the original mortgagee. A decree for redemption was passed in the plaintiff's favour, but no time was fixed for payment and there was no provision for foreclosure. That decree was confirmed in appeal subject to a slight variation in the mortgage amount. A second appeal was preferred to this Court in 1867 by the descendant of the original mortgagee. In the memorandum of that appeal the existence of the mortgage and the relationship of mortgagor and mortgagee between the parties was admitted as subsisting. This memorandum (exhibit 90) was signed by the pleader of the appellant. The appeal was dismissed, but thereafter neither the mortgagor nor the mortgagee did anything in the way of redemption or foreclosure. It appears that a *botkhat* of the khoti property was prepared in 1893, and the Damles, i.e., the mortgagees, were continued to be shown in that register from 1893 to 1913. In 1921 and in 1922 a fractional share in the suit property was sold by the descendants of the original mortgagee to two persons. One transaction was a sale-deed by the three descendants of the original mortgagee of their fractional share to two persons Abdul Rahiman and Abdul Karim on April 27, 1921,

and in the other deed another descendant of the original mortgagee also sold his fraction of the mortgaged property to Abdul Karim on April 19, 1922. In both these deeds, the vendors, i.e. Damles, purported to sell the property as owners, and the purchasers, who are some of the descendants of the original mortgagors, are the main defendants in these suits. The present plaintiffs are some of the other descendants of the original mortgagors, and they have filed these suits against the defendants treating them not as purchasers but as redeeming co-mortgagors, to recover possession of their proportionate shares in the property comprised in the two sale-deeds on payment of the proportionate amount of the price stated in the two sale-deeds. Their case in short is that the two sale-deeds practically amounted to deeds of redemption of the original mortgage, that they were entitled to recover possession of their share from the redeeming co-mortgagors of the property, and that the cause of action arose when the property had been redeemed by these defendants from the descendants of the original mortgagee, i.e. in 1921 and 1922.

The defence to the suits was that the mortgagors had lost their right to redeem and their title was also extinguished, that the Damles had become owners of the property and the two deeds of 1921 and 1922 conveyed shares in the property itself and not the mortgage rights in them, so that the defendants having purchased the property from its owners got rights of ownership which the plaintiffs cannot challenge.

It appears that five out of the six suits came to be tried by one Judge, Mr. Vaidya, and the sixth suit having been filed later on, was tried by his successor. The learned Judge who tried the five suits framed several issues of which the material issue for the purpose of these appeals is, whether it was proved that the mortgage was extinguished and that Damles had become absolute owners. He found that issue in the affirmative, and also held that the alleged purchase by the defendants from the Damles had been proved. On these findings he dismissed all the five suits. The learned Judge who tried the sixth suit, which is the subject-matter of Second Appeal No. 427, came to a contrary conclusion on the strength of certain documents relied on as acknowledgments of the mortgage. It may be stated here that the plaintiffs relied upon these acknowledgments, and they had tried to prove them before Mr. Vaidya, but the learned Judge rejected their application on the ground that they were produced at a late stage. His successor, however, admitted them as they were produced in his suit at a comparatively early stage, and he came to the conclusion that the plaintiff's suit was in time having regard to the acknowledgments which were proved, and on that ground he decreed the plaintiffs' suit.

Against these decrees appeals were preferred to the District Court, the appeals in the first five suits having been preferred by the plaintiffs and that in the sixth suit by the defendants. The material point for determination was the same, namely, whether the suits were barred by lapse of time under art. 148 of the Indian Limitation Act, and the finding of the learned Judge was in the affirmative. In deciding that point he considered the acknowledgments relied upon by the plaintiffs, and came to the conclusion that they do not save the bar of limitation. Shortly stated, his reasons were that the two acknowledgments relied upon on behalf of the plaintiffs, namely, the

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statement of account (exhibit 92) produced by the pleader of the mortgagee in 1849 in the redemption suit and the memorandum of appeal (exhibit 90) filed by the mortgagee's pleader in the High Court in 1867, were not signed by the mortgagee or by any person claiming through him, but by his pleader who was a legal agent and whose signature would not amount to an acknowledgment under the Limitation Act of 1859 or of 1871. He, therefore, rejected both these documents as not amounting to acknowledgments under either of these two Acts. The right to redeem was lost after January 1, 1862, under the Act of 1859.

These five appeals (the plaintiffs in one suit having not appealed to this Court) have been preferred against the decrees passed by the learned District Judge. Mr. Coyajee on behalf of the appellants has based his argument on one point, viz., that the Act to apply to the present suits for the purpose of determining whether they are barred by limitation is the Act in force at the date when the suits were filed, namely, the Limitation Act of 1908, and that under that Act an acknowledgment made by a mortgagee or his agent, either specially or generally authorised, would be valid under s. 19. Therefore, the acknowledgments of 1849 and 1867, although they might be invalid under the Acts 1859 and 1871, must be deemed to be valid as tested by the provisions of the present Act which alone applies to the suits. He relies upon several cases the most important of which is the decision of their Lordships of the Privy Council in *Lala Soni Ram v. Kanhaiya Lal*.<sup>2</sup>

Before dealing with the cases cited at the bar, it is necessary to review what were the relevant provisions in the previous Acts bearing on this point. The earliest law to apply is Bombay Regulation V. of 1827, s. 8, cl. 1, in which it was provided that no length of time shall prevent the Court's entertaining a suit to recover possession of the property held in mortgage; but if such property had been held for more than thirty years by a bona fide possessor as proprietor, the right of suit would be lost. Thereafter, Act XIV of 1859 was passed by the Indian Legislature. For the first time that Act prescribed a period of limitation for suits for redemption in s. 1, cl. (15), which laid down a period of sixty years for redemption of a mortgage from its date unless the mortgagor's title or right of redemption was acknowledged in writing by the mortgagee or some person claiming under him, in which case the period would run from the date of the acknowledgment. As that Act applies to all the mortgages at the date when it was passed, and as according to the previous law there was no provision for limitation for redemption suits, the Legislature provided a period of grace by the amending Act XI of 1861 under s. 1 of which a period of grace was given up to January 1, 1862, to bring suits for redemption of mortgages which were barred on the date when the Act of 1859 came into force. The next Act of Limitation is Act IX of 1871, which repealed the previous Act of 1859, and it provided the same period of sixty years for redemption suits under art. 148 of the Second Schedule to the Act. It was further enacted that the right to sue would expire at the end of sixty years unless there was an acknowledgment of the title of the mortgagor or of his right of redemption, before the expiration of the prescribed period, made in

writing signed by the mortgagee or some person claiming under him. In that case a new period would run from the date of the acknowledgment. There was another provision for acknowledgment also in s. 20 of that Act in case of a debt or legacy, under which an acknowledgment in respect of a debt or legacy in writing signed by a party or his agent before the expiration of the prescribed period would have the effect of starting limitation from the date of the acknowledgment. It was further provided in s. 29 of that Act that at the determination of the period limited to any person for instituting a suit for possession of any land, his right to such land shall be extinguished.

This Act of 1871 was followed by Act XV of 1877, which embodied a new provision in s. 2 thereof, that nothing contained in that Act or in the Act of 1871 shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed. The provision for acknowledgment with regard to mortgage suits, which was provided for in art. 148 of the previous Act, was embodied in s. 19 of this Act in which it was provided that if an acknowledgment of liability in respect of any property or right was made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a new period of limitation would run from the date of such acknowledgment. It was further provided that the word "signed" meant signed either personally or by an agent duly authorized in this behalf. So that for the first time an acknowledgment signed by an agent became a valid acknowledgment. Section 29 of the Act of 1871 was re-enacted as s. 28 of this Act.

The last Act of Limitation is the present one, Act IX of 1908, in which all the relevant provisions, namely, art. 148 and ss. 19 and 28, are similar to those in the Act of 1877. It may be stated here that the provisions of s. 2 of the Act of 1877, which I have mentioned above, were not re-enacted in the Indian Limitation Act of 1908 for the reason that they were embodied in s. 6 of the General Clauses Act of 1897.

These are the relevant provisions of the law applicable to the facts of the present case.

As I said before, Mr. Coyajee has mainly relied on the decision of their Lordships of the Privy Council in *Lala Soni Ram v. Kanhaiya Lal* for the purpose of his argument that the law of limitation to apply to a suit is the one in force at the date when it is filed. That is no doubt true as a general rule, but it is subject to a qualification as stated in that decision itself, viz., unless there was a distinct provision to the contrary. An example of such a contrary provision is s. 2 of the Indian Limitation Act of 1877 under which a right to sue once barred cannot be revived by the provisions of a later enactment. On the facts of the particular case which their Lordships had before them, it was not necessary to apply the provisions which limited the operation of that rule. The facts there were that the mortgage was of 1842, the two acknowledgments relied upon were in 1866 and 1867 by the widow and the daughter of the mortgagee, respectively, and the suit was brought in 1907. If the acknowledgments were governed by the law prevailing at the time when they were made, i.e. by s. 1, cl. (15), of the Indian Limitation Act of 1859, they would be valid as they were given by persons who claimed under the

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mortgagee, but if they were governed by the law in force at the date of the suit, i.e. the Act of 1877, they would be invalid because they were not given by persons through whom the defendants who were reversioners derived their title. It was held that the law of limitation applicable to a suit was the law in force at the date of its institution unless there was distinct provision to the contrary, and under s. 19 of the Act of 1877, which applied, the acknowledgments were invalid for the reason stated above. There was therefore no question there of the applicability of s. 2 of the Act of 1877, according to which nothing in that Act was to affect any title acquired or to revive any right to sue barred under that Act or under any enactment thereby repealed. That was so because no title had been acquired and no right to sue was barred when that Act came into force in 1877 as the period of sixty years had not elapsed at that time. A suit could have been properly filed till the year 1902 without the aid of any acknowledgment, but after that date it would be good only if the acknowledgment was valid according to the law of 1877, and as that was not so, the acknowledgments were regarded as ineffectual. The present case, however, is a converse case where the acknowledgments would be good if they were governed by the law of 1908. The facts of this case would attract the application of s. 2 of the Limitation Act of 1877 as well as s. 6 of the General Clauses Act, because as I observed before, the mortgage in suit was in the year 1791, and it would be governed by the provisions of s. 1, cl. (15), of the Limitation Act of 1859 read with s. 1 of the amending Act XI of 1861, according to which a suit for redemption of a mortgage, which would have been barred when the Act of 1859 came into force, would be barred after January 1, 1862.

The question then is, could a suit on this mortgage have been properly filed after that date? It is clear that the alleged acknowledgment of 1849 would not have saved it, because under s. 1, cl. (15), of the Act of 1859, the acknowledgment must be by a mortgagee or some person claiming under him, and here it was not by such a person but by a legal agent. Therefore, the suit would have been barred after the beginning of the year 1862. Under art. 148 of the Act of 1871 also the acknowledgment must be given by the same type of person as mentioned in the Act of 1859. Therefore, in any case the present suit would be barred at the date when the Act of 1877 came into force, and therefore, s. 2 of that Act would apply with the result that the right to sue having been lost, it could not be revived even though the acknowledgments would have been good under the Act of 1908 when the suits were brought. The present case, therefore, stands entirely on different facts from those in *Lala Soni Ram v. Kanhaiya Lal*, and it is governed not by the general rule about the application of the law in force at the date of the suit, but by the provisions of s. 2 of the Act of 1877, which makes the general rule inapplicable by barring the remedy as well as extinguishing the right.

Before I go to the other cases relied on by Mr. Coyajee, I might dwell upon an earlier decision of their Lordships of the Privy Council in *Fatimatulnissa Begum v. Soonder Das*,<sup>1</sup> which lays down the principle applicable to the facts of the present case. In that case the mortgage was of 1788, there was no

1 (1900) L. R. 27 I. A. 103.



acknowledgment within sixty years from its date and the suit for redemption was filed in 1893. Their Lordships held that that suit would be barred at the end of sixty years on October 17, 1848, by Act XIV of 1859, s. 1, cl. (15), unless brought before January 1, 1862, or unless previous to October 17, 1848, an acknowledgment of the mortgage in terms of that clause was given, signed by the mortgagees or some person claiming under them. It was observed in the course of the judgment that as the parties did not sue on the last date provided for such a suit, namely, January 1, 1862, the right to sue had been lost and the right to property had been also extinguished under s. 29 of the Act of 1871. The same principle would apply to the present case even though there purports to be an acknowledgment within sixty years which however was not valid under the law prevailing then. The principle enunciated in this decision has been followed by the Calcutta High Court in *Gopeshwar Pal v. Jiban Chandra Chandra*,<sup>1</sup> where the later decision in *Lala Soni Ram v. Kanhaiya Lal* is distinguished. The general proposition there laid down is that where the application of the provisions of an amending Act makes it impossible to exercise a vested right of suit, the Act should be construed as not being applicable to such cases. The decision in *Lala Soni Ram v. Kanhaiya Lal* was distinguished on the ground that it did not apply to cases where the effect of the application of the amended law would be to confiscate a vested right.

Two cases of our High Court have also distinguished this Privy Council decision. The first is *Narayan v. Govind*.<sup>2</sup> In that case the mortgage was in 1807. In 1860 there purported to be an acknowledgment by one of the heirs of the mortgagee, and the suit was filed in 1920. It was held that the acknowledgment of 1860 was not a valid acknowledgment under the Act of 1859 as it was not given by all the heirs of the mortgagee, and therefore, as it was ineffectual for the purpose of the Limitation Act of 1859, the right of the mortgagor was extinguished in 1868 in view of s. 29 of the Limitation Act of 1871, and could not be revived by the later Acts. It was observed in the course of the judgment that although the general principle might be conceded, namely, that the Act of Limitation to apply to a suit is the one in force at the date of the suit, it was subject to the qualification that where a right to bring a suit had been extinguished before, it could not be revived subsequently, and on that ground the decision in *Lala Soni Ram v. Kanhaiya Lal* was distinguished. On the facts of that case it was clear that the acknowledgment was bad, and therefore, the right of suit had already been lost before the Act of 1877 came into force. This decision, therefore, would be applicable to the facts of the present case.

The next decision is in *Dhondi v. Lakshman*.<sup>3</sup> There the mortgage was in 1799, the acknowledgment was in 1865, and the suit was filed in 1924. It was held that the right to sue for redemption was barred on January 1, 1862, i.e. before the date of the acknowledgment, and therefore, the acknowledgment of 1865, could not extend the period of limitation under the Act of 1859. It was further held that the remedy as well as the plaintiffs' right to bring a

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1 (1914) I.L.R. 41 Cal. 1125, S.B.

3 (1929) 31 Bom. L. R. 1287.

2 (1927) 29 Bom. L. R. 1563.

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suit having been extinguished by the operation of s. 29 of the Act of 1871 as well as s. 2 of the Act of 1877 and s. 6 of the General Clauses Act of 1897, nothing contained in the subsequent Limitation Act of 1908 would affect the operation of the previous enactments. The *ratio decidendi* of this case is clearly applicable to the facts of the present case. The Privy Council decision in *Fatimatulnissa Begum v. Soonder Das*<sup>1</sup> was followed and the decision in *Lala Soni Ram v. Kanhaiya Lal* was distinguished on the ground that in that case there was no question of the revival of the lost right to sue.

Mr. Coyajee has referred to three more decisions to support his argument. The first decision relied upon by him, apart from the decision in *Lala Soni Ram v. Kanhaiya Lal*, is the one in *Mohesh Lal v. Busunt Kumaree*.<sup>2</sup> That was a suit to recover a debt, and governed by s. 20 of the Limitation Act of 1871, and the acknowledgment was good under that section. The law of limitation at the date of the suit being the Act of 1871 there was no question of the applicability of s. 2 of the Act of 1877. That case is, therefore, clearly distinguishable from the facts of the present case, which is not to recover a debt and as such governed by s. 20 of the Limitation Act of 1871, but is governed by art. 148 of that Act under which the two acknowledgments would be invalid.

The next case relied upon is *Zaib-un-nissa Bibi v. The Maharaja of Benares*.<sup>3</sup> In that case the mortgage was in 1823, there was an acknowledgment in 1868 which was valid according to the law in force at the date of the suit which was instituted in 1909. The suit could have been filed without the acknowledgment till 1883, and it would, therefore, have been governed by the Limitation Act of 1877 under which the acknowledgment in question was valid though it was invalid according to the law in force at the date of the acknowledgment, namely, the Act of 1859. The plaintiff was, therefore, held as entitled to rely on the acknowledgment. It is clear that in that case the right to sue was not barred when the Act of 1877 came into force, because sixty years had not elapsed at that time from the date of the mortgage. The general proposition laid down in the head note in that report correctly summarizes the law applicable to acknowledgments. It is held that the criterion to be applied to test the validity of an acknowledgment of liability put forward by a plaintiff as extending the period of limitation in his favour is the law in force at the time when the plaintiff's suit would otherwise have been time-barred and not that in force at the time when the acknowledgment relied upon was made.

The last case relied upon is *Amarchand v. Narayan*.<sup>4</sup> The mortgage there was in 1834, there were two acknowledgments, one in 1864 and the other in 1877, and the suit was filed in 1924. At least one acknowledgment, viz., the second, signed by the heirs of the mortgagee, was valid under the Act of 1908 when the suit was brought, and that acknowledgment was made while the right to sue on the mortgage was subsisting in 1877. It is clear, therefore, that the acknowledgment having been made during the subsistence of the right to sue, there was no scope for the application of s. 2 of the Act of 1877.

These are all the authorities that have been cited during the course of

1 (1900) L. R. 27 I. A. 103.

2 (1880) I. L. R. 6 Cal. 340.

3 (1911) I. L. R. 34 All. 109.

4 (1932) 34 Bom. L. R. 953.

the arguments. It would be clear from this discussion that the present case is governed by the qualification to the general rule, as the right to sue was lost before the Act of 1877 came into force. The acknowledgments, therefore, though valid under the Act of 1908 are of no avail for saving the bar of time.

The decision of the lower Court, therefore, holding that the suits were barred by limitation is correct, and the appeals are dismissed with costs.

BROOMFIELD J. In view of the learned argument at the bar, I will add a few remarks.

It is necessary to Mr. Coyajee's argument that he should be able to show that in 1921 and 1922 when the Damles sold the land, they were still mortgagees, that is to say, that the mortgage was still subsisting. It has to be conceded that, unless there was a valid acknowledgment, a suit to redeem the mortgage would have been barred in January, 1862, and also that the acknowledgment of 1849, on which Mr. Coyajee relies, being by an agent, did not become operative to save limitation until the Act of 1877 was introduced. Under that Act and subsequent Acts it would be operative for that purpose. Mr. Coyajee contends that the test of the validity of an acknowledgment is the law in force at the time of the institution of the suit. As a general rule that is undoubtedly the law : *Lala Soni Ram v. Kanhaiya Lal*.<sup>1</sup> But the rule is subject to the proviso that neither the right to the property in question has been extinguished, nor the right to sue in respect of it barred before the later law came into force. Once a right to property has been extinguished, or right of suit barred, it cannot be revived by subsequent Limitation Acts in the absence of express words so providing. That the decision in *Lala Soni Ram v. Kanhaiya Lal* does not really support the argument advanced by Mr. Coyajee in this case is clear, I think, from the discussion of that case in *Gopeshwar Pal v. Jiban Chandra Chandra*<sup>2</sup> and *Narayan v. Govind*.<sup>3</sup>

If s. 29 of the Act of 1871 applies to the case, the equity of redemption was extinguished after sixty years from the date of the mortgage and could not be revived. For the purpose of determining whether the right was extinguished or not, the relevant law must, I think, be the law in force when s. 29 was enacted. See *Fatimatunnissa Begum v. Soonder Das*<sup>4</sup> and *Indurai v. Shiwal*.<sup>5</sup> If the acknowledgment now relied on was not a valid acknowledgment under the Act of 1871—and it was not—the fact that it was made valid by subsequent legislation would be immaterial. It has not been argued before us that s. 29 of the Act of 1871 did not apply to a suit for redemption. In *Dhondi v. Lakshman*<sup>6</sup> and *Indurai v. Shiwal*<sup>7</sup> it has been held that it did apply to such a suit. But even if the equity of redemption had not been extinguished, the right to sue for redemption was barred in 1862, and in view of s. 2 of the Act of 1877, which is still the law, the right cannot be revived. It is true, as Mr. Coyajee says, that the present is not

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1 (1913) L. R. 40 I. A. 74,

s. c. 15 Bom. L. R. 489.

2 (1914) I.L.R. 41 Cal. 1125, S.B.

3 (1927) 29 Bom. L. R. 1563.

4 (1900) L. R. 27 I. A. 103.

5 (1925) 27 Bom. L. R. 467.

6 (1929) 31 Bom. L. R. 1287.

7 (1925) 27 Bom. L. R. 467.

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a suit for redemption, although it has been treated as such by both the lower Courts; but, in any case, in order to succeed the appellants have to show that the mortgage was subsisting in 1921, and that cannot be so if the right to sue for redemption was barred long before that date.

I, therefore, agree with my learned brother that the appeals should be dismissed with costs.

*Appeals dismissed.*

*Broomfield J.*

*Before Mr. Justice Broomfield and Mr. Justice Divatia.*

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September 6.

GURLINGAPPA CHINNAPPA MUTHAL.\*

*Civil Procedure Code (Act V of 1908), Sec. 64; O. XXI, r. 54; O. XXXVIII, r. 10—Transfer of Property Act (IV of 1882), Secs. 40, 54, 55(4) (b)—Attachment before judgment by creditor—Agreement to sell property to third party entered into by debtor before attachment—Sale effected after attachment—Attaching creditor whether entitled to sell property in execution of his decree—Right of attaching creditor to purchase-money.*

An attachment before judgment of property subject to a contract of sale merely gives the attaching creditor a right to the balance of the unpaid purchase-money and he is not entitled to bring that property to sale in satisfaction of a decree subsequently obtained by him. If the purchase-money or the balance thereof has not been paid, he can attach it in the hands of the purchaser. He would also in that case have the benefit of the vendor's lien under s. 55(4) (b) of the Transfer of Property Act, 1882.

The holder of a money-decree had attached the immovable property of his judgment-debtor before judgment. Before attachment the judgment-debtor had agreed to sell the property to a third party who had paid a certain amount as earnest money and who was put in possession of the property. The sale was completed by a conveyance after the attachment when a further sum was paid to the judgment-debtor and the balance was retained by the purchaser to satisfy certain mortgages on the property. In a suit by the decree-holder for a declaration that the property was liable to be attached and sold in execution of his decree:—

*Held*, that the attaching judgment-creditor was not entitled to sell the property in execution of his decree; but that he could only attach the purchase money or the balance thereof which has not been paid by the purchaser, or he could also have the benefit of a vendor's lien under s. 55 (4) (b) of the Transfer of Property Act, 1882.

*Buta Ram v. Sayyad Mohammad*,<sup>1</sup> distinguished.

*Tarakanath Mukherji v. Saratkumar Mukherji*,<sup>2</sup> explained.

*Madan Mohan Dey v. Rebati Mohan Poddar*,<sup>3</sup> *Basappa v. Hammappa*,<sup>4</sup>

\* Second Appeal No. 773 of 1938, from the decision of T. B. Shanbhag, Assistant Judge at Belgaum, in Appeal No. 222 of 1937, confirming the decree passed by V. R. Adkoli, Subordinate Judge at Bail-Hongal, in

Regular Civil Suit No. 197 of 1936.

1 (1934) I. L. R. 16 Lah. 328.

2 (1929) I. L. R. 57 Cal. 274.

3 (1915) 21 C. W. N. 158.

4 (1939) 41 Bom. L. R. 943.

*Veeraraghavayya v. Kamala Devi*,<sup>1</sup> *Veerappa Thevar v. Venkatarama Ayyar*,<sup>2</sup> and *Diraviyam v. Veeranan*,<sup>3</sup> followed.

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SUIT for declaration.

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CHANDRA  
#. GUR-  
LINGAPPA  
CHINNAPPA

One Chinnappa (plaintiff) obtained a money-decree against Virappa on September 1, 1932, in suit No. 205 of 1932, in the Court of the Subordinate Judge at Bail-Hongal. In this suit the plaintiff had obtained an order of attachment before judgment of the suit property, which consisted of a field belonging to Virappa, on June 9, 1932. Before the latter date Virappa had entered into a contract on April 27, 1932, with Rango (defendant No. 1) to sell the suit property to him for Rs. 7,000. Defendant No. 1 paid Rs. 1,500 as earnest money and he was put in possession of the property.

On June 11, 1932, i.e. two days after the attachment of the suit property, a sale-deed in respect of it was executed by Virappa in favour of defendant No. 1. Virappa was paid Rs. 1,766 and the balance was retained by defendant No. 1 in accordance with the agreement of April 27, 1932, to satisfy certain mortgages on the property.

On May 27, 1936, the plaintiff filed the present suit against defendant No. 1 and the sons of Virappa (defendants Nos. 2 and 3) for a declaration that the suit property was liable to be attached and sold in execution of his decree dated September 1, 1932.

The trial Court in granting the declaration observed as follows :—

"After exhibit 32 (the agreement of sale), but before exhibit 31 (the sale-deed), the property has been attached by the present plaintiff in Civil Suit No. 205 of 1932. In *Taraknath Mukherji v. Sanatkumar Mukherji* (57 Cal. 274) it has been held that an agreement to sell immoveable property creates an obligation which does not amount to a charge or interest in the property and cannot prevail over subsequent attachment, whether before or after judgment. At p. 158 of Mulla's Transfer of Property Act, there is the following pertinent passage :—

'The obligation which is annexed by this section to the ownership of property by a contract of sale will not prevail against claims enforceable under an attachment. If A agrees to sell immoveable property to B, and if before the conveyance is executed, a creditor C attaches the property, the subsequent conveyance by A to B will be subject to the claims of C enforceable under the attachment.'

Hence in this suit also, as the sale-deed (exhibit 32) was executed after the attachment of the property, exhibit 32 will be subject to the claims of plaintiff under the attachment."

On appeal the appellate Judge confirmed the decree of the trial Court and observed as follows :—

"The appellant urges that his right to obtain a sale-deed in respect of the property originated from the date of the contract which took place on April 27, 1932, which was much prior from the date of the attachment which was effected on June 9, 1932. The argument has no basis either in fact or in law. A mere contract for sale of the property creates no interest in favour of the purchaser. This is laid down in s. 54 of the Transfer of Property Act. It provides that a contract for sale of immoveable property does not in itself create any interest in, or charge on, such property. Hence it is clear that the contract evidenced by exhibit 32 created no interest in, nor charge on, the property in favour of the appellant under the terms of that agreement. The interest of the appellant in the property was created by the sale-deed, exhibit 31, which is obviously subsequent to the attachment

1 (1934) 68 M. L. J. 67.

3 [1939] Mad. 853, 863.

2 (1935) I. L. R. 59 Mad. 1.

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 1940 has been made, any private transfer or delivery of the property attached or of any  
 — interest therein and any payment to the judgment-debtor of any debt, dividend or  
 RANGO RAM- other moneys contrary to such attachment, shall be void as against all claims enforce-  
 CHANDRA able under the attachment.' Under the provisions of this section the appellant is bound  
 v. by the attachment to the extent of all claims enforceable under the attachment. This  
 GUR- is the view held by the Calcutta High Court in *Taraknath Mukherji v. Sanatkumar*  
 LINGAPPA *Mukherji* (57 Cal. 274). It is held therein that an agreement to sell immoveable pro-  
 CHINNAPPA perty creates no obligation amounting to a charge, or interest in the property, or an  
 — easement within the meaning of s. 40 of the Transfer of Property Act, 1882, and  
 cannot prevail over subsequent attachment whether before or after judgment.

It is, therefore, clear that the property was purchased by the appellant subject to the restrictions laid down in s. 64 of the Civil Procedure Code. It is equally clear that the attachment was valid in law as the judgment-debtors had an attachable interest in the property on the date on which the attachment was effected and as the appellant had no interest in the property at that time. As the sale-deed in favour of the appellant is subsequent to the attachment it is binding upon him as laid down in s. 64 of the Civil Procedure Code. As such the property is liable to be sold for the recovery of the debt due under the decree in execution."

Defendant No. 1 appealed to the High Court.

*M. B. Samarth*, with *N. S. Deshpande* (for *K. J. Kale*), for the appellant.  
*B. M. Kalagati*, for the respondents.

BROOMFIELD J. The question for determination in this second appeal is whether the holder of a money decree, who has attached immoveable property of his judgment-debtor before judgment, can bring that property to sale in satisfaction of his decree when the judgment-debtor has, before the attachment, agreed to sell the property to a third party and the sale has been completed by a conveyance after the attachment. The other facts which may be material in the particular case are that Rs. 1,500 out of the total consideration of Rs. 7,000 were paid at the time of the agreement, that possession was handed over to the purchaser at the same time, and that on the date of the sale-deed, which was executed two days after the attachment, Rs. 1,766 were paid to the vendor, the balance being retained by the purchaser in accordance with the agreement to satisfy certain mortgages on the property. The decree-holder brought a suit for a declaration that the property was liable to be attached and sold in execution of his decree, and both the lower Courts have held in his favour. The purchaser from the judgment-debtor has appealed.

The following provisions of law have to be considered in connection with the question :—Section 64, O. XXI, r. 54, and O. XXXVIII, r. 10, of the Civil Procedure Code, and ss. 40 and 54 of the Transfer of Property Act. Section 64 and O. XXI, r. 54, might seem at first sight to make the rights of the purchaser under the sale-deed subject to the rights of the attaching judgment-creditor, but these provisions must be read along with O. XXXVIII, r. 10. That rule saves the right of the purchaser under the contract of sale. His right is a personal one, i.e. the right to a conveyance in his favour on payment of the balance of the purchase-money. But there is nothing in the rule to suggest that it applies only to rights *in rem*. By reason of s. 40 of the Transfer of Property Act the purchaser may enforce his vendor's obligation under the contract of sale against a transferee with notice. Section 54 of the Act states that a contract for the sale of immoveable property does not, in itself,

create any interest in or charge on such property. But the attachment does not create any interest or charge either. In this respect the attaching creditor is in no better position than the purchaser, and simply on the construction of the statutory provisions it is difficult to see how his attachment can confer upon him any higher right than the judgment-debtor had at the date of the attachment, namely, a right to the balance of the purchase-money, this right being subject to the obligation to convey the property to the purchaser. The claim by the attaching creditor to sell the property in execution of his decree would override both the obligation of the judgment-debtor and the right of the purchaser existing prior to the attachment.

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We were referred only to one authority in support of the attaching creditor's claim, namely, *Buta Ram v. Sayyad Mohammad*,<sup>1</sup> and that is really no authority at all, because it was not a case of an attachment before judgment, and O. XXXVIII, r. 10, therefore, did not apply. The lower Courts have relied on *Tarakanath Mukherji v. Sanatkumar Mukherji*,<sup>2</sup> which case has sometimes been cited in the text books as an authority for the proposition that an attachment before judgment prevails over the rights arising from a prior contract of sale. But though it is by no means easy to follow the judgments delivered in that case, it is clear when the facts are looked at that the Court did not lay down any such proposition. The suit there had been brought by the purchaser from the judgment-debtor for a declaration that the property was not liable to be sold in execution of the decree against him, and the Court of first appeal had made a decree confirming the plaintiff's title, but directing him to pay certain sums to the defendants which were made a charge on the property. This decree was confirmed in second appeal. It seems probable, although the fact does not very clearly appear from the report of the case, that the direction for payment of certain sums to the defendants and the declaration of a charge effectively safeguarded the rights of the attaching creditor to the balance of the purchase-money. But, in any case, as the purchaser's title was confirmed, there was certainly no finding that the attaching judgment-creditor was entitled to sell the property in satisfaction of his decree.

It may be noted moreover that in an earlier case, *Madan Mohan Dey v. Rebat Mohan Poddar*,<sup>3</sup> the Calcutta High Court decided against the claim of the attaching creditor in similar circumstances. The facts were the same as here except that the contract for sale had been enforced in execution of a decree for specific performance, and the attached property had likewise been sold in execution. The Court had to determine the respective rights of the two purchasers. It held that the rights of the purchaser under the contract must prevail. The reasons given were that s. 64 of the Code only protects the creditor against a transaction subsequent to the attachment, and it must be read subject to O. XXXVIII, r. 10, which is not limited to rights *in rem*. In *Basappa v. Hanmappa*,<sup>4</sup> Beaumont C. J. followed this case in preference to *Tarakanath Mukherji v. Sanatkumar Mukherji*.

It has been held in several cases in Madras, *Veeraraghavayya v. Kamala*

1 (1934) I. L. R. 16 Lah. 328.

2 (1929) I. L. R. 57 Cal. 274.

3 (1915) 21 C. W. N. 158.

4 (1939) 41 Bom. L. R. 943.

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*Devi*,<sup>1</sup> *Veerappa Thevar v. Venkatarama Ayyar*<sup>2</sup> and *Diraviyam v. Veeranan*,<sup>3</sup> that the attachment before judgment of property subject to a contract of sale merely gives the attaching creditor a right to the balance of the purchase-money. With respect I agree with this view. It necessarily follows that he can never sell the property in satisfaction of his own decree. If the purchase-money or the balance thereof has not been paid, he can attach it in the hands of the purchaser. He would also in that case have the benefit of the vendor's lien under s. 55(4) (b) of the Transfer of Property Act (see *Veerappa Thevar v. Venkatarama Ayyar*<sup>4</sup>) and he could, if necessary, sue to enforce it. If the whole of the price has been paid to the vendor, the attaching creditor's only right would seem to be to attach the money in the hands of the vendor, if he can. In most cases he will not be able to do so, and the attachment will then be infructuous, for although by reason of the attachment the attaching creditor will become entitled to whatever part of the purchase-money has been paid after the attachment, the attachment itself will not enable him to enforce that right. That is the position in the present case, for the balance of the purchase-money, which was payable to the vendor, was paid on the date of the sale-deed.

We are informed that the purchaser has not yet satisfied the mortgages on the property which he is bound to do under the contract of sale. But that part of the purchase-price has to be applied in that way under the terms of the agreement. The attaching judgment-creditor got no right to it by his attachment of the property. As things are, therefore, not only is he not entitled to sell the property in satisfaction of his own debt but he is not entitled to any relief which the Court could give him in this suit.

DIVATIA J. This appeal arises in a suit by the plaintiff for a declaration that certain property consisting of a field belonging to one deceased Virappa, father of defendants Nos. 2 and 3, was liable to be attached and sold in execution of a decree in suit No. 205 of 1932 obtained by the plaintiff against Virappa. In that suit the plaintiff had obtained an order of attachment before judgment of this property on June 9, 1932. Before that date Virappa had entered into a contract on April 27, 1932, with defendant No. 1 to sell the field to him for Rs. 7,000, and the latter had paid Rs. 1,500 as earnest money and was also put in possession of the property. On the same date Virappa passed to defendant No. 1 a receipt in which it was stated that Rs. 1,500 were received as earnest money, that a sale-deed was to be passed within a month, that out of the balance of Rs. 5,500 payable for the price defendant No. 1 was to pay off a pre-existing mortgage on the property and he was to pay the remaining amount in cash to Virappa. The sale-deed was executed on June 11, 1932, Rs. 1,766 were paid to Virappa, and the remaining amount from the balance of Rs. 5,500 was left with defendant No. 1 to pay off the mortgagee. Thereafter the plaintiff's suit against Virappa ended in a decree in his favour on September 1, 1932. He applied for execution and proceeded against this property which was attached before judgment. Defendant No. 1 filed an objection petition in the darkhast on the ground that the field had been sold to him under a contract of sale prior to the attachment before

1 (1934) 68 M. L. J. 67.

2 (1935) I. L. R. 59 Mad. 1.

3 [1939] Mad. 853, 863.

4 (1905) I. L. R. 59 Mad. 1, 4.



judgment and that the title having passed to him by his subsequent sale-deed, it was not liable to be sold in execution. Defendant No. 1 succeeded in his application and the attachment was raised on April 15, 1935. Hence the present suit by the plaintiff against defendant No. 1 for a declaration of his right to attach and sell the property.

The plaintiff's case in substance was that the sale-deed being subsequent to the attachment, it was subject to his rights under the attachment, and, therefore, inoperative. Defendant No. 1's case was that he had become the absolute owner of the property even before the attachment by reason of his contract under which he was put in possession, and that in any case the attachment was invalid as he had a charge on the property to the extent of his purchase-money.

Both the lower Courts held that the attachment was valid and binding on defendant No. 1, that he took no title under the sale-deed, and the property was, therefore, liable to be sold in execution of the plaintiff's decree. The reasons given by the lower Courts are shortly these : A contract to sell does not create a charge on the property, and is not, therefore, a pre-existing right under O. XXXVIII, r. 10, of the Civil Procedure Code, that the subsequent sale-deed of the property attached was void as against all claims enforceable under the attachment under s. 64 of the Civil Procedure Code, and that as decided in *Tarakanath Mukherji v. Sanatkumar Mukherji*,<sup>1</sup> the contract to sell cannot prevail over the subsequent attachment, whether before or after judgment. A decree was, therefore, granted in the plaintiff's favour, and this appeal is now preferred by defendant No. 1 against that decree.

The point arising for decision in this appeal depends on the application of s. 64 read with O. XXXVIII, r. 10, of the Civil Procedure Code. Under s. 64 a private transfer of property after its attachment is void as against all claims enforceable under the attachment. Order XXXVIII, r. 10, provides that attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit. If, therefore, a person has a right over a property before its attachment and he is not impleaded in the suit, that right could not be affected by the attachment. The question then is whether a transfer of property in pursuance of such a right would be affected by the attachment. It is true that under s. 54 of the Transfer of Property Act a contract for sale of immoveable property does not, of itself, create any interest in, or charge on, such property, but it is also true that an attachment, whether before or after judgment, does not confer any title in, or create a charge over, the property. It merely keeps it in *custodia legis* and prevents its alienation in certain cases. Moreover, the attachment is not necessarily of the property itself but of the right, title and interest of the debtor in the property at the date of the attachment. So also under O. XXXVIII, r. 10, it is subject to pre-existing rights over the property. If, therefore, a person, having a contract of sale in his favour, has such pre-existing right, the attachment could not be binding on him. The right of a promisee under such contract is to enforce its specific performance by the sale of the property to him. If the promisor sells or gifts the property and hands over its possession to another with notice of the contract, the promisee can enforce it against that other person also under s. 27 of the Specific Relief Act as well as s. 40 of the Transfer

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of Property Act. True, it is a right *in personam* and not *in rem*, but it is an obligation annexed to the ownership of immovable property and is in the nature of a trust under s. 91 of the Indian Trusts Act. It is, therefore, clearly a right within the meaning of that term in O. XXXVIII, r. 10, and the attachment under s. 64 is subject to that right. If the promisee gets a conveyance, after the attachment, in pursuance of his contract, he takes a good title in spite of the attachment. Even if the property is sold in execution, he can enforce specific performance of his contract against the auction-purchaser as the latter acquires only the interest of the judgment-debtor, and that interest is burdened with the contract.

The lower Court has relied on the decision in *Taraknath Mukherji v. Sanatkumar Mukherji* in holding that the attachment is binding on defendant No. 1 and that the property is liable to be sold in execution of the plaintiff's decree, but it has misunderstood the actual decision in that case. There the contract to sell took place on July 8, 1921, in favour of the plaintiff under which he paid the greater part of the price as earnest money. The property was attached by three creditors in their suits in August and September, 1921; in November, 1921, it was sold to the plaintiff who paid the balance of the purchase-money. In execution of the attaching creditors' decrees, the plaintiff objected unsuccessfully, and he, therefore, filed suits for declarations that the property was not liable to be sold. The lower Court had held that the title of the plaintiff to the property would be confirmed but he should pay certain sums to the defendants which would be a charge on the property. That order was confirmed by the High Court, but the two learned Judges based their decisions on different grounds. Cuming J. observed that as the contract did not create a charge on the property, the attaching creditor had the right to bring it to sale in execution in spite of the previous sale to the purchaser who may enforce his right of specific performance against the auction-purchaser under s. 40 of the Transfer of Property Act. He discussed a previous decision of the Calcutta High Court in *Madan Mohan Dey v. Rebati Mohan Poddar*<sup>1</sup> in which it was held that the attachment was not effective against a sale in pursuance of a contract before attachment, but it was distinguished on the ground that it did not proceed on any principle of law but on natural justice. In the end, however, he did not hold the sale to the plaintiff as invalid but made it subject to a charge for the payment of sums due to the attaching creditors on the property in his hands. But he did so on the ground that as the attachment prevailed over the subsequent sale, the property remained liable for the attaching creditors' claims. The other Judge, Pearson J., was of the opinion that the previous decision in *Madan Mohan Dey v. Rebati Mohan Poddar* was not based merely on the principle of natural justice but on s. 64 coupled with O. XXXVIII, r. 10, of the Civil Procedure Code. He was, however, of opinion that the attachment affected the right of the vendor in the property, at any rate, to the extent of any balance then receivable under the agreement, and the attaching creditor was entitled to have it applied, in the events which had happened, towards the payment of his debt. On that ground he agreed with the order that the plaintiff was liable to pay to the defendants the balance recoverable at the date of the attachment.

<sup>1</sup> (1915) 21 C. W. N. 158.

I have dwelt upon this case at some length because it has been mainly relied on by the lower Court in support of its decision, and it is therefore necessary to see whether it can be regarded as an authority laying down any general rule. One thing is, at any rate, quite clear that even if that decision is correct, it does not support the decree which the lower Court, relying upon it, has made in the present case. The lower Courts have held that in spite of the sale in favour of defendant No. 1 in pursuance of the contract prior to the attachment, the property is liable to be sold in execution of the plaintiff's decree. But that was not the order in *Tarakanath's* case. On the other hand, the title of the purchaser to the property was confirmed. The only result of the attachment was held to be the creation of a charge on it for payment of the sums due to the creditors even though the whole of the price had already been paid by the purchaser to his vendor. There is no authority for the proposition that in such a case the sale in pursuance of the contract is to be treated as absolutely void and that the property should be sold at the instance of the attaching creditors either free from or subject to the right under the pre-existing contract. On the other hand, it has been held in *Veerappa Thevar v. Venkatarama Ayyar*<sup>1</sup> and *Diraviyam v. Veeranan*<sup>2</sup> that title to the property passes to the purchaser, and it cannot be sold in execution of the decree. The same view is taken by Beaumont C. J. in *Basappa v. Hanmappa*<sup>3</sup> although the observations were in the nature of *obiter dicta*. The decree of the lower Court cannot, therefore, be justified in any case, but the question would still remain whether defendant No. 1 gets absolute title under the sale or he gets it subject to a charge for the balance of the price payable at the date of the attachment. In *Tarakanath's* case, discussed above, a charge was no doubt created on the property in favour of the attaching creditors, but it is difficult to extract any general principle from either of the two judgments in that case. The plaintiff appears to have been satisfied with the confirmation of the sale to him and willing to pay off the decree-holder. *Tarakanath's* case, therefore, cannot be regarded as an authority for the proposition that the attachment prevails over the contract in the sense that the purchaser under the contract takes the property burdened with the obligation to pay off the attaching creditors to the extent of the balance of the price unpaid at the time of the attachment, even though he had subsequently paid the balance to his vendor at the time of the completion of the sale. It is indeed true that the attachment holds good in respect of such right as the vendor had in the property at the time of the attachment, i.e. the right to receive the whole or a part of the price on completion of the sale. It is held in *Veerappa Thevar v. Venkatarama Ayyar* that where there is an unpaid balance of the purchase-money, the attachment fastens to the vendor's right to recover the money, i.e. the unpaid vendor's lien over the property under s. 55(4)(b) of the Transfer of Property Act. To the same effect is the decision in *Diraviyam v. Veeranan*. Those decisions are, in my opinion, correct. If, therefore, there is an unpaid balance of price in the hands of the purchaser, the attaching creditor can hold the purchased property in his possession liable for that amount,

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1 (1935) I. L. R. 59 Mad. 1.

3 (1939) 41 Bom. L. R. 943.

2 [1939] Mad. 853.

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because by virtue of the attachment he gets the benefit of the lien. If, however, the purchaser has paid the whole price to the vendor, the vendor's lien has ceased to exist and the property is free from liability. The attaching creditor can proceed against the price in the hands of his judgment-debtor, but he cannot hold the purchaser responsible for paying it over again to him.

We have not got sufficient materials in the present case to hold that the order of attachment before judgment operated as a notice or an injunction to the purchaser not to pay the balance of the purchase-money to the vendor. It seems to be clear in any case that he had no specific notice of the order of attachment. That being so, he was not bound to pay it in Court or to the attaching creditor, and if he did pay it to his vendor at the time of the completion of the sale, he cannot be ordered to pay it over again to the attaching creditor. In my opinion, therefore, the purchaser in the present case gets an absolute title to the property he has purchased under his contract, and the decision of the lower Court is, therefore, wrong and must be set aside.

PER CURIAM. Appeal allowed, decrees of the lower Courts reversed and suit dismissed with costs throughout.

*Appeal allowed.*

*Before Mr. Justice Broomfield and Mr. Justice Wassoodew.*

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October 3.

LAXMIBAI VENKATRAO DESAI

v.

KESHAVRAO LINGANGOUDA DESAI.\*

*Hindu law—Adoption—Joint Hindu family—Sole surviving coparcener—Widows of predeceased coparceners—Arrangement under which adoptive widow of sole coparcener takes life interest—Consent of adopted son's natural father to such arrangement—Son subsequently adopted by widow of another coparcener—Whether such arrangement affects rights of subsequently adopted son.*

Under Hindu law an arrangement which regulates the rights of the adoptive mother *vis-a-vis* the adopted son cannot affect the rights or claims of a person who is subsequently adopted in the undivided family and who is not a party to the arrangement.

One V was left the sole surviving coparcener in a joint Hindu family after the death of his two brothers who died childless leaving their widows surviving them. On July 17, 1928, V executed a document in the nature of a testamentary deed of his estate by which he authorised his widow L to adopt M who was the son of his daughter by his predeceased wife. L was authorised to manage V's "property in her independent right till her death." Soon after this V adopted M and executed a registered deed of adoption under which L was authorised to manage the property in the terms of the previous deed. This arrangement was agreed to by the natural father of M. V then died and on February 26, 1935, the widow of one of V's brothers adopted the plaintiff. The plaintiff filed a suit against L and M for partition claiming a half share in the

\* First Appeal No. 231 of 1939, from the decision of G. A. Balse, First

Class Subordinate Judge at Dharwar, in Special Suit No. 42 of 1937.

joint family property. L contended that the arrangement evidenced by the adoption deed was binding on the plaintiff and governed the relationship between him and L as well as M.---

*Held*, (1) that inasmuch as the family continued to be joint so long as any widow remained in it with a power to adopt, the adoption of the plaintiff was valid and affected the family property :

*Chanbasappa v. Huchappa*<sup>1</sup> and *Irappa Lokappa v. Rachayya Madiwalayya*,<sup>2</sup> followed ;

(2) that the arrangement evidenced by the deed of adoption, validated on the ground of custom, was binding in so far as it regulated the right of L as against M :

*Krishnamurthi Ayyar v. Krishnamurthi Ayyar*,<sup>3</sup> followed ;

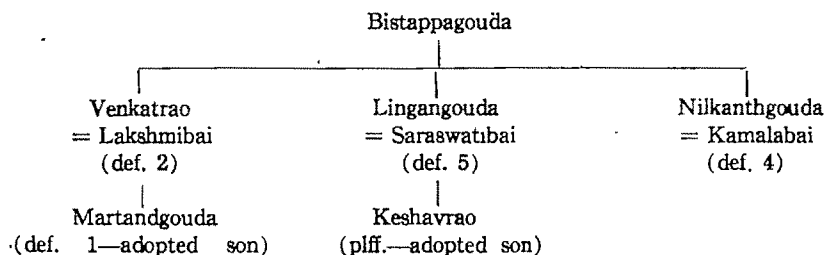
(3) that it could not be supported on the basis of a supposed alienation by a sole surviving coparcener prior to the adoption of the plaintiff, because the deed was to come into operation after V's death ;

(4) that the rights or claims of persons subsequently adopted in the family who were not parties to the arrangement were not affected by it ; and

(5) that the plaintiff was therefore entitled to half a share in the family property.

#### SUIT for partition.

The property in suit belonged originally to one Bistappagouda, to whom the parties to the suit were related as shown in the following genealogical tree :—



On Bistappagouda's death, his three sons continued to live jointly as before. One of the sons Nilkanthgouda died in 1918 leaving him surviving his widow Kamalabai (defendant No. 4). Lingangouda died in 1923 leaving his widow, Saraswatibai (defendant No. 5), surviving him.

The surviving coparcener Venkatrao was a thrice married man. By his first wife Bhagirathibai he had a daughter. That daughter had a son named Martandgouda (defendant No. 1). His second wife Lakshmibai (defendant No. 2) gave birth to three daughters, Anusuyabai, Chitrabai and Savitribai. The name of his third wife was Indirabai (defendant No. 3).

On July 17, 1928, Venkatrao executed a vyavasthapatra by which he authorised his wife Lakshmibai to adopt a son, empowered her to manage the property in her independent right during her lifetime, and provided that if disputes arose between her and the adopted son, each one should take a moiety of the income of the property.

1 (1938) 40 Bom. L. R. 1185.

2 (1939) 41 Bom. L. R. 1300.

3 (1927) L. R. 54 I. A. 248,  
s. c. 29 Bom. L. R. 969.

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On August 11, 1928, Venkatrao himself adopted his minor grandson Martandgouda (defendant No. 1) after stipulating with his natural father as his guardian that the terms of the vyavasthapatra were binding on the adopted son. Venkatrao died the next day, i.e. August 12.

Disputes between Lakshmibai and Martandgouda were not long in coming. They came to a head in 1930, and resulted in litigation in 1930. The disputes were finally decided in the High Court on September 21, 1936, by Barlee and Tyabjee JJ., who decided :—

“Lakshmibai is entitled under the agreement to the management of the estate for her life and in case the adopted son quarrels with her after he comes of age, to a life interest in a moiety. The adopted son is the full owner subject to her life interest and will get a moiety of the income after he attains majority. Up to then he is entitled to maintenance.”

Whilst the above litigation was going on, Saraswatibai (defendant No. 5), the widow of Lingangouda, adopted Keshavrao (plaintiff) on February 26, 1935.

On June 28, 1937, the plaintiff filed a suit to recover a half share in the family property as the adopted son of Lingangouda.

The trial Judge held that the adoption of the plaintiff was valid and decreed to the plaintiff a half share in the family property by partition.

Defendant No. 2 appealed to the High Court.

*R. A. Jahagirdar*, for the appellant.

*H. B. Gumaste*, for respondent No. 1.

*V. H. Gumaste*, for respondents Nos. 1 and 4.

WASSOODEW J. This is an appeal from a decree of the First Class Subordinate Judge of Dharwar in a suit by the plaintiff to recover, upon partition, possession with mesne profits of his half share in certain properties mentioned in the schedules to the plaint which were admittedly the joint family estate of the plaintiff's adoptive father Lingangouda and his two brothers Venkatrao, *alias* Kenchappaya and Nilkanthagouda. The facts which have given rise to this dispute are briefly these.

The plaintiff's adoptive father Lingangouda died childless in 1923 leaving a widow Saraswatibai, defendant No. 5 in the case. Lingangouda was predeceased by his younger brother Nilkanthagouda in 1918 who left a widow who is defendant No. 4. Upon the death of these two brothers Venkatrao was left the sole surviving coparcener in the family. Venkatrao was thrice married and in 1928, which is an important period in the history of this litigation, only his last two wives the appellant Lakshmibai, defendant No. 2, and Indirabai, defendant No. 3, were living. They had no issue. The first wife: Bhagirathibai who died before 1928 had left three daughters, one of whom had a son Martand, defendant No. 1 in the case, who was then a child aged four and is still a minor. It appears that Venkatrao on July 17, 1928, executed a document (exhibit 100) described as “vyavastha-patrack” in the nature of a testamentary disposition of his estate. By that document he authorised Lakshmibai to adopt his daughter's son Martand. He also made provision for his daughters and widows and mother and also for the management of the estate during the minority of Martand and thereafter. The mate-

rial provisions in that respect are contained in cls. (2) and (7) of the deed which are reproduced below :—

"My second wife Laxmibai should bring up the said adopted boy and she alone should make vahiwat of the property in her independent right till her death and she alone should go on managing the household affairs (go on making vahiwat of the family). It is my wish that all the members of the family should remain in union. In case any dispute arises, then the lands as mentioned below out of our family property should be taken by the respective persons and should stay.

"Laxmibai should make vahiwat of all my property. During her lifetime and after the adopted son becomes major, any dispute arises, then in the remaining income Laxmibai should take half of the net income and should manage as she wills and the remaining half only should be taken by the adopted son who should make vahiwat and enjoy the same."

Not long after executing that document, Venkatrao adopted Martand, his daughter's son referred to in the above deed, on August 11, 1928. The next day it appears Venkatrao died. On the date of the adoption Venkatrao executed a registered deed of adoption (exhibit 94) which is to the following effect :—

"I have no male issue born of me. I am now attacked by illness. For the continuation of the line of my family, I asked your genitive parents to give you (Martand) in adoption to our family. They accordingly having agreed, gave you in adoption. And I accordingly, have taken you in adoption as per our Hindu Dharma Shashtra (according to Hindu rites). You are the absolute owner to my entire moveable and immoveable property. My wife Laxmibai herself should make vahiwat of my family moveable and immoveable properties. The arrangement and the vahiwat of my family properties (moveable and immoveable) as per will executed by me on date 17th of July 1928 should be made. Such is the adoption executed by me voluntarily."

The document is signed by the adoptive father and is addressed to the adopted son Martand (*vide* exhibit 94).

Thereafter disputes arose between Laxmibai on the one hand and the adopted son represented by his natural father on the other, in consequence of which Laxmibai instituted a suit in 1930 for a declaration that the adoption of Martand was invalid and illegal and that she was entitled to manage and enjoy the property under the adoption deed read with the earlier document the "vyavastha-patrak" executed in her favour by Venkatrao on July 17, 1928. The trial Court held that the adoption was valid and binding on the widow Laxmibai, but that she was entitled under the deed of adoption to the management of the estate for her life in terms of the "vyavastha-patrak" to which reference has been made therein. It was held that the arrangement, which was agreed to between Venkatrao and the natural father of the adopted son, was binding on the parties and the adoptive mother. Against that decision Laxmibai appealed to the High Court and there were cross-objections filed on behalf of the adopted son Martand. This Court on September 24, 1936, dismissed that appeal as well as the cross-objections maintaining the decree of the trial Court.

While that litigation was pending between Laxmibai and her adopted son Martand, the widow of the deceased Lingangouda adopted the plaintiff on February 26, 1935, and on June 28, 1937, the latter instituted this suit for partition claiming a half share in the joint family estate which his deceased

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A. C. J. father was entitled to on his death.

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That claim was met by various pleas, including the plea that the adoption of the plaintiff was invalid and illegal, and in the alternative that the arrangement evidenced by the adoption deed of August 11, 1928, and upheld by the High Court in the suit between Laxmibai and defendant No. 1, Martand, was binding on the plaintiff and governed the relationship between him and Laxmibai as well as defendant No. 1. Laxmibai's principal contention was that she could not be dispossessed of this property and deprived of the enjoyment of its benefit during her lifetime, there being a disposition in her favour by her husband whilst he was the sole surviving coparcener which was acquiesced in and agreed to by the natural father of her adopted son.

The learned trial Judge has found that the plaintiff's adoption was proved and valid and that he was entitled to partition and possession of a share in the disputed estate. Accordingly a preliminary decree for partition was passed in his favour and an enquiry was directed upon the claim to mesne profits from the date of the suit, the plaintiff's share being fixed as half in the disputed property.

In this appeal by defendant No. 2 Laxmibai from that decree, two contentions have been formulated by her learned advocate, first, that the arrangement evidenced by the deed of adoption is operative as an alienation of the entire estate in favour of Laxmibai under which it was to be enjoyed and managed by her during her lifetime in terms of the "vyavastha-patrak" of July 17, 1928, and is therefore binding not only on defendant No. 1, the son adopted by Laxmibai's husband, but also on all other persons subsequently born in the family or adopted by the widows of the deceased "gotraja sapindas" who died in union; and, secondly, that the adoption of the plaintiff is illegal and invalid in view of the extinguishment of the coparcenery prior to the adoption of the plaintiff. The latter ground was not urged in the trial Court in defence to this action and no issue was claimed and no evidence directed to the question as to whether the coparcenery had come to an end either upon the death of Venkatrao or subsequent thereto prior to the adoption of the plaintiff. It is also material to note that that ground has not been taken in the memo of appeal. It is a new point raised for the first time in argument. That point necessarily involves questions not only of law but of fact. We have therefore declined to hear arguments of Mr. Jahagirdar for the appellant on that point.

The only issue that was therefore argued is the one involved in the first contention. The factum of adoption was not questioned for the appellant. The evidence in my opinion satisfactorily establishes the adoption of the plaintiff by the widow of Lingangouda on February 26, 1935. There is no question that the adoption to her husband by a widow of a deceased "gotraja sapinda", who was a member of a Mitakshara joint family, is valid and binding on the other members of the family so far as the creation and vesting of a coparcenery interest in the joint family property is concerned immediately upon adoption, the interest being co-extensive with that of his adoptive father. And it makes no difference to the vesting of that interest where only one member of the joint family survives at the time of adoption, for it has been held that the family continues to be joint so long as any widow remains in



it with a power to adopt (see *Chanbasappa v. Huchappa*<sup>1</sup> and *Irappa Lokappa v. Rachayya Madiwalayya*<sup>2</sup>).

Mr. Jahagirdar contends that the terms of the deed of adoption give effect to what he describes as a family arrangement and therefore it is binding upon all the members of the coparcenery including those born subsequent to the deed of adoption. His argument is that inasmuch as the parties to that arrangement, assuming it to be the act of Venkatrao and Martand, were absolutely entitled to the joint family estate, they could by mutual consent limit the estate of the future coparceners. His alternative contention, as I have stated, is that the arrangement is tantamount to an alienation either by a sole coparcener or existing coparceners, and as such is binding on the plaintiff, the subsequently adopted son by a widow of a deceased "gotraja sapinda". The former contention involves a strange doctrine, namely, that it is in the power of coparceners in a joint family for the time being in possession of the joint family estate by an arrangement or agreement among themselves which is short of alienation or severance of their respective interests, to restrict or curtail the rights of enjoyment of the future coparceners, born or adopted in the joint family. Mr. Jahagirdar has argued that *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*<sup>3</sup> is an authority for upholding such an arrangement. There a dispute arose between the adopted son and the widow of the adoptive father with regard to the enjoyment and management of the joint family property. An arrangement was made by the adoptive father in a will before the adoption took place, according to which his widow was allowed to enjoy his property during their lifetime, or for a less period. That arrangement was consented to by the natural father of the adopted son before the adoption. Their Lordships of the Judicial Committee after reviewing the Indian authorities which they thought were not reconcilable in so far as they could yield some principle governing the arrangements arrived at between the adoptive father and the natural father of the adopted son, came to the conclusion that the only ground on which such arrangement could be sanctioned was custom. The following observations of Viscount Dunedin, who delivered the judgment of the Board, are important (p. 263) :—

"They are of opinion that there is such a consensus of decision in the cases with the exception of the case of *Jagannadha v. Papamma*,<sup>4</sup> that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one sine qua non of such an arrangement should be the consent of the natural father. But if this is looked at narrowly, it is only because it is a part of the custom that it is either here or there."

There can be no doubt upon that authority that the arrangement evidenced by the deed of August 11, 1928, could be upheld on the ground of custom. And that arrangement has been upheld by this Court in the appeal between defendant No. 1 and defendant No. 2. But according to their Lordships of the Privy Council that arrangement is binding in so far as it regulates

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1 (1938) 40 Bom. L. R. 1185.

2 (1939) 41 Bom. L. R. 1300.

3 (1927) L. R. 54 I. A. 248,

s. c. 29 Bom. L. R. 969.

4 (1892) I. L. R. 16 Mad. 400.

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the right of the widow as against the adopted son. The question is whether the rule of custom could be extended to regulate by such an arrangement the rights of persons in the position of the plaintiff or other coparceners born in the family. If, for instance, after the arrangement was concluded a son were born to the adoptive father in his lifetime or after his death, would his interest be bound by the terms of that arrangement to which he was not a party actually or fictionally? Similarly, would the interests of a person adopted by a widow of a deceased coparcener of the joint family entitled under ordinary law to a share in the coparcenary property be affected by it? No authority has been cited before us to show that the rule of custom can be extended to affect other interests referred to. In my opinion it does not seem right that such an arrangement, which regulates the rights of the adoptive mother *vis-a-vis* the adopted son, should affect the other coparceners in the joint family acquiring that status by birth or adoption.

But Mr. Jahagirdar has argued that inasmuch as Venkatrao, who was the sole surviving coparcener prior to the adoption, could make a disposition *inter vivos* of his property in his wife's favour which would be binding on the son adopted or born subsequently, the arrangement in question should be similarly treated and given effect to. The assumption underlying that argument is that the arrangement must be looked upon as governed by a special equity or as an alienation. It is certainly not a family arrangement, as ordinarily understood implying a settlement of a doubtful claim by agreement to attract the special rule of equity to it. Nor could it be regarded as an alienation or disposition *inter vivos*, for obviously under the two deeds the adoptive father so long as he lived lost nothing or rather contracted to lose nothing of his interest in the entire estate. An alienation *inter vivos* implies the voluntary resignation of an estate by one man and its acceptance by another. The deed was to come into operation after Venkatrao's death. So that the argument based on a supposed alienation by a sole surviving coparcener prior to the adoption is not well founded. But Mr. Jahagirdar contends that it could still be regarded as a joint disposition by the father and the adopted son. That argument is obviously unsound. It could not be regarded as a disposition by the son prior to his adoption, for he had not acquired any right which he could dispose of through his natural father. In point of fact it is not a joint act of the adoptive father and the adopted son. The latter after his adoption could not being a minor effect an alienation himself. Upon his adoption his natural father could not on the minor's behalf agree to an alienation in favour of the adoptive mother except within the limits of the rule of custom recognized in *Krishnamurthi Ayyar's* case. The consent of the natural father would not be effectual in law or by custom to validate the disposition of Venkatrao according to his will, for that would take effect after the lifetime of the adoptive father and curtail the rights of the adopted son as a co-sharer. I do not therefore think on principle that the rights or claims of persons subsequently adopted in the family who are not parties to the arrangement would be affected by it. In that view of the matter, it is unnecessary to deal with the other cases referred to which have very little bearing upon the question in dispute. I would therefore confirm the decree of the lower Court and dismiss this appeal with costs (one set).

BROOMFIELD J. Mr. Jahagirdar does not rely on the will of Venkatrao and it is clear that the adoption of a son by the testator renders the will as such invalid. The main argument before us on behalf of the appellant is that the agreement between Venkatrao and the natural father of the adopted son before the adoption, providing that Venkatrao's widow, defendant No. 2, should have a life estate may be regarded as an alienation of joint family property *inter vivos* analogous to an alienation by a sole surviving coparcener or by a coparcener in excess of his share, and should be similarly held binding on a person like the plaintiff, not then in existence as a member of the family. As my learned brother has pointed out, however, it is extremely difficult to see how the transaction can be regarded as an alienation. Mr. Jahagirdar says that it was an alienation by the father Venkatrao or by Venkatrao and the adopted son together. But if it be treated as an alienation by the father, it was obviously not *inter vivos*. The terms of the agreement were not to take effect until his death. On the other hand, if it were to be treated as an alienation by the son, it was not by a coparcener, for until he was adopted he was not a coparcener. That being so the principles laid down in *Basawantappa v. Mallappa*<sup>1</sup> and the cases referred to in the judgment in that case have no application.

Defendant No. 2's right to a life interest is really based on custom and nothing else—the custom recognized in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*<sup>2</sup> which regulates the right of a widow and mother of the adopted son as against the adopted son. But in the absence of authorities,—and it is admitted that there is no authority—this custom cannot be extended so as to make the pre-adoption agreement binding on parties other than the adopted son. Defendant No. 2 by virtue of the agreement, which has been recognized in the previous litigation, got a right as against defendant No. 1 to enjoy defendant No. 1's property during her lifetime. She still has that right. But defendant No. 1 being a member of the joint family, although for a time after Venkatrao's time he was the sole surviving coparcener, his interest in the estate was liable to be diminished in case one of the widows of a deceased coparcener adopted a son, and in that event defendant No. 2's right was liable to be diminished to the same extent. I agree therefore that the appeal fails and must be dismissed.

*Appeal dismissed.*

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<sup>1</sup> (1938) 41 Bom. L. R. 268.

<sup>2</sup> (1927) L. R. 54 I. A. 248,  
s. c. 29 Bom. L. R. 969.

Before Sir John Beaumont, Kt., Chief Justice.

1940

October 14.

ANNU BAJABA JAGADALE

v.

DADU TUKARAM JAGADALE.\*

*Indian Limitation Act (IX of 1908), Secs. 6, 7, 8 and 9—Alienations by Hindu widow—Adoption made after alienations—Death of adopted son after attaining majority—Second adoption—Suit by second adopted son to set aside alienations—Whether suit by second adopted son to set aside alienations barred—Cause of action—Limitation.*

A Hindu died in the year 1900 without issue leaving certain properties. His widow alienated some of his lands in 1901 and 1904 by passing sale deeds in favour of defendants' predecessors-in-title. She adopted a son to her husband, but he died unmarried in 1918 after attaining the age of majority. In 1934 she adopted another son to her husband. In a suit by the second adopted son to set aside the alienations made by her adoptive mother, it was contended that the prior adopted son, who had been validly adopted and had attained majority long after the alienations, had a right to challenge the alienations, and, as against him the period of limitation had commenced to run, the plaintiff could not acquire a fresh cause of action to set aside the alienations in respect of which time had already run :—

*Held*, that the effect of ss. 6, 7, 8 and 9 of the Indian Limitation Act, 1908, was to bar the prior adopted son's right to sue, and as his right was barred, no further right to sue in respect of the alienations could accrue to the plaintiff.

SUIT for possession of property.

In 1900 one Tukaram died leaving certain properties but no issue behind him.

On April 15, 1901, his widow Dhondai executed a sale-deed of survey No. 184, admeasuring two acres and fifteen gunthas, for Rs. 500 in favour of the father of defendants Nos. 4 and 5.

On October 3, 1904, Dhondai's father executed a sale-deed of survey No. 165 belonging to Tukaram in favour of the father of defendant No. 6 for Rs. 200.

On May 11, 1908, Dhondai executed a sale-deed of survey No. 122, admeasuring four acres and sixteen gunthas, for Rs. 100, in favour of defendant No. 1.

Dhondai adopted a boy to her husband, but he died unmarried in 1918 after having reached the age of majority.

In 1934, she adopted the plaintiff Dadu, who brought this suit as the adopted son of Tukaram for a declaration that the three sale-deeds were not binding on him as they were not passed for legal necessity and for possession of the lands alienated thereby.

Defendant No. 1 contended that the plaintiff was not properly adopted and the sale-deed was passed for legal necessity.

\* Second Appeal No. 84 of 1940, from the decision of T. B. Shanbhag, Assistant Judge at Satara, in Civil Appeal No. 222 of 1938, reversing the

decree passed by S. G. J. D'Costa, Joint Subordinate Judge at Dahi-wadi, in Civil Suit No. 275 of 1935.

Defendants Nos. 2 to 6 contended similarly and further submitted that the suit was barred by limitation.

The trial Court held that the plaintiff was validly adopted, that the sale deeds were passed for legal necessity, that the suit was out of time so far as survey No. 165 was concerned because the possession thereof was with defendant No. 6 since 1917, and that the plaintiff was not entitled to the possession of the lands alienated.

On appeal, the lower appellate Court set aside the decree of the trial Court, holding that the alienations effected were not for legal necessity, the suit was not barred by limitation, and the claim in respect of survey No. 165 was also not barred.

Defendants Nos. 2 to 6 appealed to the High Court.

*A. G. Desai*, with *G. M. Joshi*, for the appellants.

*K. N. Dharap* for *P. B. Gajendragadker*, for the respondent.

BEAUMONT C. J. This is a second appeal from the Assistant Judge of Satara. The plaintiff, as a son adopted by one Dhondai to her deceased husband, claims to recover possession of the suit property on the ground that alienations by the widow were not for legal necessity. The husband died in 1900, and the plaintiff was adopted in 1934. The alienations took place between 1901 and 1904. There was also an alienation in 1908 in favour of defendant No. 1, but he has not appealed and I am only concerned with two alienations, one in 1901 and the other in 1904. The trial Judge raised two issues, which are relevant for the present purpose. The first is issue No. 1 :

"Does the plaintiff prove that he has been duly and validly adopted by Dhondai?"

The other is issue No. 3 :

"Is the suit barred by time?"

The only allegation relating to limitation in the written statement was that the plaintiff and his predecessors had not been in possession within twelve years from the date of the suit and hence the plaintiff's suit was out of time.

Now, on the first issue as to whether the adoption was valid, the learned trial Judge held that the fact of adoption was proved, but then he notices a legal objection raised as to its validity, namely that the widow's power to adopt had been extinguished by a previous adoption of a son who had attained the age of ceremonial competence. On that point the learned Judge observes :—

"It is admitted that prior to the present adoption Dhondai had adopted a cousin of Dadu Tukaram, who passed away in 1918 unmarried in his twenties. It is argued that because of the ceremonial competence this adopted son had attained, Dhondai's right to further adopt had terminated."

The learned Judge held that that point was not a sound one and that the widow's power of adoption had not been exhausted by this prior adoption.

On the issue of limitation the learned trial Judge held that so far as survey No. 165 was concerned, the defendants had been in possession since 1917, and the suit was out of time. He does not say why the plaintiff's title, which only accrued in 1934, should be barred.

A. C. J.

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A. C. J. In appeal the question of limitation was sought to be put upon a different  
 1940 ground. It was said that this prior adopted son had been validly adopted  
 — and had attained majority long after these assignments, which are challenged  
 ANNU and that he had a right to challenge these assignments, and as against him  
 BAJABA time had run, and that the plaintiff could not acquire a fresh cause of action  
 v. to set aside the assignments in respect of which time had already run. The  
 DADU learned Assistant Judge refused to go into that point, because, he said, it had  
 TUKARAM not been raised in the Court below and was a mixed question of law and  
 — fact. I entirely agree with the lower appellate Court that it would not be  
*Beaumont C.J.* right in appeal to allow a point of law to be raised, which depended on  
 questions of fact which the party relying on the point of law had not chosen  
 to raise in the lower Court, and certainly I should not allow such a point  
 to be raised in second appeal. The difficulty, however, in the plaintiff's way  
 is that the questions of fact about the prior adoption were raised and answered  
 in the lower Court, though not in connection with the issue of limitation. The  
 defendants in the lower Court alleged that by reason of this prior adoption  
 and of the age attained by the adopted son, the right of the widow to adopt  
 had come to an end, and, therefore, the plaintiff's adoption was invalid, and  
 it was clearly open to the plaintiff on that issue to dispute the prior adoption,  
 which he did not do. I do not think it would make any difference whether  
 the prior adopted son had attained majority or not. Even if he had not  
 attained majority when he died, I think that the effect of ss. 6, 7, 8 and 9  
 of the Indian Limitation Act would be to bar his right to sue. It is not dis-  
 puted that if the right of the prior adopted son was barred by limitation, no  
 further right to sue in respect of these assignments could accrue to the plaintiff.

I cannot agree with the lower appellate Court that this question was not  
 raised in the trial Court. The question as to the adoption was raised, and  
 the plaintiff had an opportunity of challenging the facts. As soon as the  
 learned trial Judge found as a fact, in connection with the issue as to the  
 validity of the plaintiff's adoption, that there had been a prior adoption by  
 the widow of a son who died in 1918 unmarried in his twenties, it was the  
 duty of the learned Judge under s. 3 of the Indian Limitation Act to raise  
 this point of limitation. It is true that he did not raise the point, nor did  
 the parties raise it. But there was actually an issue as to limitation, and  
 the learned Judge ought to have pointed out that on the facts found by  
 him there was a ground of limitation in addition to the ground which had  
 been raised in the written statement. Had the learned Judge taken that view  
 of the matter and observed that there was this further ground of limitation,  
 I think he would have been bound to hold that the plaintiff's suit was barred.  
 When the point was raised in the District Court, I think the learned Assistant  
 Judge ought to have done what the trial Judge should have done and said  
 that on the facts found the suit was barred. In second appeal I must adopt  
 that course and say that on the facts found in the trial Court the plaintiff's  
 suit is undoubtedly barred as against the appellants.

I must, therefore, allow the appeal. With regard to costs, I think probably  
 if this point had been raised in the trial Court, it would have been decided  
 in favour of the defendants, and there would have been no necessity of any  
 appeal. In my opinion, the proper order will be to allow the appeal and

direct that the plaintiff's suit be dismissed as against defendants Nos. 2 to 6, who are the present appellants, and that the plaintiff pay the costs of defendants Nos. 2 to 6 of the trial, but I allow no costs of the appeal to the lower appellate Court or to this Court.

*Appeal allowed.*

A. C. J.

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Beaumont C.J.

*Before Mr. Justice Broomfield and Mr. Justice Macklin.*

VITHALDAS BHAGVANDAS DARBAR

v.

TUKARAM VITHOBA KSHATRI.\*

1940

November 5.

*Transfer of Property Act (IV of 1882), Sec. 92—Subrogation—Indian Contract Act (IX of 1872), Sec. 69—Payment of money which another person is bound by law to pay—Reimbursement by person making payment—Tagai loan—Another person repaying tagai loan, whether entitled to recover it—Land Improvement Loans Act (XIX of 1883).*

In 1927 R (father of defendant No. 1) borrowed a sum of Rs. 1000 from Government as tagai allowance and made the amount a charge on his land No. 5/2, for the improvement of which the loan was taken, and offered his other lands Nos. 381, 382 and 124 as collateral security. In 1929 R mortgaged lands Nos. 381 and 382 to defendant No. 3. On January 25, 1932, R sold lands Nos. 5/2 and 124 to the plaintiff who kept Rs. 1000 out of the purchase money with himself and paid off the tagai loan with that money. Four days before the sale, i.e., on January 21, 1932, defendant No. 2, who held a money decree against R, attached land No. 5/2 in execution of his money decree and at a Court-sale which followed purchased the land himself. In 1935, the plaintiff sued for a declaration that the amount of tagai loan repaid by him was a charge on lands Nos. 5/2, 381 and 382, and for recovery of the amount by sale of the lands :—

*Held*, (1) that if the plaintiff came within the terms of s. 92 of the Transfer of Property Act, 1882, he would have the same rights as Government not only against defendant No. 1, who borrowed the money from Government but also against defendants Nos. 2 and 3 who derived their rights from defendant No. 1 ;

(2) that the plaintiff did not fall within the scope of the section, because there was in fact no mortgage to Government but only a statutory charge on the lands in favour of Government ;

(3) that inasmuch as part of the consideration for sale of land 5/2 was retained by the plaintiff for the discharge of incumbrances on the land, that money should be regarded as the money of R and therefore the plaintiff was not entitled to subrogation under the first part of the section :

• • *Hira Singh v. Jai Singh*<sup>1</sup> followed ;

\* Second Appeal No. 323 of 1938, from the decision of B. D. Mirchandani, District Judge at Bijapur, in Appeal No. 145 of 1936, confirming

the decree passed by S. H. Naik, Joint Subordinate Judge at Bijapur, in Civil Suit No. 226 of 1935.,

1 [1937] All. 880, F.B.

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(4) that the plaintiff could not come under the third paragraph of the section, because there was no registered agreement giving him the right of subrogation :

*Lakshmi Amma v. Sankara Narayana Menon*,<sup>1</sup> followed ;

(5) that the plaintiff was not entitled to a personal decree against the defendants by reason of the equitable principle enunciated in s. 69 of the Indian Contract Act, 1872, since the repayment of the tagai loan to Government was to be regarded as the act of the vendor R and not the act of the plaintiff the purchaser, and even if there was a payment by the plaintiff within the meaning of the section, it was a payment which he was bound to make under the terms of his agreement with R and it was not open to him to say that it was a payment which some other person was bound to make :

*Dakshina Mohun Roy Chowdhry v. Saroda Mohun Roy Chowdhry*<sup>2</sup> and *Muhammad Saddiq Khan v. Muhammad Nasir-ul-lah Khan*,<sup>3</sup> referred to ;

(6) that the plaintiff's suit was misconceived and that his only legal remedy was to sue his vendor, defendant No. 1, for damages.

SUIT for declaration.

One Ramappa (father of Vithoba, defendant No. 1) was the owner of lands bearing survey Nos. 5/2, 381, 382, and 124.

On October 5, 1927, Ramappa borrowed a sum of Rs. 500 from Government as tagai loan under the provisions of the Land Improvement Loans Act. On November 9, 1927, he borrowed another sum of Rs. 500 from Government for the same purpose. The amount of Rs. 1000 was needed for improving land No. 5/2, on which a charge for the amount was declared. Survey Nos. 381, 382 and 124 were given as collateral security for the advance.

On November 26, 1929, Ramappa mortgaged Survey Nos. 381 and 382 to Baswant (defendant No. 3).

On January 25, 1932, Ramappa sold Survey Nos. 5/2 and 124 to Vithaldas (plaintiff) for Rs. 5000. Of this amount Rs. 2000 were paid in cash to Ramappa. The balance of Rs. 3000 was allowed to remain with the plaintiff for repaying the tagai allowance of Rs. 1000 to Government and for paying off the fees earned by S. V. Kowjalgi, pleader, for legal services rendered to Ramappa. In repayment of the tagai debts the plaintiff paid to Government Rs. 150 on May 27, 1932, Rs. 150 on March 18, 1933, and Rs. 608 on November 23, 1934.

In 1930 Basappa (defendant No. 2) brought a suit (No. 197 of 1930) against Ramappa and obtained a money decree against him. In execution of the decree (darkhast No. 41 of 1932) defendant No. 2 attached Survey No. 5/2 on January 21, 1932. At a Court-sale held in execution proceedings on February 4, 1933, defendant No. 2 purchased Survey No. 5/2 for Rs. 1200. He obtained possession of the land on April 30, 1933.

On March 23, 1933, the plaintiff sued (suit No. 126 of 1933) Ramappa and defendant No. 2 to recover possession of Survey No. 5/2, but the suit was decided in favour of defendant No. 2 because of his prior attachment of the land.

1 (1935) I. L. R. 59 Mad. 359, F.B.

2 (1893) L. R. 20 I. A. 160.

3 (1898) L. R. 26 I. A. 45.



On February 28, 1935, the plaintiff gave a notice to defendant No. 2 calling upon him to hand over possession of survey No. 5/2 to the plaintiff.

On June 4, 1935, the plaintiff sued defendants Nos. 1 to 3 to obtain a declaration that he had a charge on survey Nos. 5/2, 381 and 382 for Rs. 974-12-0, the amount repaid by him to Government under tagai allowance together with interest, and also to recover the amount by sale of the lands. He relied in support of his claim on s. 92 of the Transfer of Property Act, 1882, and s. 69 of the Indian Contract Act, 1872.

Defendant No. 1 did not appear. Defendant No. 2 contended *inter alia* that he was a bona fide purchaser for value without notice of the tagai claim, that he did not enter into possession of land No. 5/2 till May 1933 and the plaintiff could not seek to recover the tagai loan repaid before that date, and that the plaintiff purchased lands Nos. 5/2 and 124, subject to the tagai incumbrance, after defendant No. 2 had attached land No. 5/2 in darkhast No. 41 of 1932. The defence of defendant No. 3 was that the plaintiff had purchased Ramappa's interest in land No. 5/2, that he had paid off the tagai loan on that land in order to enjoy it free from any burden, and that he could not therefore maintain the suit.

The trial Court dismissed the suit, observing as follows :—

"The crucial question is whether the plaintiff is entitled to a prior statutory charge on the suit lands and can enforce it against defendants Nos. 2 and 3, who are the transferees thereof. Section 92 of the Transfer of Property Act and s. 69 of the Indian Contract Act are called in aid in support of plaintiff's contention. It is contended that the plaintiff as a purchaser of R. S. No. 5/2 was interested in discharging the *tagai* encumbrance on that land and, therefore, he is subrogated to the rights of Government in respect of R. S. No. 5/2 and the collateral security thereof, viz. R. S. Nos. 381 and 382. I think s. 92 of the Transfer of Property Act can have no application to the facts of the present case. There was a covenant in the sale-deed passed by Ramappa in favour of plaintiff that the latter should discharge the *tagai* encumbrance on the suit land R. S. No. 5/2 for this purpose a sum of Rs. 1,000, which formed part of the consideration of the sale-deed passed by Ramappa, was left with plaintiff, see exhibit 28. If plaintiff paid Rs. 908 to Government on account of *tagai*, he paid it as part of the consideration which he was to pay to Ramappa. He paid it as an agent of Ramappa. The principle of subrogation cannot, therefore, apply to plaintiff's case. A person cannot claim subrogation when he simply performs his own obligation. Covenant excludes subrogation and this rule has been applied to a transferee from the purchaser of an equity of redemption with notice of the covenant, see *Lakshmi Achi v. Narayanasami*, 53 Mad. 188, *Thiruvadi v. P. Janaki*, 45 M. L. J. 693, and *Abdul Razak v. Abdul Rahiman*, 65 M. L. J. 390. In paying the *tagai* the plaintiff was discharging his own obligation.

The same principle which excludes the operation of the principle of subrogation in plaintiff's case also excludes the principle of reimbursement contained in s. 69 of the Indian Contract Act. It has been held that a person purchasing property subject to a charge is alone liable to pay it off, and he is not, therefore, entitled to recover the amount paid by him from the person originally liable in respect of it, see *Manindra Chandra v. Jamahir Kumaree*, 32 Cal. 643. The High Court of Madras has held that a person who buys immoveable property, subject to a charge for maintenance in favour of a widow, cannot recover from the vendor maintenance money paid by him to the widow, to save the property from sale at the instance of the widow, see *Mangalathalmal v. Narayan Swami*, 17 M. L. J. 250. The plaintiff in this case purchased R. S. No. 5/2 subject to the *tagai* encumbrance and he retained with him money on that account out of the consideration of the

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A. C. J. sale-deed. If, therefore, plaintiff discharged the *tagai* encumbrance out of the  
1940 sale consideration retained by him, he cannot claim reimbursement from defendant  
No. 1 under s. 69 of the Indian Contract Act.

VITHALDAS There can be no doubt that defendants Nos. 2 and 3 will not also be liable under  
BHAGVANDAS s. 69 of the Indian Contract Act to answer plaintiff's claim, nor can there be any  
v. doubt that plaintiff is not entitled to proceed against the suit property in the hands  
TUKARAM of defendants Nos. 2 and 3 under the said section. All that s. 69 says is that  
VITHOBA a person who is interested in the payment of money which another is bound by law  
to pay, and who, therefore, pays it, is entitled to be reimbursed by the other. If,  
therefore, plaintiff is entitled to claim reimbursement, he can claim it from defendant  
No. 1 and not from defendants Nos. 2 and 3. I have already held that even  
defendant No. 1 is not liable to plaintiff in this suit."

On appeal, the decree was affirmed by the District Judge, for the following reasons :—

"Before the plaintiff can claim the right of subrogation (s. 92), he must show that with regard to the lands in the possession of defendants Nos. 2 and 3 he comes in the category of persons referred to in s. 91 (of the Transfer of Property Act). This point appears to have escaped the notice of the learned Judge below. The appellant's counsel says that his client comes within the description of persons mentioned in cl. (a) to s. 91. That clause refers to 'any person (other than the mortgagor of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged, or in or upon the right to redeem the same!' Now under the sale deed exhibit 28, by which the appellant purchased the two S. Nos. 5/2 and 124 the appellant did not get any interest in the two survey Nos. 381 and 382 mortgaged by Ramappa to defendant No. 3. The payment by him to Government of the *tagai* dues cannot, therefore, secure to him the mortgage rights of Government in these two survey numbers, which were redeemed by the appellant, for the simple reason that the principle of subrogation cannot be invoked in favour of a mere volunteer or stranger. The plaintiff's claim against defendant No. 3 is, therefore, untenable on this ground alone. Besides, the payment to the Government was in reality by the mortgagor himself and not the present plaintiff. The *tagai* dues were discharged out of a part of the consideration amount which was left by the vendor with the present plaintiff specifically for that purpose. The plaintiff was merely an instrument or agent of the mortgagor for making the payment. As a mortgagor paying a prior debt is not himself entitled to subrogation it is clear that where he employs an agent to secure the mortgage, the agent also is not entitled to subrogation for the simple reason that the agent cannot be clothed with a higher right than his principal. In the present case on a perusal of the contents of the sale-deed, exhibit 28, there can be absolutely no doubt that the payment made by the plaintiff was on behalf of his vendor Ramappa and out of funds belonging to Ramappa. It is true that in a recent full bench case of *Tota Ram v. Ram Lal* (54 All. 897) the Allahabad High Court has repudiated this doctrine of agency which has been recognized by its earlier decisions. The reasoning on which their Lordships' decision is based is, however, not acceptable to me. The facts in the Allahabad case were also quite different. In the present case there can be no doubt that the payment, though nominally, by the present plaintiff was in effect and to all intents and purposes by the mortgagor. The present plaintiff, therefore, cannot, on the principle of subrogation, claim rights in S. Nos. 5/2 or S. Nos. 381 and 382 for the reason that his principal, the mortgagor, for whom he made the payments to Government, is not entitled to such rights. Even if the doctrine of agency were not to be applied, the plaintiff has no case against defendant No. 3 who is in possession of S. Nos. 381 and 382; for the plaintiff had no interest such as is contemplated by s. 91 of the Transfer of Property Act in those survey numbers, when he made the payments to Government. It is, however, different with regard to S. No. 5/2. The plaintiff had an interest in that survey number as he had actually purchased it along with S. No. 124 under the sale-

deed though the sale with regard to S. No. 5/2 was subsequently held to be invalid. But a purchaser of mortgaged property who has paid off the mortgages on the property is entitled after the sale is found to be invalid to stand in the shoes of the mortgagee whom he has paid off. He is not a mere volunteer, because when he discharged the mortgage, he did so by virtue of his claim as purchaser and had an interest to protect. However, as I have already remarked, the payment being in reality by the plaintiff's vendor and not by himself he cannot get the relief which he has claimed against defendant No. 2 who is in possession of this survey number. For these reasons I hold that the plaintiff's suit was properly dismissed."

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The plaintiff appealed to the High Court. Defendant No. 1, having died pending the hearing of the appeal, was represented by his sons Tukaram and others.

*H. C. Coyajee*, with *G. R. Madbhavi*, for the appellant.

*S. R. Parulekar*, for respondents Nos. 2 and 3.

BROOMFIELD J. This is an appeal by the plaintiff from a decree of the District Judge of Bijapur confirming a decree of the Joint Subordinate Judge of Bijapur, who dismissed a suit brought by the plaintiff for reimbursement or contribution.

The plaintiff's claim was put forward in the following circumstances. One Ramappa who was the father of defendant No. 1 was the owner of four fields, survey Nos. 5/2, 381, 382 and 124. In October-November, 1927, Ramappa borrowed Rs. 1,000 from Government under the Land Improvement Loans Act for the improvement of survey No. 5/2. By virtue of s. 7 of the Act Government therefore has the right to recover the money with interest from the borrower personally, or out of the land for the benefit of which the loan was granted, or out of properties given as collateral security that is in the present case survey Nos. 381, 382 and 124. It is provided in the same section that it is in the discretion of the Collector to determine the order in which he will resort to the various modes of recovering the moneys which are recoverable as if they were arrears of land-revenue. On November 26, 1929, Ramappa mortgaged survey Nos. 381 and 382 to defendant No. 3. On January 25, 1932, he sold survey Nos. 5/2 and 124 to the plaintiff. The consideration for the sale was Rs. 5,000, and the sale deed (exhibit 28) provided that out of this sum Rs. 1,000 was to be kept with the purchaser (plaintiff) for discharging the tagai debt. Prior to this in 1930 defendant No. 2 had obtained a money decree against Ramappa and he attached survey No. 5/2 four days before the plaintiff's purchase. Subsequently on February 4, 1933, defendant No. 2 purchased that survey number in execution proceedings. The tagai debt due to Government was paid off by the plaintiff in three instalments—one of Rs. 150 paid on May 27, 1932, one of Rs. 150 paid on March 18, 1933, and the final instalment of Rs. 600 paid on November 13, 1934. On March 23, 1933, the plaintiff brought a suit against defendant No. 2 to recover possession of survey No. 5/2, but the suit failed because it was held that defendant No. 2 had a prior claim in view of the fact that he had attached the land before the sale of it to the plaintiff. The suit in which the present appeal arises was filed by the plaintiff in June, 1935. He claimed to have a charge on survey Nos. 5/2, 381, and 382 and to be entitled to recover the amount paid by him to Government from defendants Nos. 1, 2

A. C. J. and 3. As I have mentioned, the plaintiff failed in both the lower Courts.  
 1940 He there relied partly on s. 92 of the Transfer of Property Act and partly on  
 — s. 69 of the Indian Contract Act.  
 VITHALDAS Section 92 deals with the rule about what is called subrogation. In s. 91  
 BHAGVANDAS certain persons other than the mortgagor are stated to be entitled to redeem  
 v. a mortgage; and s. 92 provides that if any of these persons does in fact  
 TUKARAM redeem a mortgage, he has the same rights as regards redemption, fore-  
 VITHOBA closure or sale as the mortgagee whose mortgage he has redeemed has against  
 — the mortgagor or any other mortgagee. That is provided in the first para-  
 Broomfield J. graph of s. 92, and the third paragraph provides this:

“A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.”

By virtue of s. 59A of the Act the word “mortgagor” includes “persons deriving title from a mortgagor,” so that if the plaintiff comes within the terms of s. 92 he would have the same rights as Government not only against defendant No. 1 who borrowed the money from Government but also against defendants Nos. 2 and 3 who derived their rights from defendant No. 1.

There are however obvious difficulties in the way of the application of s. 92 to this case. In the first place there was in fact no mortgage to Government. There was a statutory charge in favour of Government in respect of survey No. 5/2 and also the three fields given as collateral security. But it was not a mortgage. Assuming however that that difficulty could be got over, it has been held, by a Full Bench of the Allahabad High Court in *Hira Singh v. Jai Singh*,<sup>1</sup> that where part of the consideration for sale of land is retained by the purchaser for the discharge of incumbrances on the land that money is to be regarded as the money of the vendor, and therefore the purchaser is not entitled to subrogation under the first paragraph of s. 92. He may or may not come under the third paragraph, but in the present case it is clear that the plaintiff cannot come under the third paragraph because there is no registered agreement giving him the right of subrogation. The same view of the construction of s. 92 has been taken by a full bench of the Madras High Court in *Lakshmi Amma v. Sankara Narayana Menon*.<sup>2</sup>

In view of these authorities the learned counsel for the appellant has conceded that he cannot rely on the doctrine of subrogation. He does not now claim that his client has any charge over the lands in suit and argues merely that he is entitled to a personal decree against the defendants by reason of the equitable principle enunciated in s. 69 of the Indian Contract Act. According to that section “a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.” But the same reasoning which rules out s. 92 of the Transfer of Property Act appears to render s. 69 of the Indian Contract Act also inapplicable. If the repayment of the tagai loan to Government is to be regarded as the act of the vendor Ramappa, and not the act of the plaintiff, the purchaser, the plaintiff, obviously does not

come within the terms of s. 69. Moreover, even if it were possible to say that there was a payment by the plaintiff within the meaning of s. 69, it was a payment which he was bound to make under the terms of his agreement with Ramappa, and it would not therefore be open to him to say that it was a payment which some other person was bound to make.

Mr. Coyajee relied on *Dakshina Mohun Roy Chowdhry v. Saroda Mohun Roy Chowdhry*,<sup>1</sup> where Lord Macnaghten said in the course of his judgment (p. 163) :—

"...it seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by, the person who ultimately benefits by the payment,..."

Section 69 of the Indian Contract Act was not mentioned in the judgment, but the principle relied upon seems to be the same, and that principle does not apply if the legal effect of the transaction between the plaintiff and Ramappa was that Ramappa paid the money and not the plaintiff. Incidentally I may say that the plaintiff's good faith is by no means clear, since all the payments which he made to Government were made after the attachment of the survey No. 5/2 and the final payment was made after defendant No. 2 had actually got possession of the land.

We were also referred to *Muhammad Siddiq Khan v. Muhammad Nasir-ul-lah Khan*.<sup>2</sup> In that case part of the consideration for a sale of land was retained by the vendees for the purpose of partially discharging the encumbrances on the land, the vendor being bound to supply the rest of the money necessary for the purpose. Their Lordships held that the money retained by the vendees was not to be regarded as a deposit of the vendor's money on which the vendor was entitled to get interest. They did not say that the money was not the vendor's money, and I think that there is nothing in this case inconsistent with the view taken by the Full Benches of the Allahabad and Madras High Courts. The Privy Council case therefore appears to be of no material assistance to the plaintiff.

It may be a case of some hardship as the plaintiff has not got the full benefit of his repayment of the tagai loan to Government, whereas the other defendants have benefited by it in proportion to the land in which they are interested. But in our opinion the lower Courts were clearly right in holding that the plaintiff's suit was misconceived and that his only legal remedy was to sue defendant No. 1, his vendor, for damages. The appeal therefore must be dismissed with costs.

*Appeal dismissed.*

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November 8.

RAMABAI SHRINIWAS NADGIR

v.

THE GOVERNMENT OF BOMBAY

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v.

NARAYAN GOVIND NADGIR.\* •

*Civil Procedure Code (Act V of 1908), Sec. 53—Watan property inherited by son from father—Father's debts—Liability of son under decree to extent of inherited property—Execution of decree against property in hands of son, whether proper—Pleadings—Admission in pleading by party to suit—Whether party bound by such admission in other suit.*

Watan property inherited by a son from his father is not exposed to liability to execution under s. 53 of the Civil Procedure Code, 1908, for the payment of the father's debts. The fact that the son is made liable under the decree to the extent of the property inherited by him does not by itself make the watan property liable to execution under the section.

*Vithaldas v. Shrinivasrao*,<sup>1</sup> *Vishvanath v. Keshavbhai*<sup>2</sup> and *Jagjivandas Javerdas v. Imdad Ali*,<sup>3</sup> followed.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. Where a party is prepared in a particular suit to deal with the case on a particular ground and makes an admission, that admission is not binding on him in any other suit, and certainly not for all time.

#### EXECUTION.

In a suit filed by one Laxmanrao, against the Secretary of State for India in Council (plaintiff), and Shrinivas, Narayan and Venkaji (defendants Nos. 1 to 3), the Privy Council made an order on June 28, 1927 [*Laxmanrao v. Shrinivas*, 29 Bom. L. R. 1484] that costs should be paid by the plaintiff and the defendants. In April 1929 the plaintiff paid these costs in full, which amounted to Rs. 13,649-6-5, on his own-behalf and on behalf of the three defendants.

The plaintiff thereafter filed a suit against the defendants to recover contribution from them and a decree was passed on November 26, 1934, directing contribution. Defendant No. 3 was made liable to the extent of the property he had inherited from his father, who was the original defendant.

The plaintiff then took out the present darkhast against the defendants in execution of the decree obtained by him. The defendants contended that the lands sought to be attached were watan lands which could not be attached under s. 13 of the Bombay Hereditary Offices Act, 1874.

\* Cross First Appeals Nos. 204 and 275 of 1937, (with Civil Applications Nos. 1040 of 1937 and 9 of 1939), from the decision of G. A. Balse, First Class Subordinate Judge at Dharwar,

in Special Darkhast No. 128 of 1933.

1 (1933) 36 Bom. L. R. 169.

2 (1933) 36 Bom. L. R. 181.

3 (1882) 1. L. R. 6 Bom. 211.

The trial Judge held, as against defendant No. 1, that the lands which were sought to be attached were not watan lands, and in the case of defendants Nos. 2 and 3 he held that their lands were nadgirki watan lands. He observed as follows in his judgment :—

“ Only the watan property assigned as remuneration of an officiator under s. 23 of the Bombay Hereditary Offices Act (Bombay Act No. III of 1874) is not liable to process of any civil Court (vide s. 13 of the aforesaid Act). Hence it is on the judgment-debtors Nos. 2 and 3 to show that the lands in dispute are such watan property. They rely on para. 12 of exhibit 46 which is a copy of written statement filed by the present darkhastdar in Original Suit No. 2 of 1913, of which the suit in which the decree now under execution is passed, was an off-shoot. In that paragraph the present darkhastdar has admitted that the nadgir watan lands were assigned for nadgirki, that is to say, for nadgir services. It is argued for the darkhastdar that that admission is wrong. Reliance is placed in this connection only on the observations in the Privy Council judgment reported in 29 Bom. L. R. 1484, which was the final decision in suit No. 2 of 1913 referred to above. It will, however, appear from that Privy Council judgment that there was no question about nadgirki lands in that proceeding which related only to the lands, which were claimed as patilki and kulkarniki watan lands. Hence the observations of their Lordships of the Privy Council cannot be taken to apply to the nadgirki lands, with which we are now concerned. This being so, there is nothing to show that the present darkhastdars' admission relied on by the judgment-debtors is wrong. And in view of that admission I hold that the lands were assigned for nadgirki service, and that they, as such, come under s. 23 of the above-mentioned Bombay Hereditary Offices Act. Hence I hold that under s. 13 of the Act the lands of judgment-debtors Nos. 2 and 3 are not liable to attachment.

Even assuming for the sake of argument that the lands in the hands of judgment-debtor No. 3 sought to be attached are not assigned for nadgirki, I hold that they are not liable to attachment in view of the ruling in *Vithaldas v. Shrinivasrao*, 58 Bom. 218, because it is not defendant No. 3's own property but his father's property that was held liable by the decree under execution.

The learned pleader for the darkhastdar relies on the ruling in 58 Bom. 273 (*Vishvanath v. Keshavbhat*), where it has been held that in the execution of a decree against the father and his minor sons, the life interest of the sons in the watan property can be attached and sold. That case is, however, distinguishable from the present one, inasmuch as in that case there was a decree against the sons themselves, while in this case the decree is practically against the father alone, in that it holds only the father's property liable for the decretal debts.”

Defendant No. 1 and the plaintiff filed cross appeals in the High Court.

#### FIRST APPEAL NO. 204 OF 1937.

*J. C. Shah*, for the appellant.

*R. A. Jahagirdar*, Government Pleader, for the respondent.

#### FIRST APPEAL NO. 275 OF 1937.

*R. A. Jahagirdar*, Government Pleader, for the appellant.

*K. R. Bengeri*, for respondent No. 1.

*H. C. Coyajee*, with *J. C. Shah*, for respondent No. 2.

BEAUMONT C. J. These are two cross appeals against an order made by the First Class Subordinate Judge of Dharwar. An order was made by the Privy Council in certain litigation that costs should be paid by the defendants, who were the Secretary of State for India, and defendants Nos. 1 to 3 in this suit, or their predecessors. The Secretary of State for India ulti-

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mately paid those costs in full, and then he filed this suit to recover contribution from his co-defendants, and a decree was passed on November 26, 1934, directing contribution. In the case of defendant No. 3, it had been stated by an amendment of the plaint that the original defendant had died, and his son defendant No. 3 was held to be liable to the extent of the property he got inherited from his father. The Secretary of State for India then took out the present darkhast in order to execute the decree against the three defendants. The contention of all the defendants was that the lands sought to be attached were watan lands, and that they could not be attached by virtue of the protection afforded under s. 13 of the Watan Act. As against defendant No. 1, the learned Judge held, in view of certain admissions made by that defendant in the witness-box, that the lands which were sought to be attached were not watan lands. In the case of the other two defendants, he held, basing his decision on the Record of Rights, that the lands were nadgirki watan lands. I am not quite sure whether he merely meant to hold that the lands of defendant No. 1 were not shown on the Record of Rights as nadgirki watan lands, or whether he meant to hold that the admission of defendant No. 1 would rebut the presumption arising from the entry in the Record of Rights that they were nadgirki watan lands. I am rather disposed to think that there is no distinction between the lands held by defendant No. 1 and the lands held by defendants Nos 2 and 3. However, having held that the lands of defendants Nos. 2 and 3 were watan lands, it was then necessary to establish that they had been assigned as remuneration for services under s. 23 of the Watan Act, because, unless they had been so assigned, the protection afforded by s. 13 does not arise.

There is really no evidence on the record to show that any of these lands had been assigned under s. 23 as reward for services. The learned Judge, in the case of defendants Nos. 2 and 3, held that Government were bound by an admission in their written statement filed in the original suit of 1913 in which the costs were incurred, and that by that admission Government had acknowledged that the lands had been assigned as reward for services; but the learned Judge's view on that point is clearly wrong. A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground and to make an admission, but that admission is not binding in any other suit, and certainly not for all time. Government may have known much less about the position in 1913 than they know now. If they had pleaded erroneously in the suit of 1913 and had discovered the error in time, they could have amended the pleading, and it would be a strange thing to hold that, after the suit had been disposed of, and the chance to amend the pleading had gone, Government were bound for all time by their admission. In my opinion there is no evidence on record that the lands of any of the defendants had been assigned by the Collector under s. 23 of the Watan Act and that, therefore, the protection afforded by s. 13 came into operation.

But in the case of defendant No. 3, there is a separate defence. As I have pointed out, the decree sought to be executed provides that he is liable to the extent of the property he got inherited from his father, and, of



course, the executing Court is bound by the decree. Therefore, if he inherited this watan property from his father, that property is liable. But on the authority of the cases, to which the learned trial Judge referred [viz. *Vithaldas v. Shrinivasrao*,<sup>1</sup> *Vishvanath v. Keshavbhat*<sup>2</sup> and *Jagjivandas Javerdas v. Imdad Ali*<sup>3</sup>], it is, I think, established that a son does not inherit watan property from his father at any rate to the extent of making that property liable for the father's debts. As was pointed out by this Court in *Vithaldas v. Shrinivasrao*, to hold that watan property was liable for the father's debts, like other property of a Hindu father, would really be to go behind the prohibition contained in s. 5 of the Watan Act, which prevents a watandar from alienating or mortgaging watan property beyond the term of his own life. The learned Government Pleader seeks to distinguish the cases of *Vithaldas v. Shrinivasrao* and *Vishvanath v. Keshavbhat* on the ground that the decrees in these cases were ordinary money decrees against the father, whereas here there is an express provision that the decree may be executed against the property of the father inherited by the son; but that does not really carry the matter any further, because in my view the effect of the decisions of this Court is to show that watan property is not to be regarded as property inherited by the son, so as to expose it to liability to execution under s. 53 of the Civil Procedure Code. Whether it can be regarded as inherited for other purposes, it is not necessary for us to consider. I think, therefore, that the learned Judge's decision was right as to defendant No. 3.

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In the case of defendant No. 1, I think that his decision was also right, although I base my opinion on different grounds from those which appealed to the learned Judge. We are told that defendant No. 1 has died since the date of the decree appealed from and that his widow has been brought on record. Of course, a question may arise in execution how far the property can be attached as against the widow of defendant No. 1, but we are not concerned with that. The appeal of defendant No. 1 must be dismissed, because the decree only dealt with his liability during his lifetime.

The result will, therefore, be that the appeal of defendant No. 1 will be dismissed with costs, and the appeal of Government, First Appeal No. 275, will be allowed with costs as against defendant No. 2 but, dismissed with costs as against defendant No. 3 in proportion to the claims of defendants Nos. 2 and 3.

SEN J. I agree.

*Decree varied.*

1 (1933) 36 Bom. L. R. 169.

2 (1933) 36 Bom. L. R. 181.

3 (1882) I. L. R. 6 Bom. 211.

*Before Mr. Justice Broomfield and Mr. Justice Macklin.*

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NAGAPPA CHANNAPPA TAMBRALI

November 21.

*v.*

RAMSING JESSASING.\*

*Civil Procedure Code (Act V of 1908), Sec. 10—Stay of suit—Suit pending in mofussil Court—Suit subsequently filed on Original Side of High Court—Application for stay of suit in High Court made to Appellate Side Bench of High Court—Whether application competent.*

An application under s. 10 of the Civil Procedure Code, 1908, for stay of suit should be made to the Court which is actually seized of the case.

An application under s. 10 of the Civil Procedure Code was made on the Appellate Side of the High Court to stay a suit which was instituted on its Original Side until the decision of a previously instituted suit between the same parties in a Court in the mofussil. On the question whether the application to the Appellate Side Bench of the High Court was competent :—

*Held*, that the application should be made on the Original Side to the Judge trying the suit.

APPLICATION for stay of suit.

On January 1, 1940, one Nagappa (applicant) filed a suit (No. 4 of 1940) against Ramsing and Atmasing (opponents Nos. 1 and 2) in the Court of the First Class Subordinate Judge at Sholapur for a declaration that a promissory note executed by him in favour of opponent No. 2 was not binding on him and for its cancellation. While this suit was pending opponent No. 1, as assignee of opponent No. 2, on January 9, 1940, filed a suit (No. 38 of 1940) on the aforesaid promissory note against the applicant and two others on the Original Side of the High Court.

On April 8, 1940, the applicant under s. 10 of the Civil Procedure Code, made the present application to the Appellate Side Bench of the High Court for stay of opponent No. 1's suit filed on the Original Side of the High Court on the ground that the High Court suit was a later instituted suit.

The application was heard.

*G. N. Thakor* with *T. N. Walawalkar*, for the applicant.

*F. J. Coltman* with *Haridas & Co.*, for the opponents.

BROOMFIELD J. This is an application under s. 10 of the Civil Procedure Code to stay a suit which has been instituted on the Original Side of this Court until the decision of a previously instituted suit in the Sholapur First Class Subordinate Judge's Court.

Mr. Coltman who appears for the opponents has taken a preliminary objection that the application should be made on the Original Side. We think he is right. He relies on r. 344 of the High Court Original Side Rules. But in our opinion the matter is made sufficiently clear by the language of s. 10 itself. The section provides that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in

\* Civil Application No. 392 of 1940.

issue in a previously instituted suit between the same parties. It is a reasonable inference in our opinion that an application asking the Court not to proceed with the trial should normally be made to the Court which is actually seized of the case. According to my experience that is also in accordance with the general practice.

Mr. Thakor for the applicant says that so far the case has not been assigned to any particular Judge on the Original Side. But in due course the assignment will be made and when it is made his client can apply. As held in *Mulchand Raichand v. Gill & Co.*<sup>1</sup> the Judge on the Original Side could, if necessary, restrain the parties from proceeding with the suit in the mofussil Court. If the Judge declined to make an order under s. 10 an appeal would then lie to an Appellate Bench as held in *Jivanlal Narsi v. Pirojshaw Vakaria & Co.*<sup>2</sup>

Mr. Thakor has relied on a case, *Lachmandas Tulshiram v. The Buckingham and Carnatic Co. Ltd.*,<sup>3</sup> in which my learned brother and myself held that an Appellate Side Bench of this Court has power under s. 24 of the Code to transfer a suit pending on the Original Side of the High Court for trial to a Court in the mofussil. In coming to that conclusion we were partly influenced by the fact that there was a precedent, whereas in this case no precedent has been referred to, and we were also impressed by the circumstance that it is at least doubtful whether a Judge on the Original Side would have power to make the order of transfer which we were asked to make under s. 24. It is unnecessary, however, to decide whether we have or have not jurisdiction to make the order which we are asked to make in the present case, because we are quite satisfied that even if we have jurisdiction, we ought not to exercise it. We consider that the proper and convenient procedure is that the application should be made on the Original Side to the Judge trying the suit, and we apprehend that all sorts of difficulties might arise if applications of this kind were to be entertained on the Appellate Side.

For these reasons we discharge the rule with costs.

*Rule discharged.*

A. C. J.  
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—  
NAGAPPA  
CHANNAPPA  
v  
RAMSING  
JESSASING  
—  
Broomfield J.  
—

1 (1919) I. L. R. 44 Bom. 283,  
s. c. 21 Bom. L. R. 963.

2 (1932) I. L. R. 57 Bom. 364,  
s. c. 35 Bom. L. R. 15.

3 (1940) C. A. No. 672 of 1939,  
decided by Broomfield and Macklin  
JJ., on January 17, 1940 (Unrep.).

## FULL BENCH—CRIMINAL ORIGINAL.

*Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice Broomfield, and  
Mr. Justice Wassoodew.*

1940

EMPEROR

October 4.

v.

THOKARSI NARSI.\*

*Criminal Procedure Code (Act V of 1898), Sec. 289—Trial by jury—No evidence against accused—Direction by Judge to jury—Acquittal of accused.*

In a case tried by a jury if the Judge comes to the conclusion that there is no evidence to go to the jury, it is the duty of the Judge to direct the jury that in law they must acquit.

It is the function of the jury to determine whether the evidence is true, and if the Judge thinks that the prosecution evidence, if true, will lead to a conviction, then he is bound to leave the case to the jury. He may think that the prosecution story is inherently improbable, that the evidence is discrepant, and that it is of a class which is generally unreliable; but if he thinks that though weak the evidence if true will justify a conviction, he must leave the case to the jury, cautioning them about the weak points in the evidence.

If, however, the Judge, after the prosecution case is closed, comes to the conclusion that, assuming that the jury believe every word of the prosecution evidence, nevertheless they will not be justified in convicting, then he is bound in law to say so and to direct the jury that in law they must bring in a verdict of not guilty, and he ought not in such a case to leave the matter to the jury.

THIS was a trial for theft in the High Court Sessions before Macklin J. and a common jury.

The accused Thokarsi Narsi was a mehta and cashier in the service of Sulleman, Mithai & Co., Ltd., in Bombay. He was one of the two cashiers employed by the company. The duties of the cashiers were to note particulars of a hundi presented for payment in the presentation book, to check the hundies in order to see whether they should be honoured, and to pay the amount of the hundies.

There was a room in the office of the company where the typist of the company used to work. In that room there was a cupboard in which printed forms of hundies were kept. They were bound in books, and the forms were serially numbered. The cupboard also contained stationery of the company. It had two keys. Each one of the two cashiers had a key. At the start of work every morning the cashier unlocked the cupboard, and it remained open during office hours; in the evening the cupboard was locked again. During office hours any clerk in the office had access to the cupboard.

In March, 1939, the company sent one Ratansi up country to purchase cotton, and was given a book of hundi forms for the purpose of drawing hundies for the price of cotton purchased by him. On March 8, 1939, Ratansi drew a hundi for Rs. 5,000 and cashed it with one Achratlal Hiralal. The

\* First Criminal Sessions of 1940: case No. 2.

hundi so drawn bore printed number 1604. On the same day Ratansi wrote a letter to the company intimating to them the drawing of the hundi.

In the ordinary course the hundi would be presented for payment within two or three days after it was drawn. It was not so presented. Thokarsi (accused No. 1) was therefore asked by the directors of the company not to honour the hundi on presentation without their permission.

On May 5, 1939, a hundi for Rs. 5,000 purporting to be drawn by Ratansi and to bear No. 1604 was presented at the office of the company for payment. Accused No. 1 informed the directors of the company about the hundi, and acting upon their instructions refused payment of the hundi.

The hundi in question bore some other number, which appeared to have been changed into 1604. The signature of Ratansi appeared to have been forged. It was presented for payment by the New Citizen Bank of India, Ltd., for collection and payment into the account of one Shamji Damji, who could not be traced.

On examination of forms of hundi books kept in the company's cupboard it was found that a hundi-form bearing the serial number 1904 together with its counterfoil was missing from its book.

Accused Nos. 1 and 2 were cousins. Accused No. 2 used to live as a boarder in the same building as accused No. 1, and used to sleep in the passage of the building. He was without employment. Accused No. 1 had a Home Savings account with the Central Bank of India, Ltd. On May 1, 1939, he drew from the account a sum of Rs. 85 by a withdrawal order drawn in favour of self and endorsed into the name of accused No. 2. On the same day accused No. 2 opened an account in the New Citizen Bank of India, Ltd., in the name of Shamji Damji and paid Rs. 150 into it. The bank rules required an initial minimum payment of Rs. 100 for the opening of the account. On May 4, 1939, accused No. 2 withdrew Rs. 130 from the account, and paid in a hundi for Rs. 5,000 to be collected from Sulleman Mitha & Co., Ltd. The bank presented the hundi for payment on May 5, 1939. It appeared that the signature of Ratansi on the hundi was in the handwriting of accused No. 2. The endorsement on the reverse of the hundi and a letter giving authority to the bank to deliver the proceeds of the hundi were in the handwriting of accused No. 3.

On May 6, 1939, the company lodged a complaint with the police.

On May 8, 1939, accused Nos. 1 and 2 were found talking with each other for 15 to 20 minutes in the building where accused No. 1 resided.

On these facts the three accused were tried before Macklin J. and a common jury on February 29, 1940. The presiding Judge charged the jury as regards all the accused. The jury returned a verdict of guilty as against all the accused. The Judge sentenced accused No. 1 to suffer rigorous imprisonment for five years, and the other two accused to like imprisonment for three years each.

On August 27, 1940, the Advocate General of Bombay issued a certificate under cl. 26 of the Letters Patent that "in my judgment whether the omission to direct the jury hereinbefore specified is an error in law and amounts in law to a misdirection, should be further considered by this Hon'ble Court."

On October 4, 1940, the case was thereupon reconsidered by a full bench consisting of Beaumont C. J., Broomfield J. and Wassoodew J.

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F.B. Sir Jamshedji Kanga, with V. G. Mohile and M. G. Dharamsey, for accused No. 1.  
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— A. C. Beynon, with N. K. Petigara, Public Prosecutor, for the Crown.

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*Sir Jamshedji Kanga.* The matter comes up before the Court under cl. 26 of the Letters Patent. There is no evidence against accused No. 1 to connect him with the offence with which he is charged. There is nothing against him beyond mere suspicion. The error here lies in the fact that the trial Judge did not point out to the jury that there was no evidence against accused No. 1. In doing so, he has contravened the provisions of s. 289(2) of the Criminal Procedure Code, 1898.

*A. C. Beynon.* According to the English practice the Judge is not bound to withdraw the case from the jury in the absence of a submission : *Frederrick Jackson*.<sup>1</sup> The term used in s. 289(2) of the Criminal Procedure Code is "may" and not "must". Refers to *Queen-Empress v. Vajiram*,<sup>2</sup> which approves *Queen-Empress v. Munna Lal*,<sup>3</sup> and *Makbul Khan v. The King-Emperor*.<sup>4</sup>

BEAUMONT C. J. This matter comes before the Court on a certificate given by the Advocate General under cl. 26 of the Letters Patent. Under cl. 25 there is no appeal from a decision in the Sessions Court, but under cl. 26, the Advocate General may certify the matter to the Court if he thinks that there has been some error in law on a matter which requires further consideration. Many people, including myself, think that it is very wrong that there should be no appeal, at any rate on points of law, from a trial in Sessions in this Court. But, however that may be, in law there is no appeal.

The learned Advocate General in deciding whether to give a certificate, and this Court in dealing with any matter which he has certified, is in a difficulty where the case is not one of murder, because owing to the insufficient number of shorthand writers supplied to the Court no shorthand note is taken of the learned Judge's charge to the jury. It is only in murder cases that a note is taken.

The ground on which the learned Advocate General has certified that the case should be reconsidered is that he thinks that a question arises whether the learned Judge should not have withdrawn the case from the jury on the ground that there was no evidence to go before them. In determining that question it would assist us to know from the charge to the jury what view the learned Judge took of the evidence. However, fortunately the learned Judge made a full note of the evidence and we can ascertain from that what the real case was.

There were three accused, and the general nature of the case was this. The present appellant, if I may so call him, accused No. 1, was one of the two cashiers with Messrs. Sulleman Mitha & Co., Ltd., Bombay. In the month of March 1939 Sulleman Mitha & Co. sent an agent named Ratansi into the Broach District to buy cotton. He bought certain cotton and drew a hundi on the firm by way of payment, cashed that hundi with one Achratlal

1 (1910) 5 Cr. Ap. R. 22.

2 (1892) I. L. R. 16 Bom. 414.

3 (1888) I. L. R. 10 All. 414.

4 (1928) 32 C. W. N. 872.

or Amratlal Hiralal of Broach, and notified his firm of Sulleman Mitha & Co. on the same day by exhibit B that he had drawn such a hundi. The number of the hundi was 1604; and the evidence is that Ratansi took with him a book of forms of hundies, and it was from this book that he withdrew the form 1604 and filled it up in favour of the payee for Rs. 5,000. The evidence of the two directors of Sulleman Mitha & Co., who were called, is that in the normal course a hundi is presented for payment within a day or two after they have been notified that it has been drawn, and, having been presented, it would be the duty of one of the cashiers to check the particulars of the hundi, and if there was nothing suspicious about it, he would pay it, as he would have seen in the ordinary course the notification that the hundi had been drawn, and would probably have no difficulty in deciding whether it was a hundi which should be honoured. But in the case of this hundi, No. 1604, it was not presented for payment within the normal time, and accordingly the directors instructed accused No. 1 as cashier not to pay it when it was presented without reference to them. The hundi was dated March 8, and these instructions were given, I suppose, about the 10th or 11th. On May 5, hundi No. 1604 was presented for payment to Sulleman Mitha & Co. It was apparently received by some other clerk. Accused No. 1 says he was not in the office, and the particulars were entered in a book by that other clerk. But then accused No. 1 as cashier was informed about the presentation of this hundi, and he at once informed the two directors of the firm who told him not to honour it without further instructions. They then enquired into the matter. The hundi had been presented through a bank, called the New Citizen Bank, and they found that it had been paid into an account with that Bank in the name of Shamji Damji, and it was not found possible to trace Shamji Damji. The directors also thought that the signature on the hundi was not that of Ratansi, their agent. Therefore they placed the matter in the hands of the Police, and I think we must take it for the purposes of this reference that it was definitely proved that accused No. 2 was the man into whose account this hundi had been paid, that Shamji Damji was a fictitious name taken by accused No. 2, and that accused No. 2 had forged the body of the hundi. The endorsements on the hundi, according to the evidence, had been forged by accused No. 3. But there is no suggestion that accused No. 1 had forged any part of the hundi. The actual charges against accused No. 1 were two.

"First :—That you, accused No. 1, Thokarsi Narsi between the 8th day of March 1939 and the 5th day of May 1939, at Bombay, being employed as a Mehta and cashier of Sulleman Mitha & Co., Ltd., Bombay, committed theft by stealing page No. 1904 from an hundi Book (Ex. D) in the possession of the said Sulleman Mitha & Co., Ltd., Bombay, and thereby committed an offence punishable under Section 381 of the Indian Penal Code....."

"Secondly : That you, accused No. 1, Thokarsi Narsi, at the time and place aforesaid, abetted the commission by accused No. 2, Khiasi Asaria, of the offence of forging a valuable security, which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under Sections 109 and 467 of the Indian Penal Code...."

The suggestion is that the forged hundi, which purports to bear the number 1604, had in fact been written on a blank form, and the number had been altered. It looks as if both numbers '6' and '0' had been altered, but the

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Beaumont CJ.

F. B. suggestion is that the original number of the form used was 1904, and the  
 1940 reason for that suggestion is that in the hundi book kept by the firm form  
 — No. 1904 is missing. So that the prosecution case seems to be this, that the  
 EMPEROR hundi No. 1604, which was a genuine hundi, was stolen. The evidence is  
 v. that it was sent by post from Broach to the payee's agent in Bombay in order  
 THOKARSI to be cashed, and that in fact it never arrived. So, probably it was stolen,  
 NARSI and it may be that originally it was intended to present that hundi, perhaps  
 — with a forged endorsement, for payment, but that was not done. Whether  
 Beaumont C.J. the hundi met with some accident or not, I do not know. But the suggestion  
 — is that, not being able to present the original hundi, the conspirators got an-  
 other form with a number which could be easily altered to 1604, and they  
 then altered the number and forged the contents of the hundi; so that the  
 charge against accused No. 1 is that he stole the form No. 1904 and thereby  
 enabled the forgery to be committed; and the question is whether there was  
 any evidence to go to the jury on that charge.

Now, the book of forms, from which form No. 1904 was missing, was kept  
 in a cupboard in a part of the office of Sulleman Mitha & Co., which was only  
 occupied by a typist, and the typist was not there all day. It would, I think,  
 have been easy for anybody to come up by the lift and enter this room, and if  
 the typist was out, there would be no difficulty in getting to the cupboard. The  
 door is just next to where the lift comes up. This cupboard was kept locked  
 at night, and each of the two cashiers, including accused No. 1, had a key.  
 The other cashier was away when the forged hundi was presented, though he  
 had only gone away early in May, and his key was kept by the directors in his  
 absence. So that, no doubt, accused No. 1 had access to this cupboard in  
 which the forms were kept. But then the evidence of both the directors is  
 that many other people had access to it as well, because stationery and other  
 things were kept in the cupboard, and the cupboard was kept open during  
 the day. It was unlocked by one of the cashiers in the morning, and left open  
 during the day, and as there was only the typist in the room at certain  
 periods, there would be no difficulty in many persons entering this room and  
 taking away forms from the hundi book in the cupboard.

However, the first piece of evidence against accused No. 1 is that he had  
 access to the cupboard from which it is suggested that the form was taken.  
 I may say that there is no conclusive evidence to my mind that the forged  
 hundi is on a form which was originally numbered 1904. It looks as if the  
 '6' and the '0' have been altered, but I am quite unable to say from the  
 hundi itself that the original number was 1904. The second figure has been  
 obliterated, and it is no more than a guess that it may have been 9.

Then the next piece of evidence against accused No. 1 is that accused No. 2,  
 who did the major part of the forgery, is his cousin, and they lived in the  
 same building, though not on the same floor. The third piece of evidence is  
 that it is proved that on the first of May, that is seven days before the forged  
 hundi was presented, accused No. 1 drew a cheque on his bank account to self  
 or bearer, and gave that cheque to accused No. 2, who cashed it, endorsing his  
 name on the back of the cheque, because, although it was a bearer cheque,  
 the Bank apparently required anybody cashing it to endorse his name on the  
 back. It is then shown that accused No. 2, very shortly after receiving this



money from accused No. 1, opened an account in the name of Shamji Damji at the New Citizen Bank, and for that purpose he had to deposit at least Rs. 100 to open the account, and he did in fact deposit Rs. 150, and it is a justifiable inference that he obtained a part of that Rs. 150 by means of this advance from accused No. 1. But it is not shown that accused No. 1 knew the purposes for which the sum of Rs. 85 was required, or the manner in which it was in fact used. He says that accused No. 2, being his cousin, borrowed the money from him to go upcountry to his native place, and he says, though there is no independent evidence of the fact, that he had advanced him moneys before. That, at any rate, is not improbable, seeing that accused No. 2 was his cousin and had apparently no work. That is the whole of the evidence against accused No. 1.

Mr. Beynon, counsel for the prosecution, in addressing the trial Court, said that he did not stress the charge of theft against accused No. 1, but relied on the abetment of forgery. It is, I think, difficult to see what abetment of forgery there was apart from the alleged theft of the form No. 1904. But the jury brought in a verdict of guilty against accused No. 1, on both charges, by a majority of 8 to 1, and the learned Judge accepted that verdict and sentenced accused No. 1 to five years' rigorous imprisonment.

The question which we have to determine is whether there was any evidence to go to the jury that accused No. 1 was guilty. Under s. 289 of the Criminal Procedure Code, if the Court considers that there is no evidence that the accused committed the offence, it may, in a case tried by a jury, direct the jury to return a verdict of not guilty. No doubt, the word used is "may" and not "must", but it is well settled that if the Judge comes to the conclusion that there is no evidence to go to the jury, it is the duty of the Judge to direct the jury that in law they must acquit. In applying any rule, there are always cases on the border line, and it may be difficult some times to say on which side the particular case falls. But the general principle which governs the present matter is to my mind perfectly clear. It is the function of the jury, in a trial by jury, to determine whether the evidence is true, and if the Judge thinks that the prosecution evidence, if true, will lead to a conviction, then he is bound to leave the case to the jury. He may think that the prosecution story is inherently improbable, that the evidence is discrepant, and that it is of a class which is generally unreliable, for example, the evidence of discharged servants; but if he thinks that though weak the evidence if true will justify a conviction, he must leave the case to the jury, cautioning them, of course, about the weak points in the evidence. But if the Judge, after the prosecution case is closed, comes to the conclusion that, assuming that the jury believe every word of the prosecution evidence, nevertheless they will not be justified in convicting, then he is bound in law to say so and to direct the jury that in law they must bring in a verdict of not guilty, and he ought not in such a case to leave the matter to the jury.

Now, the question here is whether there was any evidence on which the jury could convict, assuming they believed the whole story against accused No. 1 to be true. To my mind there was not. It is perfectly clear that the particular items of evidence against accused No. 1 come to nothing. Any one may have a dishonest cousin, any one may lend money to that cousin, and it

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*Beaumont C.J.*  
—

is shown that many people besides accused No. 1 had access to the cupboard in which the document alleged to have been stolen was kept. Therefore none of those particular items of evidence can lead to a conviction. But, no doubt, one has to consider their cumulative effect, and it seems to me that the cumulative effect comes at the very most to a case of suspicion. The learned Judge seems to have been most impressed, judging from the memorandum which he has been good enough to supply to the Court, with the fact that very shortly before the forged hundi was presented, accused No. 1 had lent money, or given money, to accused No. 2, without which it might have been difficult or impossible for accused No. 2 to open the account through which the forged hundi was to be presented. But that, at the most, raises mere suspicion. If it had been shown that accused No. 1 knew the purpose for which the money was to be used, that would have been a different matter. But there is no evidence whatever that he knew the purpose for which it was intended, or the manner in which in fact it was used, and it is not by any means unlikely that he lent the money to his cousin because the cousin was in financial difficulties and wanted to go upcountry to his native place. But, at most, the evidence raises a case of suspicion, and I must confess that to my mind, when one looks at the whole of the prosecution evidence, the suspicion is extremely faint. It is proved that accused No. 1 as cashier knew that this hundi No. 1604 was suspect. He had been warned by the directors that if it was presented for payment, he was not to pay it without reference to them; he was to take instructions; and in fact he reported to them the presentation of the hundi. Surely, therefore, if he was in a conspiracy to try and cash a forged hundi on form No. 1604, he would have told his fellow conspirators that it was perfectly useless to go on with the matter. He knew for a fact that the presentation of hundi No. 1604 was not going to lead to payment of Rs. 5,000, but was likely to lead to an enquiry by the Police, and he would have warned his fellow conspirators that they had better take no further steps in the matter. That would have been the course he would probably have adopted, if he had really been in the conspiracy. These observations relating, as they do, rather to the weight of the evidence go beyond the reference, but I have made them because it is only fair to the accused, who will have to take up again the threads of his life, to say that in my view on the materials before the Court there is no case against him even of serious suspicion.

So far as the question of law is concerned, I am clearly of opinion that the learned Judge erred in not ruling that there was no case to go to the jury, and that he ought to have directed the jury that in law they must bring in a verdict of not guilty. That being so, we must set aside the conviction, acquit the accused, and direct that he be released.

BROOMFIELD J. I agree and have nothing to add.

WASSOODEW J. I agree.

*Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice N. J. Wadia, and  
Mr. Justice Sen.*

EMPEROR

v.

DAWOOD HASHAM.\*

1940

November 15.

*Criminal Procedure Code (Act V of 1898), Sec. 289—Trial by jury—No evidence against accused—Duty of Judge—Withdrawal of case, from jury.*

Section 289 of the Criminal Procedure Code, 1898, provides that if the Court considers that there is no evidence that the accused committed the offence, it may, in a case tried by a jury, direct the jury to return a verdict of not guilty. It confers in terms a discretion on the Judge—a discretion which must be exercised judicially. Where the Judge is satisfied that there is no evidence to go to the jury, he must in his discretion withdraw the case from the jury, or, in other words, direct them to return a verdict of not guilty. The question whether there is any evidence to go before the jury is a question of law.

If the Judge is of opinion that the evidence led for the prosecution is very weak, that there are discrepancies in it, that it is of a type usually found to be unreliable, and that the story is inherently improbable, he is bound to bring such defects to the attention of the jury.

Where, however, the evidence is such that if it is believed by the jury, it must lead to a conviction, the Judge is bound to leave the question to the jury, because it is for them to decide whether the evidence is to be believed or not. If the Judge comes to the conclusion that, assuming that the jury believes the whole of the evidence placed before them, in law they cannot convict the accused, then he is bound to hold that there is no evidence to be placed before the jury, and he is bound to direct them in law to return a verdict of not guilty.

THIS was a trial for murder and abetment of murder before Lokur J. and a special jury in the High Court Sessions.

The murdered man Hussain and his son Noor Mahomed lived in a house in Bhisti Moholla in Bombay. Four or five years before August 1939 a quarrel had taken place between Hussain and one Suleman Adam (a near relation of Dawood Hasham and Suleiman Ahmed, accused Nos. 1 and 2) regarding some satta beta.

On the night of January 22, 1939, at about 11 p.m. when Noor Mahomed returned home he heard some persons shouting abuses from an otla near his house. He found accused Nos. 1 to 3 and one Hasham on the otla.

When Noor Mahomed inquired why he was being abused, accused No. 2 replied by more abuses. The two started abusing each other. From words they soon came to blows.

About that time Hussain, the deceased, as well as the father of accused No. 2 were passing by. They interceded and separated the contestants.

Just then, either Hasham or accused No. 3 or both shouted: "Seize Hussain; do not let him go." Accused Nos. 2 and 3 caught hold of Hussain,

\* Third Criminal Sessions, 1939 : Case No. 4.

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who shouted to his son : " Dawood (accused No. 1) has a knife in his hand : run away." Noor Mahomed accordingly ran away to his house.

All of a sudden accused No. 1 jumped down from the otda and stabbed Hussain with a knife on his chest, while he was being held fast by accused Nos. 2 and 3. Accused No. 1 then ran away. Hussain died shortly afterwards.

The whole incident lasted barely a few minutes.

Accused No. 1 was later tried for the offence of murder and accused Nos. 2 and 3 for abetment of the offence before Lokur J. and a special jury.

Lokur J. in his summing-up to the jury, after dealing with the case of accused No. 1, addressed the jury as regards accused Nos. 2 and 3 thus :

" Unless you assumed that there must have been a conspiracy beforehand and in pursuance of the conspiracy accused Nos. 2 and 3 caught hold of Hussain, you cannot say that accused Nos. 2 and 3 abetted the commission of the crime. It is admitted that accused Nos. 2 and 3 did not speak to accused No. 1 nor did accused No. 1 say anything to accused Nos. 2 and 3 or to the deceased before he stabbed the deceased. It was done all of a sudden, and so you cannot hold accused Nos. 2 and 3 guilty of abetting the stabbing of the deceased. Accused Nos. 2 and 3 themselves did not know why they were called upon to seize the deceased Hussain. It may be that Hasham wanted merely to detain Hussain. Hussain had gone there as a peace-maker to settle the quarrel between accused No. 2 and Noor Mahomed. Noor Mahomed ran away, and then Hasham or some one from the crowd may have thought of keeping Hussain in order to settle the dispute once for all. In these circumstances unless there was a previous conspiracy that Hussain should be seized and stabbed, it will be difficult for you to hold accused Nos. 2 and 3 guilty of abetment. But the presence of Hussain there was accidental. It is, therefore, to my mind clear that on the evidence accused Nos. 2 and 3 cannot be held to have conspired with accused No. 1 for stabbing the deceased Hussain."

The case of accused No. 1 as well as the case of accused Nos. 2 and 3 were left to the jury.

The jury returned an unanimous verdict of guilty against accused No. 1 of murder, and of abetment of murder against accused Nos. 2 and 3.

His Lordship accepted the verdict, sentenced accused No. 1 to death, and accused Nos. 2 and 3 to transportation for life, because " they had merely seized the deceased when accused No. 1 stabbed him."

The Advocate General granted a certificate under the Letters Patent that " whether the omission to direct the jury [as regards accused Nos. 2 and 3] is an error of law and amounts in law to a misdirection, should be further considered by this Honourable Court." It was represented to him that it was the duty of the Judge to determine as a matter of law whether any evidence had been given on behalf of the prosecution on which the jury could properly find accused Nos. 2 and 3 guilty on the charge against them, and that having regard to the provisions of s. 289(2) of the Criminal Procedure Code it was the duty of the Judge to direct the jury to return a verdict of not guilty.

The case against accused Nos. 2 and 3 was accordingly considered by a full bench consisting of Beaumont C. J., N. J. Wadia J. and Sen J.

A. C. *Beynon*, for accused Nos. 2 and 3.

P. P. *Khambatta*, with N. K. *Pettigara*, Public Prosecutor, for the Crown.

BEAUMONT C. J. This case comes before the Court on a certificate of the Advocate General given under cl. 26 of the Letters Patent. He considers that the question, whether the learned Judge should have withdrawn the case from the jury on the ground that there was no evidence to go to the jury, is a question of law which requires to be considered by this Court.

The case in question was tried by Mr. Justice Lokur and a special jury, and in it three accused were charged with murder and abetment of murder. The actual murder was charged against accused No. 1, and abetment of murder against accused Nos. 2 and 3.

The material facts, which the jury accepted, appear sufficiently from the certificate of the Advocate-General. The murdered man, Hussain Aiman, and his son Noor Mahomed were living in a house in Bhisti Moholla, and on January 22, 1939, about 11 p.m., Noor Mahomed was returning to his house, when he was abused, by accused Nos. 1, 2 and 3 and a man named Hasham who were sitting on the otla of a house near to his house. A quarrel ensued and a fight started between Noor Mahomed and accused No. 2, and at that stage Hussein, the father of Noor Mahomed, came up and separated the contestants, and either Hasham or accused No. 3 shouted, "Seize Hussein, do not let him go." Thereupon accused Nos. 2 and 3 caught hold of the deceased Hussein. Hussein, when caught, was facing the otla and accused No. 3 was facing Hussein. Whilst Hussein was being held by accused Nos. 2 and 3, he shouted to his son Noor Mahomed "Dawood, (that is accused No. 1) has a knife in his hand, run away." Then Noor Mahomed ran away. Thereupon accused No. 1 jumped down from the otla and stabbed Hussein through the heart, and killed him. Accused No. 1 was found guilty of murder by the jury and was sentenced to be hanged, and no question about his guilt arises.

Accused Nos. 2 and 3 were found guilty of abetment of murder and were sentenced by the learned Judge to transportation for life, and the question before us is whether there was any evidence to go to the jury that they were guilty of abetment. Now, the law, I think, is free from doubt. Section 289 of the Criminal Procedure Code provides that if the Court considers that there is no evidence that the accused committed the offence, it may, in a case tried by a jury, direct the jury to return a verdict of not guilty. That section confers in terms a discretion on the Judge, but it is a discretion which must be exercised judicially, and when one considers the respective functions of the Judge and jury in a trial by jury,—functions which are prescribed in ss. 298 and 299—, it is quite clear that where the Judge is satisfied that there is no evidence to go to the jury, he must in his discretion withdraw the case from the jury, or, in other words, direct them to return a verdict of not guilty. That is clear, because all questions of law have to be decided by the Judge, and the question whether there is any evidence to go before the jury is a question of law. The jury have to decide all questions as to the reliability of the evidence, and it is for them to determine which view of the facts is true. The Judge may consider that the evidence led for the prosecution is very weak, that there are discrepancies in it, that it is of a type usually found to be unreliable, and that the story is inherently improbable. All such defects he ought to bring to the attention of the jury, but if the evidence is

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such that if it is believed by the jury, it must lead to a conviction, then the Judge is bound to leave the question to the jury, because it is for them to decide whether the evidence is to be believed or not. But if the Judge comes to the conclusion that, assuming that the jury believes the whole of the evidence placed before them, in law they cannot convict the accused, then he is bound to hold that there is no evidence to be placed before the jury, and he is bound to direct them in law to return a verdict of not guilty.

Now, the question is, on which side of the line this case comes. Is it a case of no evidence which can justify a conviction, or is it a case of weak evidence which the jury nevertheless would be entitled to accept? Nobody suggests that the evidence against accused Nos. 2 and 3 is of a convincing character. The learned Judge gave a very full and fair summing-up, indeed so full is the summing-up that both sides have agreed that it is not necessary to have a transcript of the evidence, because the learned Judge has correctly summarised all the material evidence. The bulk of his charge is, of course, directed to the case against accused No. 1, with which we are not concerned, but in the early part of his summing-up he explains to the jury accurately the nature of abetment. He points out that under s. 107 of the Indian Penal Code abetment may be of three characters, either by instigation, or by conspiracy, or by aiding or assisting, and then, at a later stage of his summing-up, he deals with the case against accused Nos. 2 and 3 specifically. There was no evidence that accused Nos. 2 and 3 had instigated accused No. 1 to stab Hussein, but the learned Judge discusses the two other aspects of abetment—active assistance, and previous conspiracy. He points out that as against accused Nos. 2 and 3 there is no evidence at all that they took any active part in the actual stabbing. He also points out that the whole incident took place in a few minutes and that it is not alleged that accused No. 1 shouted out that Hussein should be stabbed. He points out further that if accused Nos. 2 and 3 were looking away from the *otla*, they could not expect that accused No. 1 would immediately come down from the *otla* and stab Hussein. He says that abetment requires that the persons abetting must intend to facilitate the commission of the offence. Then he says

“If accused Nos. 2 and 3 did not seize Hussein intending that he should be stabbed by accused No. 1, then they cannot be said to have abetted the commission of the offence by accused No. 1. It was pointed out to you in the course of the arguments that as accused Nos. 2 and 3 were holding Hussein, they could not see what the accused No. 1 was doing as their backs were turned towards him. If accused No. 1 had shouted to accused Nos. 2 and 3, ‘Seize Hussein, I am coming to stab him,’ then they might perhaps have let him go or prevented accused No. 1 from stabbing him. There is no evidence to show that accused Nos. 2 and 3 had their attention directed towards accused No. 1. Unless you assume that there must have been a conspiracy beforehand and in pursuance of that conspiracy accused Nos. 2 and 3 caught hold of Hussein, you cannot say that accused Nos. 2 and 3 abetted the commission of the crime.”

So that the learned Judge seems definitely to express the view that unless the jury found abetment by means of previous conspiracy, there was no evidence of abetment; there was no evidence, that is to say, of actually aiding in the commission of the murder. Then the learned Judge goes on to discuss the evidence relating to previous conspiracy. He says:

"It is admitted that accused Nos. 2 and 3 did not speak to accused No. 1, nor did accused No. 1 say anything to accused Nos. 2 and 3 or to the deceased before he stabbed the deceased. It was done all of a sudden."

Then he says :

"Accused Nos. 2 and 3 themselves did not know why they were called upon to seize the deceased. It may be that Hasham wanted merely to detain Hussein. Hussein had gone there as a peacemaker to settle the quarrel between accused No. 2 and Noor Mahomed. Noor Mahomed ran away and then Hasham or some one from the crowd may have thought of keeping Hussein in order to settle the dispute once for all. In these circumstances unless there was a previous conspiracy that Hussein should be seized and stabbed, it would be difficult for you to hold accused Nos. 2 and 3 guilty of abetment. But the presence of Hussein there was accidental. It is, therefore, to my mind clear that on the evidence accused Nos. 2 and 3 cannot be held to have conspired with accused No. 1 for stabbing the deceased Hussein."

So that the learned Judge has really held that there was no evidence of abetment by active assistance or previous conspiracy, and there was no suggestion of abetment by instigation. I think, therefore, that if the learned Judge's attention had been drawn to s. 289 of the Criminal Procedure Code, he would have held that there was no evidence to go to the jury. Unfortunately, his attention was not directed to that section, and he left the case to the jury, and, no doubt, much to his surprise and regret, the jury brought in a unanimous verdict of guilty against accused Nos. 2 and 3.

It is argued by Mr. Khambatta for the Crown that in point of fact there was evidence, weak perhaps, but still evidence fit to be left to the jury. The evidence has not been transcribed, and, as I have said, we are judging from the summing-up of the learned Judge. To my mind the learned Judge has ruled upon the question, which it was for him to rule upon, and he has in fact held in his summing-up that there was no evidence against accused Nos. 2 and 3 of abetment, and, if that is so, as a matter of law he was bound to withdraw the case from the jury. There is no material before us which would justify our differing from the learned Judge on his view of the law. The error arises from the fact that, having decided the question of law, and held that there was no evidence to go to the jury, he did not adopt the correct course and direct the jury that in law they were bound to return a verdict of not guilty.

I think, therefore, that we must set aside the verdict of the jury as against accused Nos. 2 and 3. Of course, they might undoubtedly have been held guilty of assault under s. 352, and, therefore, they have not much to complain of, if they have spent some time in prison. We set aside the verdict and sentence as against accused Nos. 2 and 3 and direct that they be acquitted and set at liberty.

N. J. WADIA J. I agree and have nothing to add.

SEN J. I agree.

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*Conviction set aside.*

## DISCIPLINARY JURISDICTION.

*Before Mr. Justice Broomfield and Mr. Justice Wasseodew.*

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*In re* TULSIDAS AMANMAL KARANI.\*

*November 8.* Disciplinary jurisdiction—Letters Patent of Bombay High Court, 1865, cl. 10—Attorney—Scandalous notices under Civil Procedure Code (Act V of 1908), Sec. 80 sent to Judge of Subordinate Court—Contempt of Court—Power of High Court to remove or suspend practising attorney—Reasonable cause for suspension—"Reasonable cause" meaning of—"Misconduct" meaning of—Moral delinquency in private character, whether punishable—Bar Councils Act (XXXVIII of 1926) Sec. 10.

Under cl. 10 of the Letters Patent, 1865, the High Court is empowered to remove or suspend from practice an advocate or attorney on "reasonable cause". A wide discretion is given to the High Court in regard to the exercise of disciplinary jurisdiction by the use of the words "reasonable cause."

*S. B. Sarbadhikary*, In re<sup>2</sup>, referred to.

"Reasonable cause" means professional or other misconduct under s. 10 of the Bar Councils Act, 1926. "Misconduct" is a wide expression and it is not necessary that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or is likely to hamper or embarrass the administration of justice by the High Court, or any of the Courts subordinate thereto, amounts to "misconduct."

*Advocate General of Bombay v. Three Advocates* (O.S.)<sup>2</sup>, followed.

The High Court has power to remove an advocate or attorney if he is unfit to be entrusted with a professional status and character. If an attorney is found guilty of moral delinquency in his private character, he is liable to be struck off the roll.

An attorney of the High Court sent two notices, under s. 80 of the Civil Procedure Code, 1908, to a Judge of the Small Cause Court, Bombay, alleging that the Judge had acted with prejudice, bias, and malice, in the course of his judicial duties, that he decided a case in which the attorney figured as a witness not according to his own convictions but to please somebody else, and that the remarks made by him in respect of the evidence of the attorney were false, unjustified, malicious and irrelevant, and that in passing those remarks he did not act honestly, judically, or in good faith. On a petition presented by the Advocate General for taking disciplinary action against the attorney—

*Held*, (1) that the fact that the allegations were contained in notices under s. 80, Civil Procedure Code, 1908, did not prevent them from being contempt of Court ;

(2) that the Court had to consider the conduct of the attorney as it affected his position as an attorney and his relations to the Court ; and

(3) that the conduct of the attorney in writing the notices to the Judge amounted to a reasonable cause for taking disciplinary action against him under cl. 10 of the Letters Patent, 1865.

In re *Wallace*,<sup>3</sup> distinguished.

\* O. C. J. Disciplinary Jurisdiction, Mis. No. 126 of 1940.

1 (1906) L. R. 34 I. A. 41, s. c. 9 Bom. L. R. 9.

2 (1934) I. L. R. 59 Bom. 57, s.c. 36 Bom. L. R. 1136, F.B.

3 (1866) L. R. 1 P. C. 283.



## DISCIPLINARY action.

In January, 1931, one Vishnabai and others filed a suit in the Small Causes Court, Bombay, against one Choithram Bharmal for recovery of rent.

On February 24, 1931, the suit came on for hearing before S. E. Kurwa, a Judge of the Court, and, there being no appearance for the defendant, an ex parte decree was passed in favour of the plaintiffs.

On August 11, 1931, the plaintiffs issued a notice against the defendants' father, Bharmal, to show cause why his name should not be brought on the record as the real defendant, why the decree be not amended, under s. 151. Civil Procedure Code, 1908, and why execution be not issued against him on the ground that he had occupied the premises in the name of his son Choithram.

In the course of the hearing of the notice, one Tulsidas A. Karani, a solicitor of the High Court, was examined as a witness. The Judge was not favourably impressed with the witness' demeanour, and disbelieved his evidence, and severely criticised him in his judgment which he delivered on November 12, 1931. The Judge made the notice absolute and ordered execution to be issued against Bharmal. An appeal against his judgment was made to the Full Court of the Small Causes Court, but it was dismissed on December 9, 1931. Bharmal then applied to the High Court in revision, but his application was dismissed on December 9, 1932.

On March 26, 1936, Karani served a notice, under s. 80 of the Civil Procedure Code, on the Small Cause Court Judge, stating his intention to file a suit against the Judge in the High Court for a declaration that the remarks passed by him in his judgment were false, unjustified, malicious and irrelevant, and that in passing those remarks he did not act honestly, judicially, or in good faith, and for an order that the remarks should be expunged from the judgment.

On August 31, 1937, Karani served another notice, under s. 80, Civil Procedure Code, on the Judge alleging that he had no jurisdiction to pass the ex parte decree, to entertain the application made by the plaintiffs under s. 151 of the Civil Procedure Code, and to pass the false unjustified, malicious, and irrelevant remarks in his judgment.

On November 11, 1937, Karani filed a suit in the High Court against the Judge on the grounds mentioned in the two notices, but the suit was dismissed as the consent of the Governor of Bombay was not obtained to the institution of the suit as required under s. 270 (1) of the Government of India Act, 1935. Karani filed an appeal, but it was dismissed on October 5, 1939. He then applied to the High Court for leave to appeal to the Federal Court of India, but his application was dismissed.

On December 7, 1939, the Registrar of the Small Causes Court, Bombay, presented a petition to the High Court in its disciplinary jurisdiction praying for an inquiry into the conduct of Karani, and for disciplinary action against him.

On March 19, 1940, the High Court issued a notice to Karani to show cause why action under the disciplinary jurisdiction should not be taken against him for the allegations made by him in the two notices.

The Chamber Judge, Mr. Justice B. J. Wadia, made a formal inquiry

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Q. C. J. and in his report stated that the charges formulated against Karani were proved. [The charges are set out in the Judgment of Broomfield J.]

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—  
On July 31, 1940, the Advocate General was asked by the High Court to submit a petition praying that Karani might be called upon to show cause why disciplinary action should not be taken against him.

On August 22, 1940, the Advocate General presented a petition submitting that Karani was guilty of such conduct as made him unfit to continue on the roll of attorneys of the High Court, and praying that he might be called upon to show cause why his name should not be removed from the roll of attorneys or why he should not be suspended from practice.

*M. C. Setalvad*, Advocate-General, for the petitioner.

*A. J. Poonawala*, for the opponent.

BROOMFIELD J. This is an application to the High Court in its disciplinary jurisdiction made by the Advocate General of Bombay in the matter of Tulsidas Amanmal Karani, an attorney of this Court.

The material facts are as follows: In January, 1931, a suit was filed in the Court of Small Causes at Bombay by certain plaintiffs, whose names are not material, against one Choithram Bharmal for the recovery of Rs. 120 for rent. The suit came on for hearing on February 24, 1931, before Mr. S. E. Kurwa, a Judge of the said Court of Small Causes, and an *ex parte* decree was passed in favour of the plaintiffs. On August 11, 1931, the plaintiffs issued a notice against one Bharmal Tilokchand, the father of the defendant in the suit, to show cause why his name should not be brought on record as the real defendant and why the decree should not be amended under s. 151 of the Civil Procedure Code, and why execution should not be issued against him. The allegation was that Bharmal had occupied the premises in question in the name of his son Choithram. In these proceedings several witnesses were examined on behalf of Bharmal of whom one was Karani. The Judge was unfavourably impressed with Karani's demeanour as a witness. He disbelieved his evidence and criticised it with some severity. The notice was made absolute and execution was ordered to be issued against Bharmal. He filed an appeal which was dismissed, and he also went in revision to the High Court but that application was dismissed on December 9, 1932.

On March 26, 1936, Karani served a notice under s. 80 of the Civil Procedure Code on Mr. Kurwa stating his intention to file a suit in the High Court against him for a declaration that the remarks passed by him as Judge of the Small Cause Court against him (Karani) in the judgment in the small cause suit were false, unjustified, malicious and irrelevant, that in passing those remarks Mr. Kurwa did not act honestly, judicially or in good faith, and for the reliefs that the said remarks should be expunged and that Mr. Kurwa should be made to pay the costs. On August 31, 1937, Karani served a further notice under s. 80 alleging that Mr. Kurwa had no jurisdiction to pass the *ex parte* decree in the small cause suit and that he had no jurisdiction to entertain the application under s. 151, also that he had no jurisdiction to make the false, unjustified, malicious and irrelevant remarks in his judgment.

On November 11, 1937, Karani filed a suit in the High Court on the grounds intimated in the two notices. Several preliminary issues were raised and one of them was tried first, viz., whether in the absence of the consent of the Governor of Bombay under s. 270(1) of the Government of India Act, 1935, the suit was maintainable. On January 25, 1939, Mr. Justice Blackwell held that the suit was not maintainable as the consent of the Governor of Bombay was not obtained. The suit was accordingly dismissed with costs. Karani appealed, but his appeal was dismissed on October 5, 1939. He then applied for leave to appeal to the Federal Court and this application was refused.

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On December 7, 1939, the Registrar of the Small Causes Court presented a petition to this High Court in its disciplinary jurisdiction. In the petition certain paragraphs from the notice of March 26, 1936, were set out.

"I may state that you were seriously prejudiced and biassed against me by the unwarranted attack made on me on September 11, 1931." (Karani was here apparently referring to certain remarks made about him by counsel appearing for the plaintiffs in the Small Cause Court suit). "The cumulative effect of your false remarks is that I had given false evidence. The aim of the said false remarks is to ruin my career as a legal practitioner. The language and style of the judgment is quite different from that of your own. Evidently you have played in the hands of some designing persons. You have not hesitated even to record my answers incorrectly. [He then referred to an instance of alleged misrecording of his evidence.] In what other ways you abused your powers as a Judge will be proved at the proper time and place. With a view to vindicate my honour and clear up the cloud cast by you on my character as a witness and also as a legal practitioner I have decided to file a suit against you in the High Court of Bombay for a declaration that the remarks passed by you against me are false, unjustified, malicious and irrelevant, that in the passing of the said remarks you did not act honestly, judicially or in good faith, that the said remarks be expunged from the judgment, that you be made to pay the costs of and incidental to the suit, and for such other reliefs as the Court may deem fit to grant."

The Registrar's petition averred that the said notice did not set out the true facts and was a most unbecoming, scandalous and libellous attack on a judicial officer, and prayed for an inquiry into the conduct of the said Karani and for proper disciplinary action against him.

In accordance with the rules of the High Court in these matters, the Chief Justice ordered an inquiry by the Chamber Judge. On March 19, 1940, a notice was issued to Karani to show cause why action under the disciplinary jurisdiction should not be taken against him. Karani put in an affidavit by way of defence but he did not appear in person. On June 25, 1940, which was the first date of hearing before the Chamber Judge, Mr. Justice B. J. Wadia, he was represented by a solicitor who, according to the Judge's note of the proceedings, applied for a week's adjournment in order to communicate with his client about the charges and to induce him to apologise. The adjournment was granted and on July 2, 1940, the second date of the hearing, Karani was again absent and his solicitor withdrew from the inquiry. The following formal charges were drawn up by the Chamber Judge :

1. That you Tulsidas Amanmal Karani, a solicitor of this Honourable Court, in your notice, dated March 26, 1936, addressed to Mr. S. E. Kurwa, a Judge of the Small Causes Court, Bombay, did accuse the said learned Judge of acting with prejudice, bias and malice in the course of his judicial duties.

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2. That you did also in the said notice accuse the said learned Judge of playing into the hands of some designing persons and of delivering a judgment different in language and style from his own.

3. That you did in the said notice accuse the said learned Judge of having abused his powers as a Judge and of not acting honestly, judicially or in good faith.

Mr. Justice B. J. Wadia held that all the charges had been clearly proved and reported accordingly. In accordance with the rules the Advocate General was then instructed by the Chief Justice and Judges to present the present petition.

The Advocate General in his petition submits that Karani has been guilty of conduct which makes him unfit to continue on the roll of attorneys of this High Court, and prays that his name be removed from the roll of attorneys or that he be suspended from practice.

The opponent was represented before us by counsel who has relied for the most part on the affidavit in reply to the notice issued before the inquiry by the Chamber Judge. Before dealing with his arguments a few words are necessary as to the nature of our jurisdiction. Under cl. 10 of the Letters Patent the High Court is empowered to remove or suspend from practice advocates, vakils or attorneys "on reasonable cause". The expression "reasonable cause" was considered by the Privy Council in *S. B. Sarbadhicary*, *In re*<sup>1</sup> and it was there stated (p. 45) :—

"Their Lordships will not attempt to give a definition of 'reasonable cause', or to lay down any rule for the interpretation of the letters patent in this respect. Every case must depend on its own circumstances. It is obvious that the intention of the Crown was to give a wide discretion to the High Court in India in regard to the exercise of this disciplinary authority."

In *Advocate General of Bombay v. Three Advocates* (O.S.): *District Government Pleader, Kolaba v. Two Advocates* (A. S.)<sup>2</sup> it was held that "reasonable cause" in this context means the same as professional or other misconduct under s. 10 of the Indian Bar Councils Act. There must be something which can fairly be described as misconduct; otherwise there can be no reasonable cause for taking disciplinary action. But "misconduct" itself is a sufficiently wide expression; it is not necessary, for instance, that it should involve moral turpitude. The learned Chief Justice who delivered the judgment of the full bench pointed out that the Court has a right to expect a high standard of loyalty to the Court and co-operation from those who practise the profession of the law. (The full bench was concerned in that case with advocates and pleaders but the same thing applies to attorneys). Any conduct which in any way renders a man unfit for the exercise of his profession or is "likely to hamper or embarrass the administration of justice by this Court or any of the Courts subordinate thereto" may be considered to be misconduct calling for disciplinary action. "What we have to consider in all these cases is the conduct of the Advocate (Attorney) as it affects his position as an advocate (Attorney) and his relations to the Court."

The points urged by counsel before us on behalf of the opponent were (1) that the letter or notice complained of was written in the capacity of a

<sup>1</sup> (1906) L. R. 34 I. A. 41,  
s. c. 9 Bom. L. R. 9.

<sup>2</sup> (1934) I. L. R. 59 Bom. 57,  
s. c. 36 Bom. L. R. 1136, F.B.

suitor and not as an attorney and the case is therefore covered by the authority of *In re Wallace*;<sup>1</sup> (2) that the letter was a step in judicial proceedings contemplated against Mr. Kurwa, being sent by way of notice under s. 80 of the Civil Procedure Code, and that the opponent as a party was absolutely privileged; (3) that the opponent is prepared to substantiate his allegations against Mr. Kurwa, the truth of which has not been inquired into.

This last plea of justification may be very briefly disposed of. Assuming that it was open to the opponent to produce evidence in support of his allegations against Mr. Kurwa in these proceedings, he did not attempt to do so at the only time when, if at all, it would have been permissible, viz., at the formal inquiry before the Chamber Judge. He allowed his case then to go by default and the learned Chamber Judge in finding the charges against him proved has also held that there was no justification whatever for the allegations made by him. The rules relating to these disciplinary proceedings expressly provide that evidence cannot be given at the final hearing of the matter before a bench.

The other two points are inter-related and in connection with them it is necessary to refer in some detail to *In re Wallace*. The facts of that case were these. Wallace was an advocate and also an attorney practising in the Supreme Court of Nova Scotia. He was also a party in several cases in that Court. Supposing that he had reason to complain of the conduct of the Judges in dealing with those cases, he wrote a letter to the Chief Justice reflecting on the Judges and on the administration of justice generally in the Court. The Judges pronounced the letter to be a contempt of Court and issued a rule calling upon Wallace to show cause why he should not be suspended from practice as an attorney and barrister until he should make a suitable apology in writing, to be read in open Court, for his contempt. (It appears that he had offered a full verbal apology to the Chief Justice before the rule was issued but this was not considered sufficient). The rule was made absolute and Wallace appealed to the Privy Council.

The Judges of the Supreme Court had treated the matter as a case of contempt of Court. The Chief Justice in his judgment relied on authorities in contempt cases, and as regards the punishment to be imposed merely said "our right to substitute a suspension from practice for imprisonment is too clear to be disputed." The Judges may or may not have taken the view that Wallace's conduct rendered him unfit to practise, but if they did, they did not say so.

Their Lordships of the Privy Council disapproved of the order. Lord Westbury who delivered the judgment said that the letter written by Wallace was of a most reprehensible kind, a contempt of Court "which it was hardly possible for the Court to omit taking cognizance of." (It may be mentioned incidentally that Wallace accused the Judges of acting upon inadmissible evidence and private information. He did not allege, as Karani has alleged in the present case in so many words, prejudice, bias, malice and dishonesty).

Lord Westbury then went on to state the reasons why suspension from practice was an inappropriate punishment for the offence committed by Wallace,

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O. C. J. and, as the judgment is really the main foundation of the opponent's defence  
1940 in the present case, I cite the material part of it in full (p. 294) :—

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"It was an offence, however, committed by an individual in his capacity of a suitor, in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor; and it had no connection whatever with his professional character, or anything done by him professionally, either as an Advocate or an Attorney. It was a contempt of Court committed by an individual in his personal character only.

To offences of that kind there has been attached by law and by long practice a definite kind of punishment, viz. fine and imprisonment. It must not, however, be supposed that a Court of Justice has not the power to remove the Officers of the Court if unfit to be entrusted with a professional *status* and character. If an Advocate, for example, were found guilty of crime, there is no doubt that the Court would suspend him. If an Attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the Roll.

But in this particular case, there is no *delictum* brought forward or assigned, except that which results from the fact of addressing an improper and contemptuous letter to the Chief Justice of the Court, in respect of something supposed to have been done unjustly to the writer in his private capacity as a suitor. We think, therefore, there was no necessity for the Judges to go further than to award to that offence the customary punishment for contempt of Court. We do not find anything which renders it expedient for the public interest, or right for the Court, to interfere with the *status* of the individual as a Practitioner in that Court. In that respect, therefore, we think that the Judges departed from the course which ought to have been pursued, by adopting a different description of punishment from the ordinary punishment for offences of this nature.

When an offence was committed which might have been adequately corrected by that punishment, and the offence was not one which subjected the individual committing it to anything like general infamy, or an imputation of bad character, so as to render his remaining in the Court as a Practitioner improper, we think it was not competent to the Court to inflict upon him a professional punishment for an act which was not done professionally, and which act, *per se* did not render him improper to remain as a Practitioner of the Court.

On this ground, therefore, we do not approve of the order. At the same time we desire it to be understood that we entirely concur with the Judges of the Court below in the estimate which they have formed of the gross impropriety of the conduct of the Appellant. But we are still of opinion his conduct did not require and did not authorize a departure from the ordinary mode and standard of punishment; and upon that ground, and that ground only, we shall advise Her Majesty to discharge the Order, in respect of its having substituted a penalty and mode of punishment which was not the appropriate and fitting punishment for the case in question."

The learned Chamber Judge in his report in this case says that *In re Wallace* was decided on its own facts and is no authority for holding that a legal practitioner could never be punished for professional misconduct committed by him in his personal capacity, however gross the offence may be. The same view has been taken by the Allahabad High Court in *In the matter of a Pleader*.<sup>1</sup> With respect we agree with this view. The effect of the judgment certainly seems to be that contempt of Court by an advocate or attorney, not in the exercise of his profession but in a private capacity, does not render him liable to be punished professionally unless it can further be said that his conduct in some way affects his fitness to be a member of the profession. But their Lordships found as a fact that Wallace's professional status and character was

not affected by what he had done. Nothing was alleged against him except the fact of addressing an improper and contemptuous letter to the Court in respect of something supposed to have been done unjustly to the writer in his private capacity as a suitor and that it was held did not *per se* render him improper to remain as a practitioner of the Court. Those were the facts on which the judgment was based. Had the facts been different in that respect, the decision would no doubt have been different. Their Lordships did not say, and there is no reason to suppose that they meant, that contempt of Court when committed in a private capacity can never be of such a nature as to show professional unfitness.

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It is difficult to see how there could be a grosser contempt than to allege that a Judge has acted with prejudice, bias and malice in the course of his judicial duties, that he decided a case not according to his own convictions but to please somebody else (that appears to be the meaning of the passage which is made the subject of the second charge) and that he abused his powers as a Judge and acted dishonestly and in bad faith.

Learned counsel for the opponent has argued that no offence was committed, not even contempt of Court, because these allegations were contained in a notice under s. 80, which the opponent was bound to submit before bringing a suit. But without very strong authority—and no authority has been cited in that connection—we are not prepared to say that a man merely by filing or threatening to file a suit and calling his communication a notice under s. 80 can insult and vilify a Judge in this manner. The opponent must have known, or ought to have known, being a practitioner of the law, that his suit was unmaintainable even apart from the technical flaw of want of sanction under the Government of India Act. No suit of the kind lies for anything said or done by a Judge in his jurisdiction or in a bona fide belief that he has jurisdiction, and there can be no sort of question but that a Judge has jurisdiction to criticise a witness. As for the allegation in the second letter denying the Judge's jurisdiction to make the orders which he made in the small cause suit, that was not a matter that concerned Karani who was not a party, and anyhow, in view of the result of the appeal and revision application, there was no substance in the point. The fact therefore that these scandalous allegations were contained in a notice under s. 80 does not in our opinion prevent them from being contempt of Court.

As for the plea of absolute privilege, that only means that the opponent could not be proceeded against for defamation, not that he is immune from any sort of penalty. The fact that Mr. Kurwa himself had no remedy against the opponent only makes the matter worse, and is indeed one of the strongest reasons why this Court should take action. As their Lordships of the Privy Council said in *S. B. Sarbadhary*, *In re* (p. 45) :

"...it is essential to the proper administration of justice that unwarrantable attacks should not be made with impunity upon judges in their public capacity."

The opponent in his affidavit has stated that the Chief Justice told him he ought to apologise to Mr. Kurwa and that he decided that he would not apologise but file a suit. He never has apologised in any shape or form or expressed the slightest regret. On the contrary he appears to be of opinion that his

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conduct was perfectly justified. We do not wish to lay too much stress on the absence of an apology, though that might be very material in ordinary proceedings for contempt of Court. But the fact that the impropriety of his conduct was pointed out to him at an early stage and that nevertheless he persisted in filing his suit, appealing against the dismissal of the suit and so on, is, we think, material because it seems to show a determination to harass the Judge which almost amounts to persecution.

One of the points raised by the opponent in his affidavit was that there was great delay in instituting these proceedings. But his counsel did not urge this point, probably for the very good reason that the delay is entirely due to the pendency of the litigation which the opponent insisted on prosecuting as long as possible.

The learned Advocate General has submitted that the writing of these scandalous letters to Mr. Kurwa and the opponent's persistence in his entirely unwarrantable attacks on the Judge constitute conduct which shows him unfit to be an attorney. If such conduct is characteristic of him there could be no question about the matter, and the fact that he has shown himself to be capable of such conduct in this one instance raises grave doubts as to his being a fit person to cooperate with the Courts in the administration of justice. We think that in accordance with the principles which have been laid down as to the exercise of our disciplinary jurisdiction there is reasonable cause for taking action under cl. 10 of the Letters Patent.

We therefore suspend him from practice as an attorney for six months and direct that he pay the costs of these proceedings including the costs of the inquiry before the Chamber Judge.

*Order accordingly.*

Solicitors for petitioner : *Little & Co.*

Solicitors for opponent : *Choksey & Co.*

#### INCOME-TAX REFERENCE.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Kania.*

1940

*In re* THE CENTRAL TALKIES CIRCUIT, MATUNGA.\*

October 7.

*Indian Income-tax Act (XI of 1922), Secs. 16(3), 26-A; Income-tax Rules 2, 4—Partnership consisting of assessee, his wife and minor son—Formation of new partnership—Mother of assessee substituted for wife and minor son—Alteration effected to avoid incidence of taxation—Whether such alteration by itself sufficient ground to refuse registration under Act—Shares of partners specified in deed of partnership—One partner a nominee of share for another partner—Deed whether registrable.*

On an application, under s. 26-A of the Indian Income-tax Act, 1922, to register a firm, it is open to the Income-tax Officer to say that the shares which appear in the deed of partnership presented to him for registration are not the true shares of the partners and therefore there is no proper application by the requisite firm under that section. If it were shown that one of the partners was

\*O. C. J. Income-tax Reference No. 3 of 1940, made by A. C. Turner, Commissioner of Income-tax, Bombay Pre-

sidency, under s. 66(3) of the Indian Income-tax Act, 1922.



only a nominee of a share allotted to him or her for another partner, the deed would not then specify correctly the individual shares and registration would be refused.

But the fact that the object of the alteration in a partnership, which is otherwise genuine, is to avoid the effect of s. 16(3) of the Indian Income-tax Act, 1922, is no ground for refusing to register the partnership under s. 26-A of the Act.

REFERENCE under s. 66(2) of the Indian Income-tax Act, 1922.

The Central Talkies Circuit, Matunga (assessee) were a firm of film distributors which originally consisted of the following partners:—

|                        |         |         |
|------------------------|---------|---------|
| 1. V. H. Desai         | .. .. . | 4 annas |
| 2. H. V. Desai         | .. .. . | 2 annas |
| 3. Taramati V. Desai   | .. .. . | 4 annas |
| 4. Ratnagauri C. Munim | .. .. . | 5 annas |
| 5. Charity             | .. .. . | 1 anna  |

The firm was registered for the first time in the year 1932-33 on the strength of a partnership deed with the above persons as partners. Thereafter up to the year 1935-36 registration was renewed every year, at the time of assessment the constitution of the firm remaining the same. The constitution of the firm was however changed on July 27, 1936, and the firm as newly constituted was registered on the strength of a new deed put in on July 28, 1936. The deed showed the firm to consist of the following partners:—

|                                          |         |         |
|------------------------------------------|---------|---------|
| 1. V. H. Desai (original sub-proprietor) | .. .. . | 3 annas |
| 2. T. V. Desai (wife of No. 1)           | .. .. . | 3 annas |
| 3. M. V. Desai (minor son of No. 1)      | .. .. . | 2 annas |
| 4. H. V. Desai                           | .. .. . | 2 annas |
| 5. Ratnagauri C. Munim                   | .. .. . | 3 annas |
| 6. Nandkumar C. Munim                    | .. .. . | 2 annas |
| 7. Charity                               | .. .. . | 1 anna  |

In this altered constitution V. H. Desai's minor son (No. 3) and Nandkumar C. Munim (No. 6) were admitted as partners in the firm. For the purposes of assessment for the following financial year, viz., 1937-38 a further change was made in the constitution of the firm. A new partnership deed was executed on July 14, 1937, substituting V. H. Desai's mother's name as a partner in place of his wife and minor son. There were five partners and their shares as shown in the deed were as under:—

|                        |         |          |
|------------------------|---------|----------|
| 1. V. H. Desai         | .. .. . | 3½ annas |
| 2. Vijayabai M. Desai  | .. .. . | 4½ annas |
| 3. H. V. Desai         | .. .. . | 2 annas  |
| 4. Ratnagauri C. Munim | .. .. . | 3 annas  |
| 5. Nandkumar C. Munim  | .. .. . | 2 annas  |
| 6. Charity             | .. .. . | 1 anna   |

For the purposes of the assessment of the financial year 1937-38 the assessee submitted on August 30, 1937, a return showing an income of Rs. 68,066, and on the strength of the said new deed of partnership applied to the Income-tax Officer under s. 26-A of the Indian Income-tax Act for the registration of the firm. It was stated that the minor son and the wife of V. H. Desai had ceased to be partners and that instead Desai's mother, Vijayabai M. Desai, had been taken as a partner. The eight annas share belonging to V. H. Desai and his wife and his minor son was re-distributed between him and

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O. C. J. his mother, so that V. H. Desai had a three and a half annas share and his  
1940 mother a four and a half annas share.

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On examination of the deed and other circumstances connected therewith, the Income-tax Officer came to the conclusion that the partnership purported to be shown as existing by the said deed was not a genuine partnership. The partnership deed was executed on July 14, 1937, i.e., shortly after the passing of Act IV of 1937 by which s. 16(3) was added to the Act, and the new partnership deed purported to drop out the very persons whose income would be included in that of the original sub-proprietor and to substitute in their place another person (the mother, who was not affected by the amendment to the Act). The application for registration was therefore rejected by the Income-tax Officer on the ground that the deed did not evidence a genuine partnership. Accordingly the firm was assessed to income-tax and super-tax as an unregistered firm.

An appeal against the order of the Income-tax Officer was thereupon made to the Assistant Commissioner of Income-tax, Bombay, by a petition dated October 18, 1937, and it was urged that the refusal to register the said firm was unjust and illegal. The Assistant Commissioner confirmed the decision of the Income-tax Officer, and held that the deed of partnership did not represent a genuine partnership. The appeal was accordingly dismissed.

The assessee thereupon approached the Commissioner in revision under s. 33 of the Act with a request to set aside the orders of the Income-tax Officer and the Assistant Commissioner refusing to register their firm. The Commissioner came to the conclusion that the registration of the deed of partnership had been rightly refused and declined to interfere.

The Commissioner was thereafter approached under s. 66(2) of the Act to refer the case of the assessee to the High Court. He however refused to refer the case.

The assessee thereupon applied to the High Court under s. 66(3) of the Act, and the High Court held that a question of law of the following nature in fact arose, namely, whether there was any evidence to justify the Income-tax Officer in refusing to register the firm alleged to have been constituted by exhibit No. 1 to the civil application No. 872/1938.

The following question was accordingly submitted to the High Court for decision :—

Whether there was any evidence to justify the appellate officers' finding of fact that the partnership stated to be in existence by the said deed was not a genuine partnership.

The opinion of the Commissioner on the question referred was thus expressed :—

"The assessee's argument merely amounts to this that ss. 2(14) and 26A of the Act coupled with rr. 2 to 4 framed under the Act, leave no option to the Income-tax authorities to refuse registration, once an instrument of partnership specifying the individual shares of the partners is presented to them by the assessee. The instrument of partnership specifying the individual shares of the partners referred to in s. 26-A must, however, mean a genuine partnership, and if there is evidence, direct or circumstantial, showing the bogus nature of the alleged partnership or that the alleged partnership is not a genuine partnership it is submitted that it is open to the Income-tax authorities to refuse registration of the firm in question. The

finding of the Assistant Commissioner in the present case was not based merely on the fact that the mother's name had been substituted for the names of the wife and the minor son. In order to test the genuineness of the partnership, he called for the accounts of the assesseees and examined them to find out how far the new deed embodied a genuine change in the partnership. As stated by the Assistant Commissioner in his appellate order, the assesseees failed to prove the allegation made by them that the mother had been made a partner in consideration of capital brought by her into the business and the allegation that the minor partner had been paid off. The story of bringing in further capital by the mother when obviously there was no necessity for it in view of the fact that there was a balance of more than a lakh in the beginning of the year 1937, with the principal partner, coupled with the failure to prove the source from which the money was brought, was rejected by the Assistant Commissioner. The entries made in the accounts to lend colour to the story as regards the alleged bringing in of capital by the new partner have also been held by the Assistant Commissioner in his order to be mere book-entries and not a genuine transaction. The new deed appeared to have been executed merely in order to circumvent the provisions of the amended s. 16(3) and the Income-tax authorities were justified in the view that they took as to the nature of the alleged new firm in that it had no purpose or meaning except to enable the assessee to avoid the liability to income-tax and super-tax and that it was not a genuine firm. The Assistant Commissioner's finding that the said deed did not represent a genuine partnership was an inference based *inter alia* on the following facts, viz., (1) the existence of a large cash balance of Rs. 1,44,546 making it unnecessary and useless to have a financing partner, (2) the giving to the alleged new partner a larger share in the profits than was kept for the principal partner without any adequate consideration and any sufficient reason, (3) failure to prove whence the so-called financing partner obtained the money which was credited to her account, and (4) the introduction of s. 16(3) in the Act making the assessee liable in respect of the shares in profit of his wife and minor son. It is submitted that the question whether such an inference has been properly drawn is not a question of law but of fact (see 4 I. T. C., p. 111). Attention of your Lordships is also respectfully invited to the cases of (1) *Sookinabhoy Salebhoy v. Commissioner of Income-tax, Bombay* (VI I. T. C., 13), (2) *Bhagwandas Harkisondas v. The Commissioner of Income-tax, Central and United Provinces* (I. T. R., Volume VI, p. 177), and (3) *Haji Ghulam Rasul Khuda Baksh v. Commissioner of Income-tax, Bengal* (5 I. T. R., 507 and I. L. R. 57 Cal. 1336). As observed by Abdul Rashid J., in 5 I. T. R. at p. 509, 'the principle underlying all these rulings is that it is open to the Income-tax authorities to go into evidence, both circumstantial and direct, to determine whether the instrument of partnership is a genuine document or whether it merely embodies a bogus transaction for the purpose of evading tax.' As pointed out by Pollock and Digby JJ. 'A deed is not a magical talisman,' and every deed has to be examined in the light of the evidence available to see whether it represents a genuine partnership. For these reasons, it is submitted that the Income-tax authorities had in fact evidence before them to justify their refusal to register the firm and that their refusal to register the firm is based on a finding of fact on evidence before them that the instrument of partnership did not represent a genuine transaction."

The reference was heard.

*Sir Jamshedji Kanga*, for the assesseees.

*M. C. Setalvad*, Advocate General, for the Commissioner.

BEAUMONT C. J. This is a reference made by the Commissioner of Income-tax raising the question :

"Whether there was any evidence to justify the appellate officers' finding of fact that the partnership stated to be in existence by the deed of July 14, 1937, was not a genuine partnership."

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The assesseees are a firm carrying on business in the name of Central Talkies Circuit, Matunga, and down to the partnership deed of July 14, 1937, the partners were : V. H. Desai with three annas share, (he is described as the original sub-proprietor), his wife with three annas share, his minor son with two annas and his major son two annas and two outside partners. As from April 1, 1937, an amendment was introduced into the Indian Income-tax Act by the addition of s. 16(3) under which the share of a wife or minor son in a partnership has to be included in the income of an assessee. Having that provision in mind, a partnership deed of July 14, 1937, was executed, under which the mother of V. H. Desai was substituted for his wife and minor son, and she was given four and a half annas. That is to say, the five annas, which had previously been divided between the wife and the minor son, were distributed as to half anna for V. H. Desai and four and a half annas for the mother, who thus became entitled to the largest share in the firm. It is, of course, not disputed that the object of the alteration was to avoid the effect of s. 16(3) of the Indian Income-tax Act.

On an application to register the firm, the Income-tax Officer refused registration on the ground that the partnership deed produced was one prepared only to avoid what he calls "proper taxation" owing to the operation of the new s. 16(3) of the Act. That is not a good ground for refusing to register. I do not like the expression "proper taxation." Taxation is either legal as falling within the terms of the taxing Act, or non-existent. As has been pointed out many times by this and other Courts, any one is entitled so to conduct his affairs within the law as to avoid incidence of taxation, and if a man finds that he will suffer less in taxation by carrying on business in partnership with his mother rather than his wife, he is entitled to select his mother. But the partnership must be a genuine partnership. The Assistant Commissioner, no doubt, appreciated that the Income-tax Officer had not put his case on the right ground, and he called for the books of the alleged partnership and came to the conclusion that there was no genuine partnership, and with that conclusion the Commissioner agrees. He relies on the fact that a large cash balance of nearly a lakh and a half existed in this partnership in 1937, which made it unnecessary to secure a new financing partner, and that it is not proved that the mother has in fact brought in any capital, nor is it proved that she had any capital to bring in. I think he might also have relied on other evidence of a negative character, namely, that there was no evidence that the mother knew anything about the business, or had assisted in the conduct of the business in any way. The contention of the assesseees is that the evidence produced before the Assistant Commissioner was not such as could possibly justify him in refusing to register the firm.

By s. 26-A of the Indian Income-tax Act, application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of the Act, and then under sub-s. (2) rules may be made. Under the rules, which were in force down to April 1, 1939, it is provided in r. 2 that any firm constituted under an instrument of partnership specifying the individual shares of the partners may register with the Income-tax Officer the particulars contained in the instrument. Then it is provided that

the application must contain certain particulars, including the names of the partners in the firm with the shares of each in the business. Then r. 4 provides that on the production of the original instrument of partnership or on the acceptance by the Income-tax Officer of a certified copy thereof, the Income-tax Officer shall register the instrument and issue a certificate. Since the coming into operation of the Income-tax (Amendment) Act, 1939, r. 4 has been altered, and it now reads : " If, on receipt of the application referred to in r. 3, the Income-tax Officer is satisfied that there is a firm in existence constituted as shown in the instrument of partnership," then he has to register. Having regard to the authorities on the old rule, I think that the new rule really does not alter the law as it previously existed; it only makes the true effect of r. 4 clearer than it was under the previous wording. Under the old rule the Courts held that the Income-tax Officer was entitled to consider whether the deed produced for registration really constituted a partnership as alleged. Under r. 2 the only person who can apply for registration is a firm constituted under an instrument of partnership specifying the individual shares of the partners, which must, of course, mean specifying correctly the individual shares of the partners. I think it is open, whether under the old rule or the new rule, to the Income-tax Officer to say that the shares which appear in the deed are not the true shares of the partners, and therefore there is no proper application by the requisite firm. Speaking for myself, I should say that if it were shown that one of the partners was only a nominee of a share allotted to him or her for another partner, the deed would not then specify correctly the individual shares. I think it must specify correctly the individual and beneficial shares, because that is a matter which is relevant from the point of view of the Income-tax authorities. If the Assistant Commissioner had any evidence before him to lead to the conclusion that the mother in this case was not really entitled to a beneficial interest of four and a half annas share, I think he was justified in refusing to register the deed.

The only question before us is whether there was any such evidence. If there was, his conclusion must stand, as we are not sitting in appeal on the Assistant Commissioner. I am not prepared to say in this case that there was no evidence before the Assistant Commissioner on which he could find that this partnership was not proved to exist in the terms specified in the deed sought to be registered. The grounds on which he relies, coupled with the absence of any evidence that the mother really was for any purpose,—finance, working or otherwise—, a partner in this firm do afford some ground on which the Assistant Commissioner could hold that this never was a genuine partnership, that it was a mere device to escape payment of income-tax, and that it was not an effective means of evading such payment.

In my opinion, therefore, the question raised must be answered in the affirmative. The assessee to pay costs.

KANIA, J. In this matter an application was made for the registration of the firm for the year 1932-33 disclosing therein the names of the following persons as partners with the shares mentioned against their names :—

|                                |    |    |    |    |    |    |    |         |
|--------------------------------|----|----|----|----|----|----|----|---------|
| 1. V. H. Desai                 | .. | .. | .. | .. | .. | .. | .. | 4 annas |
| 2. H. V. Desai (His adult son) | .. | .. | .. | .. | .. | .. | .. | 2 annas |
| 3. Taramati V. Desai           | .. | .. | .. | .. | .. | .. | .. | 4 annas |

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|                                                                                                                      |                                          |          |
|----------------------------------------------------------------------------------------------------------------------|------------------------------------------|----------|
| O. C. J.                                                                                                             | 4. Ratnagauri C. Munim                   | 5 annas. |
| 1940                                                                                                                 | 5. Charity                               | 1 anna   |
| By another deed prepared later on, and dated July 28, 1936, the shares of the partners were registered as follows :— |                                          |          |
| <i>In re</i>                                                                                                         | 1. V. H. Desai (original sub-proprietor) | 3 annas. |
| CENTRAL                                                                                                              | 2. T. V. Desai (wife of No. 1)           | 3 annas. |
| TALKIES                                                                                                              | 3. M. V. Desai (minor son of No. 1)      | 2 annas. |
| CIRCUIT,                                                                                                             | 4. H. V. Desai (adult son of No. 1)      | 2 annas. |
| MATUNGA                                                                                                              | 5. Ratnagauri C. Munim                   | 3 annas. |
|                                                                                                                      | 6. Nandkumar C. Munim                    | 2 annas. |
| <i>Kania J.</i>                                                                                                      | 7. Charity                               | 1 anna   |

Thereafter there came the amendment of s. 16(3) of the Income-tax Act, in respect of shares standing in the name of a wife and minor son of a partner. On that provision being made in the Income-tax Act, a new partnership deed dated July 14, 1937, was executed. The partners therein mentioned were V. H. Desai with three and a half annas share, his mother, (Vijayabai M. Desai in place of T. V. Desai and M. V. Desai) with four and a half annas share, and the remaining partners with their shares as in the previous deed. It is not disputed that this reshuffling of the shares was made because of the amendment of the Income-tax Act. The Income-tax Officer, before whom the matter came first, rejected the partnership deed dated July 14, 1937, as the motive was to get round the amendment. That was wrong. The motive of a person in making alterations in the mode of his doing business is no ground for rejecting the registration of a firm. As has been pointed out repeatedly, if any subject could manage his business affairs as to pay the least tax which he might be liable to, he may do so provided the whole action is within the law.

In the present case when this partnership deed was put before the Income-tax Officer, he had to inquire under s. 26-A, read along with rr. 2 to 4, whether the firm constituted under the instrument of partnership and stating the particulars contained in the instrument was a genuine partnership. The rule, as amended by the Act of 1939, in terms gives power to the Income-tax authorities to make the inquiry and determine whether the deed is genuine and also whether the partnership is constituted as stated in the deed. The words of old r. 2 are also sufficiently wide enough to include such an inquiry. The question whether the taxing authorities had the right to inquire whether the deed was a genuine one or not came to be considered in *In re Bisweswarlal Brijlal* and a bench of Judges held that they had that authority. No reference to r. 2 is found in the judgments there, but it is based on general principle of law. Rule 2, as it existed before April, 1939, in my opinion, supports that conclusion. A number of cases, which have been cited to us, show that the power to make the inquiry about the genuineness of the deed is recognised and affirmed by the Courts.

The question, then, is whether in the present case the Commissioner was right in holding that there was evidence on which he could come to the conclusion that the partnership deed as put forth was not genuine. The contention involves the question whether the statement of shares of the individual partners as mentioned in the deed is also correct. No particular reported case has been cited to us in which this last mentioned question has

been specifically raised. It appears to me that if it is conceded that the Commissioner has the power to inquire whether the partnership deed as put forth by the applicants is genuine or not, it does involve a consideration whether the share of an individual partner as mentioned therein is also correctly stated or not. For example, if the share of a partner were stated to be five annas, and on inquiry and taking evidence the Commissioner definitely came to the conclusion that the share was four annas, the partnership agreement as put forth by the applicants would not be correct, and there appears to be little doubt that the Commissioner would be entitled to hold that the deed executed by the applicants was not a correct partnership deed. "Partnership," as defined by the Partnership Act, and which definition is adopted by the Indian Income-tax Act, is a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. It is that relationship, as set out in the partnership deed, which, the Commissioner has to determine, exists or not.

Approaching the question from that point of view, in the present case the applicants stated that Vijayabai was admitted as a partner with four and a half annas share in consideration of capital brought by her into the business. That is the only ground set up by the applicants in support of their allegation that this lady was given the share. The Assistant Commissioner made inquiries about this allegation. He looked into the books of account. The books contained two entries showing the total sum of about Rs. 20,000 credited to her. On considering the other entries the Assistant Commissioner came to the conclusion that those were mere book entries. It is not open to this Court to inquire whether that conclusion of the Assistant Commissioner is right or wrong. On looking into the evidence, which consists of the books of account of the partnership, he held that the only ground alleged by the applicants for giving this lady this large share in the partnership was not proved. In arriving at that conclusion, it is not possible for this Court to say that there was no evidence. He had jurisdiction to hold that the only motive alleged for giving her this share was not proved to exist, and, therefore, in his opinion the statement that Bai Vijayabai was entitled to a four and a half annas share in this partnership was not proved.

It is not the case of the applicants here that Vijayabai was a trustee in respect of this share for Desai or for any other partner. If that case had been urged, it would have been inquired into, and I express no opinion as to what the result of the inquiry would have been. The applicants went to the Assistant Commissioner on the footing that a four and a half annas share was given to Vijayabai as a capitalist partner. The Assistant Commissioner found that the evidence was not satisfactory and came to a conclusion against the applicants. Under the circumstances it is not possible to say that there is no evidence for coming to the conclusion that the partnership agreement as put forth did not correctly represent the state of affairs, and, therefore, the reference fails.

*Reference rejected.*

Attorneys for assesseees : *Motichand & Devidas.*

Attorneys for Commissioner : *D. H. Namavati*, Solicitor to Central Government at Bombay.

O. C. J.

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*In re*  
CENTRAL  
TALKIES  
CIRCUIT,  
MATUNGA

*Kania J.*

## ORIGINAL CIVIL.

*Before Mr. Justice Kania.*

1940

THE BANK OF MORVI, LIMITED

v.

September 3.

R. P. WAGLE &amp; CO.\*

*Civil Procedure Code (Act V of 1908), Order XXI, rr. 11, 16 and 22—Decree—Assignment of decree—Application by transferee for execution of decree—Establishment of title—Right acquired by transferee to execute decree—Stage at which objections of judgment-debtor to decree may be considered—Revival of decree—Notice—Procedure.*

Where an application for execution of a decree is made by a transferee of the decree, he has to establish his title, and he has therefore to make an application under O. XXI, r. 16, Civil Procedure Code, 1908, to the Court that passed the decree. On a notice being issued on this application, the Court has to decide whether the applicant is the person entitled to execute the decree. The extent of his right and the conditions on which the assignee may proceed with the execution are not touched by this decision; nor does the Court decide how far the decree can be executed or the objections, if any, to the decree being executed. If the notice under O. XXI, r. 16, is made absolute the transferee acquires a right to execute the decree in the same manner and subject to the same conditions as the decree-holder himself had. Any objections raised by the judgment-debtor as to the execution of the decree cannot be considered at that stage. The transferee has then to apply for execution of the decree under O. XXI, r. 11, Civil Procedure Code, when the objections, if any, of the judgment-debtor will be considered.

Where the decree has to be revived under O. XXI, r. 22, Civil Procedure Code, the objections of the judgment-debtor to the execution of the decree will be considered when notice under that rule is issued and comes for decision.

*Bajinath v. Binraj*; In re *Jankiprasad*,<sup>1</sup> referred to.

## EXECUTION.

On November 11, 1924, a decree by consent was passed in a suit brought by the Bank of Morvi, Ltd., as plaintiffs, against one Wagle & Co. (defendant No. 1) and Nagindas Bhagvandas (defendant No. 2). Under that decree defendant No. 2 was to pay to the plaintiffs the sum of Rs. 15,000 in full satisfaction of the plaintiffs' claim in two instalments: Rs. 10,000 on February 1, 1926, and Rs. 5,000 on February 1, 1927. If defendant No. 2 failed to pay the instalments on the due dates, then interest at the rate of six per cent. per annum was to be paid on each of the instalments from the respective due date thereof.

On February 7, 1926, defendant No. 2 died and his estate was managed by his two executors, Ranchhoddas Gordhandas Kanakia and Damanlal Umiram Mehta.

On December 7, 1931, the decree was assigned to the Universal Trading Co., and on March 19, 1935, they assigned it to one Chhotalal Ishwardas Parekh.

Chhotalal made an application for execution of the decree under O. XXI, r. 16, Civil Procedure Code, 1908.

\* O. C. J. Suit No. 3693 of 1932.

1 (1936) 39 Bom. L. R. 540.



Ranchhoddas, one of the executors of the will of defendant No. 2 who had since died, opposed the application stating *inter alia* that the application was bad and misconceived as (1) the mode of execution as prescribed or required had not been specified therein, (2) the particulars in the application were not in accordance with the record of proceedings, (3) notice under O. XXI, r. 22, Civil Procedure Code, had not been issued and served, (4) the execution of the decree was time-barred and (5) satisfaction of the decree had been effected but was not certified on the decree.

O. C. J.

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BANK OF  
MORVI,  
LIMITED

v.

P. WAGLE  
& Co.

*K. M. Vakeel*, for the applicant (assignee No. 2).

*D. B. Desai*, for the opponent (heirs of defendant No. 2).

KANIA J. This is an application under O. XXI, r. 16, Civil Procedure Code, by the assignee of the decree.

The decree was originally passed in November, 1924, for Rs. 15,000, payable by two instalments of Rs. 10,000 on February 1, 1926, and Rs. 5,000 on February 1, 1927. Defendant No. 2 died on February 7, 1926. The decree was assigned to the first assignees on December 7, 1931, who in their turn assigned it to the second assignee on March 19, 1935. On the decree a payment of Rs. 100 made on July 2, 1936, and another of Rs. 500 made on February 27, 1939, are certified. The assignee has made his application under O. XXI, r. 16.

From the facts it is clear that another application under O. XXI, r. 22, is required to be made before an order can be made for execution in respect of the application made under O. XXI, r. 11.

The fact of the assignment and the right of the assignee to execute the decree by virtue of his assignment are not disputed. Various objections were raised by the legal representatives of the second defendant. They are summarised in para. 2 of his affidavit to show cause. It is also contended that execution of the decree is now time-barred, and that satisfaction of the decree has been effected which is not certified on the decree. In my opinion the different objections raised against this application cannot be entertained at this stage.

When an application for execution is made by a transferee, not being a person in whose favour the decree is passed, he has to establish his title in the first instance. Order XXI, r. 16, therefore, requires that he must make an application to the Court that passed the decree, as distinct from the Court which would execute the decree. The rule is that the transferee may apply for execution of the decree to the Court which passed it. Although the words do not expressly say so, it means that on the notice being issued on this application the Court will decide if the applicant is the person entitled to execute the decree. The extent of his right and the conditions on which he may in fact proceed with the execution are not touched by this decision. This fact is emphasized by the last sentence in the first part of r. 16 of O. XXI which runs as follows: "...and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder." It is therefore clear that by the notice being made absolute the Court does not decide how far the decree can be executed or the objections, if any, to the decree being executed. It only decides that the decree may be executed as if the application were made on behalf of the decree-holder himself. The reported decisions show that whilst deciding the application under O. XXI,

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r. 16, the Courts have heard and decided objections to the application for execution under O. XXI, r. 11. Bearing in mind that the judgment-debtor is entitled to be heard and his objections decided at some stage before the Court permits an administrative order to be made on the application under O. XXI, r. 11, it appears that the Courts proceeded to decide the questions when disposing of the application under O. XXI, r. 16. In the present case the situation is different. On this notice being made absolute the only right which the transferee will acquire will be the same as if the application for execution were made by the decree-holder. He will be permitted to execute the decree in the same manner and subject to the same conditions as if the application were made by the decree-holder himself. As the decree has to be revived under O. XXI, r. 22, all the objections of the judgment-debtor to the execution of the decree will be considered, when the notice under O. XXI, r. 22, is issued to him and comes for hearing. If the decree-holder himself were making the application to-day under O. XXI, r. 11, the objections of the judgment-debtor would not be disposed of on any application except the one made under O. XXI, r. 22, and of which notice would be given to the judgment-debtor. The fact that the transferee wants to execute the decree does not in any way alter the position. The objections to the execution of the decree will be heard and disposed of when notice under O. XXI, r. 22, is issued and comes for decision. In *Bajinath v. Binraj*: In re *Jankiprasad*<sup>1</sup> B. J. Wadia J. had occasion to consider the effect of O. XXI, rr. 11, 16 and 17; and the learned Judge observed as follows (p. 544) :

"In my opinion the procedure to be followed in making an application under Order XXI, r. 16, falls under two heads. The transferee must first apply for execution of the decree to the Court which passed it, and pray that the usual notices do issue. After the objections have been heard and the notice is made absolute, the decree may be executed by the transferee in the same manner and subject to the same conditions as if the application was made by a decree-holder. The transferee must then apply for execution of the decree under Order XXI, r. 11, specifying the mode or modes in which assistance of the Court is required."

These observations clearly show that after the notice under O. XXI, r. 16, is made absolute the transferee acquires a right to execute the decree in the same manner and subject to the same conditions (which are the words used in rule 16) as the decree-holder himself had.

Mr. Desai referred to certain observations in cases where it appears to be stated that the effect of r. 16 is to bring the transferee on record. Expressions used in judgments, as has been repeatedly observed, have to be read with the facts of that case. In spite of his best endeavours counsel has been unable to point out any case in which two steps, as in the present case, had to be taken by the transferee before he could obtain an order for execution.

The result is that this notice under O. XXI, r. 16, is made absolute. The objections of the legal representatives of the original second defendant raised on this application will be considered and dealt with when the notice under O. XXI, r. 22, comes to be disposed of. There will be no order as to costs.

*Notice made absolute.*

Attorneys for applicant : *Bhaishankar, Kanga & Girdharlal.*

Attorneys for opponent : *Matubhai, Jamietram & Madan.*

Before Mr. Justice Blackwell.

RAI SAHEB ULFATRAI HUKUMCHAND

v.

NAGARMAL GOPIMAL RAO.\*

1940

September 24.

*Pakka adatia contract—Interpretation of contract—‘Or’, meaning of—Contracts effected in different markets for different quantities at different times—Liabilities of parties in respect thereof—Separate outstanding transactions of constituent—Right of pakka adatia to close such transactions for want of margin money—General demand for margin money by pakka adatia whether sufficient—Wrongful closing of outstanding transactions by pakka adatia before due date—Right of constituent to close outstanding transactions—Measure of damages.*

Where the terms of business between a pakka adatia and his constituent were.—“We shall do forward business for four lots of wheat or linseed or one hundred bales of cotton or ten or twelve bars of silver without any deposit. Deposit will be necessary for more business (than this)”.—

*Held*, on the true construction of the terms, that the word “or” was to be strictly construed, and that once the constituent had done business to the limit mentioned in any one of the commodities specified, if he wished to do business in any of the other commodities, he must, so long as the business already done to the limit mentioned was outstanding, pay deposit in respect of the further business.

Contracts effected in different markets for different quantities of particular commodities with different delivery dates, evidenced by separate memoranda, are for all purposes distinct, and the liabilities of the parties thereof in respect of each are separate.

*Divanchand v. Weld & Co.*,<sup>1</sup> followed.

Where there are separate outstanding transactions with different provisions as to initial deposit and margin money, the pakka adatia, if he wants to insist upon the payment of margin, so as to give him a right to close any transaction for non-compliance with the demand, must specify to the constituent in respect of what outstanding transaction the demand is made, and what is the amount of the demand in respect of it. The constituent may wish to comply with the demand in respect of some transactions so as to keep them alive, and not wish to comply with it in regard to others. Where the pakka adatia makes one general demand for an amount of margin money in reference to all the outstanding transactions, he is not entitled to close all those outstanding transactions on the ground that the demand has not been complied with.

Where a pakka adatia wrongfully closes his constituent's outstanding contracts before due dates, the constituent is entitled, owing to the special obligation imposed by custom on the pakka adatia, to close at any time upon instructions before the due dates, and to have an account taken on the footing of the prices prevailing in the market on the date on which the constituent instructs him to close the contracts.

*Michael v. Hart & Co.*,<sup>2</sup> distinguished.

*Baldosakai Surajmal & Co. v. Radhakishan Joharilal*,<sup>3</sup> referred to.

The facts appear fully in his Lordship's judgment.

\* O. C. J. Suit No. 195 of 1940.

2 [1901] 2 K. B. 867.

1 (1925) 28 Bom. L. R. 1488, 1497,

3 (1938) 41 Bom. L. R. 308.

O. C. J. *M. V. Desai*, with *K. M. Vakil*, for the plaintiff.

1940 *M. P. Amin*, with *K. K. Desai*, for the defendants.

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BLACKWELL J. The plaintiff, who carried on business at Delhi, employed the defendants, who carry on business in Bombay, as his pakka adatis to effect for him forward transactions in gold, silver, cotton and linseed. Certain transactions were outstanding on October 5, 1939, and the plaintiff says that on that date the defendants wrongfully closed those transactions. He gave to the defendants instructions to close those transactions upon the footing that they were still outstanding on October 14, 1939, and says that if the defendants had carried out those instructions, as they were bound to do, a sum of Rs. 4225-10-9 would have been found due to him on taking the accounts between the parties. The defendants, on the other hand, say that they were entitled to close the outstanding transactions on October 5, 1939, and that, upon the footing that they were so entitled, a sum of Rs. 67-5-3 is payable to them by the plaintiff on taking the accounts on that day, and they counter-claim for that amount.

It is necessary to ascertain what terms were arrived at for conducting the business between the parties, this being in dispute. The plaintiff before employing the defendants had previously employed Messrs. Dhanpatmal Diwanchand to effect his forward transactions. One Ramnarain Jauhar was a partner in that firm. According to the plaintiff, he had arranged terms with Ramnarain Jauhar upon which the business was to be done including the payment of deposit and margin in respect of the various commodities. Ramnarain Jauhar joined the defendant firm. In the correspondence, to which I shall presently refer, he described himself as a partner in the defendant firm. According to the evidence of the defendants he was not a partner, but was employed for the purpose of introducing business with a possible partnership in view. This makes no difference, because although he has, according to the defendants, improperly signed the letters, to which I shall refer, as a partner, the defendants accept responsibility for them.

On August 12, 1939, the defendants by Ramnarain Jauhar wrote to the plaintiff asking him to place his business with them. In reply the plaintiff by his letter of August 14, 1939, asked the defendants to let him know their commission charges and lowest rates, and also upon what basis they would do business with him. In reply the defendants by Ramnarain Jauhar wrote a letter dated August 16. In that letter the defendants first set out the various charges which they would make for adat. They then said as follows :—

"We shall do forward business for four lots of wheat or linseed or one hundred bales of cotton or ten or twelve bars of silver without any deposit. Deposit will be necessary for more business (than this). As regards the business done without deposit, God forbid, if there is any loss in such transactions, you shall have to pay the same here at the same time."

The letter went on to say that the limit there mentioned could be increased or decreased when the business was done fairly, and it requested the plaintiff to send them business.

The plaintiff maintained that the whole of the terms upon which he was to do business with the defendants were contained in this letter. He conceded, however, that some arrangement would have had to be come to in regard to

the amount of deposit for business exceeding the limits mentioned in the letter. In order to get over this difficulty, after referring to the arrangement previously made between him and Ramnarain Jauhar on behalf of the firm of Dhanpatmal Diwanchand as to the rates of deposit, he said that he assumed that those rates would be applicable to the business done between himself and the defendants. He did not profess to say that any such arrangement was come to with the defendants, and it was not suggested that there was any oral interview, the matter depending merely upon the letter of August 16, 1939. In fact whenever the plaintiff placed an order with the defendants they sent him with a covering letter written contracts in duplicate, one part signed by themselves, and they requested the plaintiff in the covering letter to sign the other part and return it to them. Thus in the defendants' letter of August 27, 1939, with reference to the initial transactions, the defendants referred to a telegram which they had sent to the plaintiff intimating to him that they had carried out his instructions, and stated that he must have received the telegram and noted the transactions. Then they said that they enclosed three contracts in respect of the transactions in question and requested the plaintiff to send to them the confirmation notes duly signed by him. In every case, except the last linseed contract of October 2, to which I shall refer later, the plaintiff received such contracts, signed the confirmation notes, and returned them to the defendants. He said in his evidence that he treated those confirmation notes merely as confirmation of the amount of goods bought or sold and the rates, and paid no attention to the terms, and that he was not obliged to do so. I do not believe him. I think that he knew perfectly well that the terms were contained in the contracts sent to him, but whether he knew that or not his conduct in signing those confirmation notes, in my opinion, makes the terms therein contained binding upon him. The result is that I hold that the business was done on the terms contained in the various contracts sent by the defendants to the plaintiff, except so far as those terms were cut down by what was contained in the letter of August 16 in reference to commission and the right given to the plaintiff to do forward business up to a certain limit without deposit.

A further question arising is as to the proper construction to be placed upon the paragraph in that letter, which I have already quoted in full, in regard to the plaintiff's right to do forward business without any deposit. According to the defendants, the word "or" in that paragraph means what it ordinarily would mean, viz., that it gave to the plaintiff alternative rights to do business in respect of the different classes of commodities mentioned up to the limits mentioned. According to the defendants, if the plaintiff did business in four lots of linseed, for instance, he would not be entitled, while such a contract was outstanding, to do business in any of the other commodities without paying a deposit. For the plaintiff it was argued that the word "or" should be given an inclusive or non-alternative sense. It was contended that it was the intention of the parties to do business in various commodities which are mentioned in the letter, and that the intention was to give the plaintiff the right to do business in any of those commodities up to the limit mentioned. If this had been the intention, I should have expected the word used to be either "and" or "and/or". I have to remember that a pakka adatia, who.

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does forward business without an initial deposit, may incur a considerable risk if the market suddenly drops. In construing this part of the letter, therefore, I feel bound to give a strict meaning to the use of the word "or". I accept, therefore, the construction contended for by the defendants, and hold that once the plaintiff has done business to the limit mentioned in any one of the commodities specified, if he wishes to do business in any of the other commodities, he must, so long as the business already done to the limit mentioned is outstanding, pay deposit in respect of the further business.

In order to see what the position was on October 5, 1939, when the defendants closed the transactions of the plaintiff which were then outstanding, because he failed to comply with a demand to remit the sum of Rs. 2000, I propose to review the transactions briefly. On August 25, 1939, the plaintiff instructed the defendants to sell 500 tolas of gold for Aso delivery. The contract relating to that sale is exhibit (C). This form of contract applies both to this gold transaction and to the various silver transactions which the plaintiff effected. Clause 3 is the clause which deals with initial deposit and further margin, and it will therefore be useful to refer to it once and for all in connection with the gold and silver transactions. It is in the following terms:—

"I/we hereby agree to place with you a deposit for margin at the rate of Rs. 100/- after one Peti silver and Rs. 250/- for 250 tolas of gold and I/we agree to maintain such deposit and to forthwith deposit with you in Bombay such further sum or sums of money as you may from time to time require as further margin and I/we agree that the amount of such further margin from time to time required by you shall be in your absolute discretion. Interest at 6% per annum will be credited to me/us on the amount of the margin for the time being standing with you. If I/we fail to pay you the required margin within the time given after demand by letter or telegram addressed to my/our usual or last known residence or place of business, it shall be lawful for you without any notice to me/us to close my/our contract or to act as advised on my/our risk and on my/our account."

It will be observed that this clause imposes an obligation upon the constituent to deposit without demand the initial deposit mentioned and to maintain such deposit. As regards the further margin it will also be observed that the constituent is to pay such further margin as may be required, i.e., he is not bound to pay further margin in respect of gold and silver unless and until a demand is made upon him to do so. Further the right to close is made conditional upon a demand by letter or telegram and a requirement to pay margin within the time given in that letter or telegram. It is important to bear this point in mind having regard to what happened later in this case and to a contention by the defendants that they were entitled to treat a fall in the silver market of Rs. 630 on a silver contract then outstanding as included in a general demand for Rs. 2000 without making any specific demand for further margin in reference to the outstanding silver contract.

On the sale of gold effected on August 25, there was an obligation upon the plaintiff by virtue of this clause to pay Rs. 500 as initial deposit. That sum was not paid. The defendants did not ask for payment, nor did they even debit that amount to the plaintiff. At the time when this sale was effected the plaintiff also applied nazrana at the rate of eleven annas per tola on five hundred tolas for the Aso vaida in respect of which he became liable to pay a premium of Rs. 364-1-9. The plaintiff contends that he was under no obli-

gation to pay the sum of Rs. 500 the initial deposit, because he had effected the nazrana transaction ; but by virtue of the double option he could at the due date declare himself either a buyer or a seller, and it by no means followed that he would declare himself a buyer against the sale of five hundred tolas of gold. The defendants contend that these transactions were independent and that they were under a risk having regard to possible fluctuations in the market in respect of the sale of 500 tolas of gold, because the plaintiff might not have declared himself a buyer and closed that transaction by a purchase, but might, on the contrary, have declared himself a seller. In my opinion the defendants' contention is right. I hold that Rs. 500 were payable and maintainable. The defendants, however, were entitled to waive payment of that sum for as long as they pleased, and as they did not even debit the amount to the plaintiff and inform him that they had done so, I think that they must be treated as having waived payment up to October 5, and that the plaintiff was entitled to assume that they had done so ; but, when October 5 arrived, I think that the defendants were entitled to bring that sum into account in considering what the credit and debit relationship between them and the plaintiff was, but to enable them effectually to do so I think that it was incumbent upon them, if they were going to call for margin on that date, upon the basis that they were bringing that sum into account, to inform the plaintiff clearly as to what the position then was.

As regards the sum of Rs. 364-1-9, the premium payable on the nazrana, the plaintiff contends that that sum was not payable by him until the due date, viz., October 31, 1939. With their letter of August 27, 1939, the defendants sent to the plaintiff a bill debiting that amount to the plaintiff and requesting him to credit the same to their account. The plaintiff did not object, and I hold that that amount became payable by him as from August 26, 1939.

The first transaction in silver was a purchase of ten bars on August 25, 1939. That being the first transaction no initial deposit was payable in respect of it. On September 2, 1939, the plaintiff purchased a further lot of ten bars of silver. The plaintiff recognised his obligation to pay a deposit in respect of that purchase in his telegram to the defendants of September 2, 1939, in which he said that he was sending money. By their telegram of September 3, 1939, the defendants requested him in reference to that purchase of silver to remit Rs. 1000. But the payment of that deposit was not insisted upon, no doubt because the market rose. It was not debited to the plaintiff by the defendants, and the purchases of August 25 and September 2 were closed by two contracts of sale dated September 19 and 26, 1939. As the result of this closing there was a profit to the plaintiff of Rs. 2344-11-3 and Rs. 1757-4-3 amounting in all to Rs. 4101-15-6. The defendants credited those sums to the plaintiff on September 20 and 27, 1939, and sent with their letter of October 3 bills showing those credits. It is to be observed that there is no debit in those bills for any initial deposit. The defendants' manager first said with regard to this that the defendants had no right to look to the plaintiff for the deposit of Rs. 1000 of the purchase of September 2 after the closing. After the overnight adjournment, however, he changed his evidence and said that the defendants notwithstanding the closing had the right to retain a deposit of Rs. 1000 up to the due date, viz., October 13, 1939. He said this although

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that sum had not been paid, nor debited, nor demanded. I hold that the defendants had no right to this deposit after those transactions were closed.

The plaintiff purchased one hundred bales of cotton on September 16, 1939, at the rate of Rs. 220 per candy, and a further one hundred bales of cotton on September 26, 1939, at the rate of Rs. 198-8 per candy, the delivery date in each case being April/May, 1940. The contracts relating to those purchases are exhibits (E) and (H). The contracts contain a provision for the payment of margin to be paid and maintained by the plaintiff until completion of the contract. The amount payable is, however, left in blank. Counsel for the defendants, after the plaintiff's case was closed, asked for leave to amend paragraph 4 of his points of defence by adding at the end thereof the following words :—

“Although in the contract for cotton the amount of rupees for margin is kept blank, according to the custom and usage of the market well known to the plaintiff the said amount was Rs. 500 for 50 bales or Rs. 1000 for hundred bales.”

The defendants' attention had been specifically drawn to the point in paragraph 2 of the points of reply, and he had made no application to amend his written statement. I refused leave to amend both because I thought that it was too late after the plaintiff's case was closed, and because where the contract itself makes provision for the payment of margin but the amount is left blank, I thought that there was no room for the application of a custom or usage of the market and that if the parties had not chosen to fill up the blanks they must be treated as having agreed that no initial deposit as contemplated by the written contract should be paid. I hold that no initial deposit was payable in respect of either of these contracts. Each contract contains a further provision that difference between the contract price and the market price arising against the constituent owing to fluctuations of the market was to be paid by the constituent in cash to the defendants in Bombay as and when they arise. That imposed an absolute obligation upon the plaintiff to pay, and it is common ground that the sum of Rs. 1975 was payable owing to fluctuations in the market in respect of both these purchases of cotton on October 5, 1939.

On October 2, 1939, the plaintiff purchased a further ten bars of silver for the Aso vaidā at Rs. 59-4. An initial deposit of Rs. 1000, in my opinion, became payable and maintainable by him having regard to the construction which I have placed on the provision as to the limit up to which commodities could be purchased without deposit in the letter of August 16, 1939. That sum was not paid, nor was it debited by the defendants to the plaintiff, nor did they call upon him to pay it, but he remained liable to pay it on October 5, 1939.

On October 2, 1939, the plaintiff purchased from the defendants seven lots of linseed, 3500 maunds, at Rs. 6-4-6 per maund. Exhibit (J) is the contract. Clause 5 provides for the payment on demand of an amount equivalent to twenty-five per cent. of the price of the contract of each transaction as an initial deposit and margin, and that margin was to be retained by the defendants until the completion of the contract. Clause 6 provides for the payment of the requisite amounts of money covering the difference due to fluctuations of the market, from time to time, as and when the same arise. These latter



amounts are payable without demand. This was the first transaction which the plaintiff put through with the defendants in linseed. The contracts for this and the purchase of the silver of October 2, 1939, were enclosed in the defendants' letter to the plaintiff of October 3, 1939. He did not receive that letter till October 5 or 6, 1939. It was argued for the plaintiff that until he received the contracts he would not know what the amount of initial deposit payable was. He has, however, conceded that he knew that linseed transactions were all made subject to the articles and bye-laws of the Marwadi Chamber of Commerce, and twenty-five per cent. of the contract price is the amount required to be paid as initial deposit according to those articles and bye-laws. I think that the plaintiff must be treated as having agreed to pay that amount, but under cl. (5) of the contract no initial deposit is payable until a demand is made and no specific demand was made for such deposit. No initial deposit, therefore, was payable. It is common ground that Rs. 765 was payable by the plaintiff in respect of the fall in the market on this linseed contract by October 5, 1939. Although he had not received the contract by the morning of October 5, he knew from the letter of August 16, 1939, that he was liable to make payments in respect of a fall in the market.

On the morning of October 5, 1939, the position therefore was as follows :— The plaintiff had standing to his credit Rs. 4101-15-6, the profit on his closed silver transactions and was liable to pay to the defendants Rs. 364-1-9 the premium on the nazrana, and Rs. 1,975 and Rs. 765 in respect of the fall in the market on cotton and linseed. On that footing he had to his credit Rs. 997-13-9. At the same time he was under an obligation to pay Rs. 500 in respect of the sale of gold effected on August 25, and Rs. 1,000 in respect of the purchase of silver effected on October 2, 1939, unless the defendants waived compliance with that objection. As I have already pointed out, it was open to the defendants, if they chose to do so, to waive payment of initial deposits. If they thought that their constituent was a substantial party they might very well waive compliance with that requirement of the contract. It is important to bear this in mind, because when the defendants made, as I shall presently point out, a demand for Rs. 2,000 on October 5, while the plaintiff must be taken to have known that he was liable to pay the premium on the nazrana and the loss in respect of the fall in the market on the cotton and the linseed transactions, it by no means follows that he must be taken to have known that the defendants were also insisting upon payment of Rs. 500 on the sale of gold in August and Rs. 1,000 in respect of the purchase of silver on October 2. He may very well have thought, the defendants not having debited him in fact with either of those sums, and not having asked for payment or informed him that they had debited him, that the defendants were not insisting upon payment of those sums, and that he was in credit with the defendants to the extent of Rs. 997-13-9. In his evidence he said that he looked into the accounts and found that the demand for Rs. 2,000 was not justified.

On October 5, 1939, there was also a fall in silver to the extent of Rs. 630 and a fall in gold to the extent of Rs. 2,125, but both these sums were payable only if required, and no demand had been made. If a demand had been made, under the terms of the contracts, the defendants would only have been justified in closing the gold and silver transactions if they had given a time for

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payment of the required margin, and it had not been paid within the time required. This must be borne in mind in considering the demand made on October 5, and the terms in which it was couched.

On October 3, 1939, the defendants sent to the plaintiff a telegram quoting rates, and they sent a similar telegram on October 4. The contention of the defendants is that the plaintiff ought to have known from these telegrams that the defendants were drawing his attention to the fall in the market with the object of his providing them with margin in consequence of that fall. Neither of those telegrams, however, makes any demand for margin.

On October 5, 1939, the defendants sent off at 7-15 a.m. a telegram to the plaintiff, which was received at the telegraph office in Delhi at 8-43, giving the rates and saying "Remit two thousand wire." It is not in evidence at what time that telegram was delivered at the plaintiff's office at Delhi, but he admitted that it must have been received at his office by 10-30 a.m., and was read by his son, but he stated that he did not see it himself till about 11-30 a.m. He said further that after attending to other business he looked into the figures and came to the conclusion that the demand for Rs. 2,000 was not justified, and that he made up his mind to telephone to the defendants in Bombay after 8 p.m. that night, when he could do so for half rates.

The defendants not having heard from the plaintiff closed his outstanding transactions at about 3-15 p.m., on October 5, 1939, and sent a telegram to the plaintiff informing him of the rates at which they had closed.

It is in controversy as to whether the plaintiff telephoned to the defendants on that night or not. He said that he did so and spoke to Ramnarain Jauhar and told him that the closing was unjustified. I do not think it makes any difference whether the plaintiff telephoned that night or not, and therefore I do not go into that question.

On October 6, 1939, in the evening the plaintiff sent a telegram to the defendants in which he acknowledged the receipt of their last telegram and said "No right to close buy same difference of rates if any will be settled afterwards". It is contended that this telegram is an acceptance of the closing by the defendants. No acceptance of the closing was pleaded. An application was made for leave to amend paragraph 11 of the points of defence by adding after the words "on the said October 5, 1939" the following words :

"The plaintiff accepted the said alleged breach by his conduct in remaining silent till the night of October 6, 1939, and by sending his telegram on the night of October 6, 1939, containing the words 'Received—no right to close buy same—difference of rates if any will be settled afterwards,' on that ground and also in law."

I refused leave. The proposed amendment introduced questions of fact. The plaintiff's case was closed and he had had no opportunity of tendering any evidence which might have been necessary if acceptance of the breach had been pleaded. As a matter of construction I am clearly of opinion that the telegram of October 6, 1939, was not an acceptance of the closing. It states in terms that the defendants had no right to close. The request which follows to the defendants to buy a like quantity of the commodities, in my opinion, was an offer by him to the defendants to restore the status quo ante, and as an inducement the plaintiff offered in the telegram to pay differences in rates if any there were. I am quite unable, as the defendants would have me do, to

construe this telegram as meaning that he accepted the defendants' right to close and was requesting them by that telegram to do fresh business independently of the closing. As to the submission made on behalf of the defendants that the plaintiff accepted the closing by doing nothing till the night of October 6, 1939, this was not pleaded, and quite apart from that the plaintiff in my opinion was entitled, if he chose, to say nothing. Unless he accepted the closing, he was, I think, in law entitled to look to the defendants to carry out the contracts at the due date. He made it clear, I think, that he did not accept the closing by his telegram of October 6, 1939. By their telegram of October 6, 1939, the defendants placed upon the plaintiff's telegram the construction which I place upon it. In that telegram they insist that they had closed right-fully and that they could do fresh business only against margin. Thereafter the plaintiff did nothing until October 14, 1939, when he sent a telegram to the defendants instructing them to close the purchases which he considered to be still outstanding by selling equivalent quantities. This the defendants declined to do.

Were the defendants justified in closing because the plaintiff did not comply with their demand to remit Rs. 2,000 made on October 5, 1939? In my opinion they were not. As was pointed out by their Lordships of the Privy Council in *Diwanchand v. Weld & Co.*,<sup>1</sup> contracts, effected in different markets for different quantities of particular commodities with different delivery dates, evidenced by separate memoranda, are in law for all purposes distinct the one from the other, and the liabilities of the parties thereof in respect of each are separate. I have drawn attention to the different provisions in the different contracts as to the liability of the plaintiff to pay initial deposit or margin. In some cases a demand is required, in some cases it is not. I have pointed out that, apart from the initial deposit of Rs. 500 in respect of the gold transaction and Rs. 1,000 in respect of the outstanding silver transaction, the plaintiff was still in credit with the defendants on October 5, 1939, in the sum of Rs. 997-13-9. I have also pointed out that, the defendants being entitled not to insist upon the payment of initial deposit, if the plaintiff did not pay it and the defendants neither debited him with the amount to his knowledge, nor made any demand, the plaintiff was in my opinion entitled to assume that the payment of initial deposit was not for the time being insisted upon. This being the position, the defendants made a demand upon the plaintiff to remit Rs. 2,000 without specifying what it was for. It is true that the market was falling heavily and that on the morning of October 5 the defendants could have insisted not only upon the payment of initial deposits, if they had asked for them, but also upon payment of a loss of Rs. 630 in silver and Rs. 2,125 in gold if they had asked for payment of these losses, in addition to the losses in cotton and linseed which I have taken into account in stating in what amount the plaintiff was at that moment in credit. I am, however, clearly of opinion that where there are separate outstanding transactions with different provisions as to initial deposit and margin, the commission agent, or pakka adatia, if he wants to insist upon the payment of margin, so as to give him a right to close any transaction for non-compliance with the demand, must specify to the

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1 (1925) 28 Bom. L. R. 1488, 1497, P.C.

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constituent in respect of what outstanding transaction the demand is made, and what is the amount of the demand in respect of it. The constituent may wish to comply with the demand in respect of some transactions so as to keep them alive, and not wish to comply with it in regard to others. Quite apart from the question what exact amount was due by the plaintiff to the defendants on October 5, 1939, in my opinion the defendants, having made one general demand for Rs. 2,000 in reference to all the outstanding transactions, were not entitled to close all those outstanding transactions, that demand not having been complied with.

Even, if the demand for margin, made in the form in which it was made, had been justified, I am of opinion that the time allowed by the defendants to the plaintiff to comply with it was wholly unreasonable, assuming that the telegram making the demand is taken to have been received by the plaintiff by 10-30 a.m., on October 5, 1939. It was in my opinion wholly unreasonable for the defendants to close all the outstanding transactions by 3-15 p.m., in the afternoon as they did. The period between 10-30 a.m., and 3-15 p.m., in my opinion was not sufficiently long to give to the plaintiff an opportunity of complying with the demand if he had been minded to do so.

My attention was drawn, in support of the plaintiff's argument that the closing was wrongful, to *Ganpat Mal-Sundar Das v. Kehr Singh-Balwant Singh & Co.*,<sup>1</sup> where the facts were somewhat similar to the present case. On the facts of the present case I hold that the closing was wrongful.

The next question arising is, what is the result in law of a wrongful closing by a pakka adatia of his constituent's outstanding contracts. I was referred to *Michael v. Hart & Co.*<sup>2</sup> In that case the defendants, a firm of stock brokers, in pursuance of a contract in that behalf bought shares on the Stock Exchange on behalf of a principal, and contracted that they would at any time before the settling day, if so directed, sell the same upon the principal's behalf. Before the settling day arrived the defendants in breach of their contract sold the shares without the principal's consent. Wills J. held that in an account taken between the defendants and the principal the latter was entitled to be credited, in respect of the shares so wrongfully sold, with the highest price that the same might have realised in the market at any time between the date of the sale and the settling day. The case went to the Appeal Court and is reported in [1902] 1 K. B. 483. Collins M. R., in the course of his judgment, pointed out that where there has been an anticipatory breach of a contract that has not of itself the effect of rescinding the contract, for there must be two parties to a rescission. It gives the other party to the contract the right if he chooses to treat the contract as rescinded; on the other hand, he may refuse to treat the contract as rescinded and hold the party repudiating the contract to his obligation when the time for performance arrives. Having regard to the opinion expressed by the Appeal Court in that case in the course of the hearing, the parties came to an agreement and the case was decided upon the footing that the plaintiff was entitled to insist on performance of the defendants' contract at the end of the May settlement, and to measure his damages with reference to the prices of the stocks at that date. The question whether the

1 (1937) I. L. R. 18 Lah. 683.

2 [1901] 2 K. B. 867.

plaintiff had a right to have the damages estimated with reference to the highest prices at which the stocks had stood in the interval between the closing of the plaintiff's account and the end of May, as Wills J. had decided, was left open. On the authority of that case, if the defendants had been merely commission agents, I should have held that the plaintiff, not having accepted the closing of the contracts, was entitled to treat them as if they had not been closed and to look to the defendants to carry them out on the respective due dates of the contracts.

The defendants, however, are not ordinary commission agents, they are pakka adatias, and I have to consider whether that fact makes any difference. In *Kanji v. Bhagvandas*,<sup>1</sup> (and on appeal at p. 611), Chandavarkar J. drew attention to the custom that when a pakka adatia receives a second order from his constituent to enter into a cross-contract and cover his first order against the due date, the pakka adatia is not bound to carry out the second order in case owing to loss of credit he is unable to do so, and all that he is bound to do is to inform the constituent accordingly so as to enable the latter to put through his order through some other pakka adatia. In *Baldeosahai Surajmal & Co. v. Radhakishan Joharilal*,<sup>2</sup> I expressed the opinion that the judgment in the case of *Kanji v. Bhagvandas*, by necessary implication, involved a positive custom that when a pakka adatia receives a second order from his constituent to enter into a cross-contract to cover his first order, the pakka adatia is bound to do so unless circumstances exist which relieve him from that obligation. The case of *Baldeosahai Surajmal & Co. v. Radhakishan Joharilal* went to the Appeal Court, and neither of the Judges in the course of their judgments appear to have thrown any doubt upon my view of that custom. Having regard to the opinion which I have expressed, I approach this case as if the defendants had not wrongfully closed the outstanding transactions. If they had not closed the outstanding transactions it was open to them at any time to insist upon payment of any initial deposits unpaid, or to demand payment of margin by a proper notice or notices in that behalf and to close the plaintiff's outstanding transactions if he failed to comply with specific demands made in reference to the specific contracts in that behalf. The defendants made no such demands but maintained the position that they had rightfully closed the transactions. The plaintiff by his telegram of October 14, 1939, called upon the defendants to close his outstanding transactions. In my opinion he was entitled to do so. He had not failed to comply with any lawful demand for margin, and when the plaintiff gave the defendants instructions to close they did not rely upon any ground which could properly relieve them from the ordinary obligation of a pakka adatia to act on the instructions to close before the due date; all that they said was, in their telegram in reply, that they could do fresh business against deposit. I have come to the conclusion that the transactions must be treated as still outstanding, that the plaintiff was entitled to give the order to close, that the defendants ought to have acted upon that order, and that the plaintiff is entitled to be put in the position in which he would have been placed if they had carried out his instructions. This case in my opinion differs from that of *Michael v. Hart & Co.*,<sup>3</sup> because of the pecu-

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<sup>1</sup> (1904) 7 Bom. L. R. 57.<sup>3</sup> [1901] 2 K. B. 867.<sup>2</sup> (1938) 41 Bom. L. R. 308.

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liar obligation imposed upon the commission agent to close at any time upon instructions before the due date. But for that special obligation, I should have held that the plaintiff's right to an account would have depended upon the prices reigning at the due date. But, because of the special obligation imposed by custom on a pakka adatia, my view is that the plaintiff is entitled to have an account taken on the footing of the prices prevailing on October 14, 1939. The figures upon that basis are set out in exhibit (H) to the plaint. Upon the figures prevailing in the market on that day, the plaintiff sustained a loss of Rs. 525 in cotton, he made a profit on the silver transaction of Rs. 630 and on the linseed of Rs. 382-13-0. Bringing into account those two last sums and his original profit on the previous silver transactions and deducting therefrom the loss in cotton and the sum of Rs. 364-1-9 for the premium on the gold, the amount due and payable by the defendants to the plaintiff on October 14, 1939, if the plaintiff's instructions had been acted upon, would have been Rs. 4,225-10-9.

The plaintiff, in my opinion, is entitled to recover that sum and the defendants fail on their counter-claim.

[After recording findings on the issues his Lordship concluded :]

I pass a decree in favour of the plaintiff for Rs. 4,225-10-9 with interest thereon at six per cent. per annum from the date of the filing of the suit, viz., February 3, 1940, till judgment. The plaintiff will also have the costs, including costs of the Chamber Summons for directions, and interest on judgment at six per cent. per annum. The counter-claim is dismissed with costs. Having regard to the strenuous manner in which this suit has been contested and the length of time it has taken, I do not think it proper to quantify the costs, but allow them to be taxed in the usual way.

*Suit decreed.*

Attorneys for plaintiff : *Khandwalla & Chhotalal.*

Attorneys for defendants : *Thakordas & Madgavkar.*

Before Mr. Justice B. J. Wadia.

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v.

December 5.

CHHOTALAL RAVICARANDAS & CO.\*

*Indian Patents and Designs Act (II of 1911), Secs. 45, 43—Designs—Certificate of registration—Conclusive evidence—Infringement of design—Plea that design was previously published or that it was neither new nor original.*

A certificate of registration of a design issued under s. 45 of the Indian Patents and Designs Act, 1911, is not final and conclusive, but is only *prima facie* evidence that the person whose name is entered as the proprietor of a registered design is the "proprietor" of the design. There is nothing in the Act which prevents a defendant in a suit against him for damages for in-

\* O. C. J. Suit No. 642 of 1940.

fringement of a registered design under s. 53 from raising in defence a plea that the design was previously published and was neither new nor original.

*Muhammad Abdul Karim v. Muhammad Yasin*,<sup>1</sup> followed.

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CHAMBER summons for discovery.

Suit for injunction and recovery of damages.

The plaintiff firm of Dwarkadas Dhanji were the registered proprietors of a certain design for being printed on textile goods. The design was registered under the Indian Patents and Designs Act, 1911, and a registration certificate of the design was issued to the plaintiffs on March 23, 1939.

The plaintiffs complained that the defendants Chhotalal Ravicarandas & Co. were recently selling in Bombay certain class of cotton textiles bearing a design which was an imitation of the plaintiffs' design.

On April 6, 1940, the plaintiffs filed this suit to obtain an injunction restraining the defendants from selling any textile goods bearing an imitation of the plaintiffs' design, for an order on the defendants to hand over to the plaintiffs for destruction all goods in their possession bearing the same design, to obtain account of profits made by the defendants from the sale of such goods, and to recover damages from the defendants for sale of the goods bearing the imitation design.

The defendants contended in their written statement that they were unaware of the design registered by the plaintiffs, and they denied that the plaintiffs had any exclusive right to the use of the design. They further contended that they had never used any design which was an imitation of the design claimed by the plaintiffs, that the plaintiffs' design was not a new or original design at the date of registration by the plaintiffs, and that the registration being invalid did not confer any exclusive rights upon the plaintiffs to use the design.

On July 31, 1940, the defendants took out a chamber summons for an order calling upon the plaintiffs to produce and disclose certain documents to substantiate the defence.

The summons was heard.

*C. K. Daphtary*, with *J. A. Shah*, for the plaintiffs.

*M. C. Setalvad*, Advocate General, with *S. T. Desai*, for the defendants.

*Setalvad*. The defendants asked the plaintiffs to disclose certain documents in order to prove their case of publication by the plaintiffs of their design prior to registration. They have taken out the present chamber summons on the plaintiffs refusing to do so. The summons was argued before the Prothonotary and Senior Master and was adjourned by him to the hearing of the suit.

[*B. J. Wadia J.* Have the defendants applied for cancellation of the design under s. 51 (a) of Indian Patents and Designs Act?]

It is not necessary for the defendants to do so as the defendants can raise the plea that the design is invalid by way of defence. Section 2(14) defines: "Proprietor of a new or original design." Hence, when a certificate of registration is granted to the proprietor of the design under s. 45 of the Act it

<sup>1</sup> (1934) I. L. R. 56 All. 1032.

O. C. J. is assumed that the design was new and original. Again, under s. 46(3) the  
1940 registration of designs is only prima facie evidence and therefore can be  
rebutted.

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Section 51A provides for cancellation of registration by a person interested under certain circumstances, and s. 53 of the Act gives right to the registered proprietor to start legal proceedings in case of piracy of the design.

There are parallel sections in the Act for registration and revocation of registration of a patent. Section 26 of the Act refers to petition for revocation of patent and provides under what circumstances revocation may be obtained, and s. 29 provides for a suit by a patentee in case his patent is infringed. Sub-section (2) of the section further provides that every ground on which a patent may be revoked under s. 26 shall be available by way of defence to a suit for infringement.

Notwithstanding there being no similar provision with respect to designs as in s. 29(2), all grounds on which a design may be revoked can be taken by way of defence. I rely on *Muhammad Abdul Karim v. Muhammad Yasin*,<sup>1</sup> which also cites with approval *Bahal Rai v. Sumer Chand*.<sup>2</sup> It is also cited with approval in Sapru's Encyclopaedia of Indian Law, Vol. VII, p. 378. In Halsbury's Laws of England (2nd edition), Vol. XXXII, p. 696, § 1006, defence by way of an attack on the validity of registration is not ruled out. Even under the English Patents and Designs Act such a defence is not prohibited. I also rely on *Birch v. Harrah and Co.*<sup>3</sup>

Under s. 77(a) of the Indian Patents and Designs Act the Central Government has power to make rules. Certain rules have been framed for procedure of registration of patents and designs. I rely on rr. 39 to 43 which are given in Patent Office Handbook published by the Government of India. It will be seen from those rules that although the Registrar can refuse to register a design, no enquiries are made at the time when it is registered. The general public has no opportunity of knowing the fact of registration. It is different in case of patents.

*Daphtary.* The defendants have not given any particulars about the date of publication of the design by plaintiffs and the enquiry sought by the further discovery is in the nature of a fishing enquiry, and therefore it should not be allowed.

When a design is registered the registered proprietor has a copyright in the design during five years from the date of registration (s. 47) and the defendants are not entitled to go behind the validity of such registration. The Indian Patents and Designs Act has been purposely divided into two parts : one part relating to patents and the other relating to designs, with certain sections common to both. In the sections which relate to the patents it has been specifically provided that all grounds on which registration of patent can be cancelled can be raised by way of defence ; but there being no similar provisions in respect of designs, it must be presumed that such a defence is not allowed under the Act. The language of s. 54 of the Act is very significant. By implication it clearly excludes the defence of prior

1 (1934) I. L. R. 56 All. 1032.

2 (1903) I. L. R. 25 All. 493.

3 (1896) 13 R. P. C. 615, 620.



publication being taken without petitioning for cancellation of registration of a design.

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*Setalvad*, in reply. The defendants are not debarred from raising the plea if it is not specifically prohibited under the Act. The other side has raised the point that the defendants have not given any particulars; but I say that the defendants cannot give such particulars. These particulars are in possession of the plaintiffs themselves. This is one of the cases where discovery should be given before particulars can be ordered to be given. See Mulla's Civil Procedure Code, pp. 533 to 534. I also rely on *Woolfe v. Automatic Picture Gallery, Ltd.*<sup>1</sup> where the defendants sought to have discovery before delivery of defence, but it was refused on the ground that defence should be filed first. The judgment however goes on to say that the plaintiffs cannot resist such discovery once the written statement is filed.

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B. J. WADIA J. This is a chamber summons taken out by the defendants for further discovery.

The plaintiffs claim to be the registered proprietors of a certain design for being printed on textile goods registered under the Indian Patents and Designs Act (II of 1911), and have filed this suit against the defendants for restraining them from infringing the design under the circumstances mentioned in the plaint, and for accounts, damages, costs and other reliefs. In their written statement the defendants allege that prior to the registration of the design it was published in British India by the plaintiffs themselves as well as by other merchants. They also contend that the design was not new or original at the date of the registration, and that the registration is invalid and does not confer any specific right upon the plaintiffs to exclusively use the same. In order to substantiate these defences, the defendants pray for an order for discovery and inspection of the documents mentioned in the summons, viz.,

- (1) The first shipment samples of the goods in dispute received by the plaintiffs from Japan,
- (2) Copy of the first order placed by the plaintiffs in respect of the said goods,
- (3) Correspondence between the plaintiffs and the Japanese firms from whom the plaintiffs imported the said goods prior to and up to first importation of the goods by plaintiffs,
- (4) The original invoices and papers in respect of the first importation of the said goods by the plaintiffs together with the covering letters with the invoices,
- (5) Entries in the plaintiffs' books of account as to when they received the first lot of such goods, and
- (6) Counterparts or copies of the contracts made by the plaintiffs with the merchants in India regarding the sale of the goods in dispute.

The suit is brought under s. 53(2) of the Indian Patents and Designs Act of 1911. This Act is based upon the English Act, the Patents and Designs Act of 1907. Under Act II of 1911, Part I up to s. 42 refers to patents,

O. C. J. Part II from s. 43 to s. 54 refers to designs, and Part III is general. The  
 1940 design in dispute has been registered under the provisions of the Act of  
 — 1911 and the Indian Patents and Designs Rules of 1933. Section 43(1)  
 DWARKADAS provides that the Controller may, on the application of any person claiming  
 DHANJI to be the proprietor of any new or original design not previously published  
 v. in British India, register the design under Part II of the Act. Section 43(4)  
 CHHOTALAL in British India, register the design under Part II of the Act. Section 43(4)  
 RAVICARAN- provides that the Controller may, if he thinks fit, refuse to register any  
 DAS & Co. design presented to him for registration, but that any person aggrieved by  
 — any such refusal may appeal to the Central Government. Rule 39 of the  
 B. J. Wadia J. Indian Patents and Designs Rules, 1933, which came into force on April 1,  
 1933, also provides that the Controller shall consider the application for  
 registration and may accept it if he considers that there is no objection to  
 the design being registered. Section 45(1) enables the Controller to grant  
 a certificate of registration to the proprietor of the design when registered.  
 Under s. 46(1) a book called the Register of Designs is kept at the Patent  
 Office, "wherein shall be entered the names and addresses of proprietors  
 of registered designs, notifications of assignments and of transmissions of  
 registered designs, and such other matters as may be prescribed." Section  
 46(3) provides that the register of designs shall be prima facie evidence of  
 any matters by the Act directed or authorised to be entered therein.

The plaintiffs contend that the defendants are not entitled to go behind  
 the certificate of registration, and that therefore the documents of which  
 inspection is asked for are not relevant to the matters in dispute between  
 the parties. The important question therefore for consideration is whether  
 the certificate of registration is final and conclusive, or whether it is open  
 to the defence to raise the pleas that the design had been previously publi-  
 shed and was not new or original at the date of the application for  
 registration and that the plaintiffs are therefore not the proprietors thereof.  
 Under s. 2(14) a proprietor means a proprietor of a new or original design.  
 Formerly the words were "new and original", but by Act VII of  
 1930 the words "new or original" have been substituted. From the words  
 of the sections which I have referred to before it will be seen that the  
 only person who can have a design registered under the Act is the proprietor  
 for the time being of the design and that the design must be a new  
 or original design and must not have been previously published in British  
 India. Plaintiffs' counsel argued that it was open to any interested person  
 under s. 51A at any time after the registration to present a petition to the  
 High Court for cancellation of the registration of the design on the ground  
 of previous publication or also on the ground that it was not a new or  
 original design. Such a petition could also within one year from the date  
 of the petition be presented to the Controller subject to an appeal to the  
 High Court. Section 64 of the general portion of the Act also provides for  
 any person making an application for rectification of the register of patents  
 or designs on the ground that any entry was wrongly made in the register.  
 Counsel further argued that in the absence of any such cancellation the  
 register of designs which contains the name of the proprietor of the regis-  
 tered design was conclusive on the point that the person registered as pro-  
 prietor was the proprietor of a new or original design. The words of

s. 46(3), however, are that the entry with regard to the name and address of the proprietor or proprietors of the registered design is prima facie evidence to that effect. That means in my opinion that there is a prima facie presumption that the person whose name is registered as the proprietor is the proprietor of a new or original design, but the entry in the register is not conclusive proof thereof, and the presumption can be rebutted. It is true that under s. 43 no registration can be effective unless the design sought to be protected is new or original and not of a pre-existing common type. But the certificate is not conclusive, and there is nothing in the Act which prevents the defendant in a suit for damages for infringement of a registered design under s. 53 from raising in defence the plea that the design was previously published and was neither new or original: see *Muhammad Abdul Karim v. Muhammad Yasin*.<sup>1</sup> It was pointed out that unless it was final and conclusive there was no advantage in having a certificate of registration. The advantage is that if no evidence is led by the defendants to the contrary, the certificate is sufficient evidence that the plaintiffs are the proprietors, that is proprietors of a new or original design. If evidence is led, it is for the Court to come to its finding on the question. A further advantage is that as the register is prima facie evidence of the matters contained in it, the onus ordinarily will be on the defendants to show that the plaintiffs are not the proprietors of the registered design in question.

Counsel for the plaintiffs also drew the attention of the Court to the several corresponding sections of the part of the Act dealing with patents. It is provided under s. 20(3) that the register of patents shall also be prima facie evidence of any matters by the Act directed or authorized to be inserted therein. Section 26 provides for the revocation of a patent on any of the grounds stated therein. Section 29(1) provides for the institution of suits for infringement of patents. It is provided by s. 29(2) that every ground on which a patent may be revoked under the Act shall be available by way of defence to a suit for infringement. Counsel pointed out that there was no corresponding section in the portion of the Act dealing with designs, nor was s. 29(2) made applicable in the matter of designs under s. 54 of the Act. It was therefore argued that as there was no section in regard to designs corresponding to s. 29(2) in regard to patents, the Act did not contemplate such a defence in the case of registered designs. I do not accept that argument. It might be that the reason for not making a specific provision in s. 53 similar to the provision in s. 29(2) was as is pointed out in *Muhammad Abdul Karim v. Muhammad Yasin*.<sup>2</sup> But what is really significant is that the Legislature has not definitely provided anywhere in the Act that the certificate of registration until cancellation is conclusive proof of the fact that the grantee of the certificate is the proprietor of the design, that is to say, the proprietor of a new or original design. I do not think that the Legislature would have left such an important point merely for inference. Nor is it provided in the Act that the only remedy of an aggrieved party is under s. 51A and s. 64 of the Act, and that if no

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1 (1934) I. L. R. 56 All. 1032.

2 (1934) I. L. R. 56 All. 1032  
at pp. 1036-37.

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such application is made the aggrieved party cannot urge his grounds of defence in a suit brought by the registered proprietor under s. 53(2) of the Act. My attention was drawn to the observations of Halsbury, Hailsham's edn., Vol. XXXII, p. 696, para. 1006, in which it is stated that it seems to be doubtful whether the validity of the registration can properly be raised by way of defence in a suit for infringement of a design, and whether it should not rather be sought by means of a motion for rectification of the register. It is, however, also pointed out that the former course has often been adopted, though it may be by consent of the parties. I, however, agree with the conclusion arrived at by the learned Judges of the Allahabad High Court in *Muhammad Abdul Karim v. Muhammad Yasin*, that the defendant to a suit under s. 53 (2) is not confined to his remedy laid down by those particular sections of the Act, and that the points pleaded in the written statement by the defendants are points which can be raised in a suit like the present.

Plaintiffs' counsel lastly urged that no order should be made on the chamber summons for inspection as the inspection asked for was on a fishing enquiry, not based on any particulars, but merely on defences which are taken up as general defences to the suit. Those defences may have been based on information and belief. The only question is whether the documents are relevant and whether they are in the plaintiffs' possession, power or control. In my opinion they are relevant, and it is nowhere definitely stated that they are not in the plaintiffs' possession. The correspondence annexed to the affidavit in support of the summons seems to indicate that they are. If any of these documents are not in the plaintiffs' possession, the plaintiffs can say so on oath.

In the result, the summons is made absolute with costs. Costs to be taxed. Counsel certified. The plaintiffs to make the supplemental affidavit of documents disclosing the documents referred to in the summons or such of them as are in their possession within a week and to give inspection to the defendants forthwith thereafter. Suit to be placed on board for hearing as a part heard on January 13, 1941.

*Summons made absolute.*

Attorneys for plaintiffs : *Madhavji & Co.*

Attorneys for defendant : *Tyabji, Dayabhai & Co.*

Before Mr. Justice Blackwell.

KANHAIYALAL HARKARANDAS

v.

MOHANLAL RAMVALLABH.\*

1940

December 13.

*Right of suit—Cause of action—Suit filed in anticipation of criminal complaint—High Court—Inherent jurisdiction—Injunction in personam against party restraining him from proceeding with criminal complaint in Court outside High Court's jurisdiction—Civil Procedure Code (Act V of 1908), Sec. 151.*

The mere fact that A is supposed to contemplate the bringing of an action against B or that A may have stated that he has grounds for such an action, does not entitle B to institute an action against A to have it declared that A has not a good cause of action against B.

*North Eastern Marine Engineering Company v. Leeds Forge Company*,<sup>1</sup> followed.

The High Court has jurisdiction, under s. 151 of the Civil Procedure Code, 1908, to grant an injunction *in personam* against a person who has submitted to its jurisdiction to restrain him from proceeding with a criminal complaint in a Court which is not subject to the jurisdiction of the High Court; but the jurisdiction should be exercised with extreme caution.

Accordingly, the High Court of Bombay refused to grant an injunction *in personam* against a defendant, who had submitted to its jurisdiction, restraining him from proceeding with the complaint filed by him against the plaintiff in the Court of the City Magistrate at Benares, praying in effect that the defendant had no cause of action against him as regards the subject-matter of the complaint.

#### Notice of motion.

The plaintiff Kanhaiyalal was the brother of the wife of the defendant Mohanlal. The plaintiff lived in Bombay. The defendant lived at Benares, in the United Provinces.

The plaintiff alleged that he had paid Rs. 2,000 to the defendant by way of loan on February 10, 1939, when he (plaintiff) had gone to Benares on the occasion of his sister's demise.

On January 19, 1940, the defendant's advocate Jagdish Prasad wrote a letter from Benares to the plaintiff in Bombay, in the course of which he demanded payment of Rs. 4,600 left in deposit with the plaintiff, and stated :—

"That you were entrusted with ornaments worth over Rs. 7,600, details of which are given hereunder, by my client on your assurance that they would be returned to my client whenever my client would desire the return of the same.

"That in spite of repeated demands for the return of the said ornaments you have been evading the return of the same by making lame excuses like pain in stomach, ill-health etc., and it appears that in view of the enormous increase now in the rates of gold and other ornaments you have dishonestly misappropriated the said ornaments with the intention to make wrongful gain for yourself and to cause wrongful loss to my client.

"That under the circumstances you are hereby required to return all the ornaments entrusted to you by my client the details of which are given below within

\* O. C. J. Suit No. 173 of 1940.

1 [1906] 1 Ch. 324.

O. C. J. a week of the receipt of this notice failing which my client will be constrained  
1940 to take steps for your prosecution under s. 406 (I. P. C.) in the Criminal Courts."

On January 31, 1940, the plaintiff filed a suit against the defendant in the Bombay High Court praying :—

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(a) that the defendant may be ordered and decreed to pay to the plaintiff Rs. 2,000 with interest thereon at six per cent. per annum from February 10, 1939, till judgment ;

(b) that it may be declared that the plaintiff had not and has not got and is not liable for any ornaments of the defendant's wife and that the defendant has no moneys in deposit with the plaintiff."

He alleged in the plaint that :

"All the ornaments of the defendant's wife always remained at the defendant's place. The plaintiff had at no time any ornaments of the defendant's wife. The plaintiff denies the allegations made in the defendant's said advocate's letter that the plaintiff wrote several letters assuring the defendant the return of any ornament. In view of the defendant's conduct and claim the plaintiff submits that he is entitled to a declaration that he is not in possession of any ornaments of the defendant's wife and that the defendant has no moneys in deposit with the plaintiff."

On February 1, 1940, the plaintiff made a formal reply to the defendant's letter of January 19, 1940, denying all statements made in that letter and putting forward his claim to Rs. 2,000.

On February 14, 1940, the defendant filed a complaint in the Court of the City Magistrate at Benares charging the plaintiff with an offence punishable under s. 406 of the Indian Penal Code, 1860.

On April 14, 1940, the plaintiff appeared in the Benares Court and made an application to have the complaint dismissed on the ground that the case was purely of a civil nature, that no offence of criminal misappropriation was committed, and that the Benares Court had no jurisdiction to entertain the complaint. The application was dismissed. The plaintiff applied in revision to the District Magistrate at Benares, who dismissed it on August 16, 1940. He next applied to the Allahabad High Court.

Meanwhile, on June 26, 1940, the defendant filed his written statement and counter-claim. He denied in his written statement his liability to pay Rs. 2,000 to the plaintiff, and counter-claimed for the ornaments valued at Rs. 7,600 and cash amounting to Rs. 4,600.

On November 12, 1940, the plaintiff put in a reply in which he denied the defendant's counterclaim.

Then on November 13, 1940, the plaintiff took out a notice of motion for an order :—

"That the defendant may be restrained by an order and injunction of this Hon'ble Court from proceeding with the complaint being case No. 232 of 1940 filed by him in the First Class Magistrate's Court at Benares."

The defendant opposed the notice of motion.

K. A. Somjee, for the plaintiff.

M. V. Desai, with V. K. Chhatrapati, for the defendant.

BLACKWELL J. This is a notice of motion taken out by the plaintiff on November 13, 1940, for an order that the defendant may be restrained from

proceeding with a complaint filed by him in the First Class Magistrate's Court at Benares. That complaint was filed on February 14, 1940.

By a letter dated January 19, 1940, the defendant's advocate alleged that the plaintiff had been entrusted with ornaments by the defendant worth over Rs. 7,600, a list of which was appended to the letter, on the plaintiff's assurance that they would be returned to the defendant whenever required, that the plaintiff had written several letters to the defendant assuring him that he would return the same, that in spite of repeated demands he had not done so, and had dishonestly misappropriated the ornaments. The letter demanded the return of the ornaments within a week of the receipt of the notice, and stated that in default the defendant would be constrained to take steps for the prosecution of the plaintiff under s. 406 of the Indian Penal Code. That letter was not in fact received by the plaintiff until January 29, 1940. Without replying to that letter the plaintiff on January 31, 1940, filed this suit. In the plaint he alleges that on or about February 10, 1939, he lent Rs. 2,000 to the defendant who promised to pay that amount in Bombay with interest at six per cent. after a month or two, that payment had been demanded and the defendant had refused to pay and by his advocate's letter of January 19, 1940, to which I have referred, and which is exhibit (A) to the plaint, put forward a false claim against the plaintiff. The plaint goes on to allege that the plaintiff had at no time any ornaments of the defendant's wife, and submits that the plaintiff is entitled to a declaration that he is not in possession of any ornaments of the defendant's wife, and that the defendant had no moneys in deposit with the plaintiff, that fact having been alleged both in the letter of January 19, 1940, and in the plaint.

It is to be observed that the first cause of action alleged in the plaint is in respect of an alleged loan by the plaintiff to the defendant of Rs. 2,000. The declaration is asked for with the object of getting a decision that the plaintiff had not in his possession at any time the ornaments of the defendant and that he had no moneys on deposit with him from the defendant. I do not express any opinion as to whether that declaration is well founded in law, or not, inasmuch as it will fall to be decided on the hearing of the suit, and it would not be proper for me to do so. I do, however, refer to some observations made by Mr. Justice Joyce in *North Eastern Marine Engineering Company v. Leeds Forge Company*.<sup>1</sup> That case arose out of s. 32 of the Patents, Designs and Trade Marks Act, 1883, but the learned Judge made some observations of a general character, with which I respectfully agree, that seem to be pertinent to the declaration asked for in the present plaint. The learned Judge said (p. 329):—

"Speaking generally, in simple cases not within s. 32 of the Act, the mere fact that A. is supposed to contemplate the bringing of an action against B., or that A. may have stated that he has grounds for such an action, does not, in my opinion, entitle B. to institute an action against A. to have it declared that A. has not a good cause of action against B. I think that is so whether the result depends merely upon questions of law, or upon facts, as to which there would, or might be, a conflict of evidence and a protracted trial. No doubt delay may in certain cases furnish a good ground for defence; but, ordinarily, an intending plaintiff may

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O. C. J. postpone his action as long as he pleases, at the risk of finding himself ultimately  
1940 barred by some Statute of Limitations, and he may choose his own time for commencing proceedings".

KANHAIYA- I am by no means satisfied that that declaration was not asked for in the  
LAL hope that it might induce the defendant not to launch criminal proceedings,  
HARKARAN- as in my opinion he was clearly entitled to do, and in the hope that he  
DAS would be persuaded to deal with the matter by way of counter-claim in the  
v. present suit.

MOHANLAL Having launched that suit the plaintiff replied to the letter of January 19  
RAM- by a letter from his attorneys dated February 1, 1940, in which he referred  
VALLABH to the claim put forward by the defendant as a bogus demand intended to  
Blackwell J. forestall the plaintiff's claim for Rs. 2,000. The letter goes on to inform  
the defendant that the plaintiff has filed a suit to recover the amount lent  
and advanced and for a declaration that the claim for the ornaments and  
moneys made by the defendant was not justified.

The criminal complaint was filed by the defendant in the Court of the City Magistrate, Benares, on February 14, 1940. A copy thereof is set out in exhibit B to the plaintiff's affidavit of November 12, 1940. It is a complaint made not only against the plaintiff but also against a second accused, who is alleged to be the munim of the plaintiff. That complaint alleges dishonest misappropriation and conversion of ornaments entrusted by the complainant to the munim on the plaintiff's behalf.

There appears to have been some delay in serving the criminal process upon the plaintiff. He had certainly been served before May 18, 1940, because on that date he filed a petition to quash the criminal proceedings on the ground that the matter was merely a civil dispute and that the Court had no jurisdiction. The Court dismissed that application, there was an application in revision which was dismissed by the District Magistrate on August 16, 1940, and the matter has now gone to the High Court of Allahabad and is still pending before that Court.

Mr. M. V. Desai, who appears for the defendant, concedes that this Court has got the power to make an order *in personam* against his client to restrain him from proceeding with that criminal complaint, if in the exercise of its discretion the Court thinks proper to do so. A number of authorities were cited to me, but in view of that concession it is, in my opinion, unnecessary to refer to any of them. The grounds upon which the order is asked for are set out in the said affidavit of the plaintiff. In paragraph 3 thereof it is alleged that the complaint filed by the defendant at Benares is only for the purpose of stifling this suit and to put the plaintiff to unnecessary harassment, annoyance and costs, and the same is of a blackmailing character, and that it has been filed for the purpose of bringing undue pressure upon the plaintiff, and similar allegations are made in paragraph 5 of the affidavit.

I have to consider whether the complaint was filed for that purpose. I have already drawn attention to the fact that by the letter of January 19, 1940, written on behalf of the defendant to the plaintiff, the claim was made for the return of the ornaments and for payment of moneys alleged to have been deposited, and that letter contains a statement that it was then the



intention of the defendant, if his demand was not complied with, to file a criminal complaint for misappropriation. The intention to file that complaint was made before any demand had been put forward on behalf of the plaintiff in respect of the alleged loan of Rs. 2,000 and without even replying to the letter this suit was filed, the curious declaration to which I have drawn attention was inserted and I am now asked to say that the object of that criminal complaint was to stifle a suit which had not even been threatened and in respect of which it had not been suggested that there was any cause of action. I entirely decline to accede to such a suggestion. In my opinion the boot is on the other leg, and the civil suit was filed and that curious declaration was inserted with the object and in the hope of forestalling and if possible preventing the threatened criminal proceedings.

I have been strongly pressed by Mr. Somjee, the plaintiff's counsel, to grant an injunction restraining the criminal proceedings upon the ground that the issues are the same and that it is a great hardship upon the plaintiff to have two Courts trying issues of a similar character. Mr. Desai for the defendant, without prejudice to his submission that the motion was unjustified and ought to be dismissed with costs, offered to have the counter-claim stayed pending the hearing and final determination of the criminal proceedings. Mr. Somjee for the plaintiff is unwilling to accede to that suggestion, and that being so, I shall not make any order staying the counter-claim. Mr. Somjee, on the other hand, has pressed me to expedite this suit with the object of getting the issues arising out of the counter-claim decided if possible before the criminal case comes up for hearing.

I here point out that this motion was not taken out until November 13, 1940, although the criminal proceedings were instituted on February 12, 1940. After he had been served with the criminal process, instead of applying promptly if so advised to the criminal Court for a stay of the criminal proceedings pending the trial of this suit in which the plaintiff had asked for the declaration to which I have referred, and which according to his contention would have justified an application to the criminal Court for a stay even before the counter-claim was filed, he chose to wait until November 13, 1940, and in the meantime to put the defendant to considerable costs by applying to the criminal Court to quash those criminal proceedings upon the ground that the Court had no jurisdiction. In my opinion, the factor of delay is one that I should consider. On an application of this character, and quite apart from the merits of the matter, I should not have been disposed to make an order on this motion after such a long period of delay.

On the merits I am of opinion that the plaintiff makes out no case of harassment. I have already drawn attention to the fact that it does not lie in his mouth to suggest that the complaint was filed for the purpose of stifling this suit which at the time the notice of intention to file such a complaint was given had not even been suggested; nor for the same reason can it be suggested that that complaint was of a blackmailing character, and in my opinion it was grossly improper for the plaintiff even to suggest such a thing in his affidavit in the events which had happened. Whatever the decision before the criminal Court may be, the civil rights and liabilities of the parties on the counter-claim will fall to be determined on the evidence adduced in

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O. C. J. this Court. I have been strongly pressed by Mr. Somjee to grant an injunction on the ground that if a judgment is given in his favour on the counter-claim in the present suit it would be admissible in evidence in the criminal proceedings and might have great weight with the Magistrate in coming to a conclusion upon the criminal complaint. Having regard however to the fact that that complaint was instituted before this suit was even suggested, that in my opinion the declaration asked for in this suit was for the purpose, if possible, of forestalling the criminal complaint, and that if he can prove criminal misappropriation the defendant is entitled to proceed by way of criminal process, I am clearly of opinion that I ought not to grant an injunction.

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I may refer to one further aspect of the matter. This application is based upon the inherent jurisdiction of this Court under s. 151 of the Civil Procedure Code. Although a civil Court no doubt has jurisdiction to grant an injunction *in personam* against a person who has submitted to the jurisdiction to restrain him from proceeding with a criminal complaint in a Court which is not subject to the jurisdiction of this High Court, this is a jurisdiction which in my opinion should be exercised with extreme caution. It was open to the plaintiff if he had been so minded to apply to the criminal Court for a stay of those criminal proceedings. He has not done so. In my opinion he ought not to have resorted to an application to this Court based upon its jurisdiction under s. 151 without first exhausting the other remedy which was open to him by an application to the criminal Court for stay of the criminal proceedings upon the ground that the issues involved had been raised by the plaintiff by his declaration in the civil suit.

In all the circumstances I am clearly of opinion that this motion was not justified. I dismiss it with costs. As regards the costs which were reserved, I think it is proper that the defendant should bear those costs himself, and I make no order in relation to them.

*Motion dismissed.*

Attorneys for plaintiff : *Ambubhai & Diwanji.*

Attorneys for defendant : *Ranchoddas & Co.*

## APPELLATE CIVIL.

*Before Mr. Justice Broomfield and Mr. Justice Divatia.*

THE NEW MOFUSSIL CO. LTD.

v.

SHANKERLAL NARAYANDAS MUNDADE.\*

1940

September 3.

*Civil Procedure Code (Act V of 1908), Secs. 16, 11, 99, O. II, rr. 2, 3, 4—Court—Jurisdiction—Place where subject-matter situated—Decree—Reversal—Error or irregularity not affecting merits or jurisdiction—Suit to include whole claim—Splitting up of causes of action—Suit for specific performance of contract—Prayer for recovery of possession—Joinder of causes of action—Multiplicity of suits—Res judicata—Leave of Court—Contract—Agreement—Settlement of some conditions between parties—Settlement of other conditions through lawyer—Agreement to be drawn up and signed—Contract not complete until such agreement drawn up and signed—English law—Applicability to India.*

Defendant No. 1, who resided in Bombay, was the liquidator of a joint stock company, which had its registered office in Bombay but which owned a factory at Dhulia in West Khandesh District. Negotiations opened in Bombay between defendant No. 1 and the plaintiff's broker on behalf of the plaintiff for the sale of the factory, some of the terms of sale were settled between the parties, and defendant No. 1 afterwards sent the broker to the company's solicitors for settling other terms, receiving the earnest money, and drawing up a draft agreement and an engrossment of that draft. The further terms were settled, the earnest money was received by the solicitors, and a rough draft of agreement was prepared. The agreement was engrossed in due course, but before it could be signed by the plaintiff, the solicitors of defendant No. 1 declined to proceed in the matter saying that they were instructed to put an end to the negotiations. Defendant No. 1 then sold the factory to defendants Nos. 2 to 5 at a higher price. The plaintiff having sued in the Dhulia Court for specific performance of the agreement and for possession of the factory :—

*Held*, (1) that the suit, in the form in which it was brought, was not *in personam* so as to attract the application of the proviso to s. 16 of the Civil Procedure Code, 1908 :

*Humsraj v. Ranchordas*<sup>1</sup> and *Velliappa Chettiar v. Govinda Dass*,<sup>2</sup> distinguished ;

(2) that O. II, r. 2, of the Code had no application, inasmuch as the cause of action for specific performance, being on the contract, was not the same as the cause of action for possession, which was on the conveyance resulting from the contract :

*Nathu valad Pandu v. Budhu valad Bhika*,<sup>3</sup> followed ;

(3) that the combination of the two suits in one was not repugnant to any provision of the law ;

(4) that the Dhulia Court alone had jurisdiction to try the suit against defendants Nos. 2 to 5, and that it also had jurisdiction to try the case as against defendant No. 1 by virtue of the language of s. 16(d) of the Code :

*Sitabai v. Laxmibai*,<sup>4</sup> followed ;

\* First Appeal No. 62 of 1939, from the decision of R. R. Karnik, First Class Subordinate Judge at Dhulia, in Special Civil Suit No. 27 of 1936.

1 (1905) 7 Bom. L. R. 319.

2 (1928) I. L. R. 52 Mad. 609, F.B.

3 (1893) I. L. R. 18 Bom. 537.

4 (1915) I. L. R. 40 Bom. 337, s. c. 18 Bom. L. R. 67.

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(5) that the cause of action for specific performance being distinct from that for possession, a subsequent suit for possession was not barred by *res judicata* or O. II, r. 3 ;

(6) that though a separate suit for possession was not barred the two causes of action could be joined in the same suit for the sake of convenience or to avoid multiplicity of suits :

*Nathu valad Pandu v. Budhu valad Bhika*,<sup>1</sup> *Krishnaji v. Sangappa*,<sup>2</sup> and *Krishnammal v. Soundararaja Aiyar*,<sup>3</sup> followed ;

(7) that the option to join the prayer for possession was not dependent on the leave of the Court under O. II, r. 4 :

*Bhagwandas v. Naran*,<sup>4</sup> relied on ;

(8) that even assuming that the leave of the Court was necessary, strictly speaking the case was covered by s. 99 of the Code ;

(9) that, however, under the circumstances the agreement arrived at between the parties at the first interview only contemplated execution of the engrossed draft in solicitors' office and was not a concluded agreement between the parties, which 'could be enforced :

*Winn v. Biall*,<sup>5</sup> *Von Hatzfeldt-Wildenburg v. Alexander*,<sup>6</sup> *Rossdale v. Demmy*,<sup>7</sup> *Coope v. Ridout*,<sup>8</sup> *Chillingworth v. Esche*,<sup>9</sup> and *Lockett v. Norman-Wright*,<sup>10</sup> followed ;

*Bonnewell v. Jenkins*,<sup>11</sup> *Bolton Partners v. Lambert*,<sup>12</sup> *Filby v. Hounsell*,<sup>13</sup> *Bijoy Kanta Lahiri Chowdhury v. Kailash Chandra Bhoomik*,<sup>14</sup> and *Harichand Mancharam v. Govind Laxman Gokhale*,<sup>15</sup> distinguished ;

(10) that the above rule of English law applied also to India :

*Harichand Mancharam v. Govind Laxman Gokhale*<sup>15</sup> and *Currimbhoy & Co. v. Creet*,<sup>16</sup> followed ;

(11) that therefore the suit failed.

SUIT for specific performance of contract and for recovery of possession of property agreed to be sold.

The New Mofussil Company, Limited, was under liquidation, and Sir Shapurji Bomanji Billimoria, Kt., (defendant No. 1) was appointed its liquidator. The Company had its registered office in Bombay, and defendant No. 1 also resided and carried on his business in Bombay. The company owned properties, including factories, at Dhulia.

The plaintiff Shankarlal, who resided at Dhulia, was minded to purchase one of the factories, and engaged as his broker one Nandurdikar to carry out the transaction.

It was the plaintiff's case that Nandurdikar saw defendant No. 1 in Bombay in May, 1936, and made an offer of Rs. 62,000 for purchase of the factory. The offer was not accepted. He saw defendant No. 1 again on July 7, 1936, when it was agreed that the factory should be sold for Rs. 63,000, that

1 (1893) I. L. R. 18 Bom. 537.  
2 (1924) 27 Bom. L. R. 42.  
3 (1913) I. L. R. 38 Mad. 698.  
4 (1932) 34 Bom. L. R. 1322.  
5 (1877) 7 Ch. D. 29.  
6 [1912] 1 Ch. 284.  
7 [1921] 1 Ch. 57.  
8 [1921] 1 Ch. 291.  
9 [1924] 1 Ch. 97.

10 [1925] 1 Ch. 56.  
11 (1878) 8 Ch. D. 70.  
12 (1889) 41 Ch. D. 295.  
13 [1896] 2 Ch. 737.  
14 (1919) I. L. R. 46 Cal. 771.  
15 (1922) L. R. 50 I. A. 25,  
s. c. 25 Bom. L. R. 531.  
16 (1932) L. R. 60 I. A. 297,  
s. c. 35 Bom. L. R. 223.

Rs. 7,000 should be paid as earnest money, that the remaining amount should be paid by the purchaser within a month of the completion of the sale, that the costs should be borne half and half, and that the brokerage should be paid by the vendor as also by the purchaser at two and a half per cent. to Nandurdikar. On the same day defendant No. 1 sent Nandurdikar to Manekshaw, a partner in the attorneys' firm of Wadia, Ghandy & Co., where, after discussion of further terms, a draft agreement was prepared by Manekshaw. The agreement then stood over for engrossment. Nandurdikar paid Rs. 7,000 as earnest money to the attorneys, who passed a receipt for the amount. On the 8th Nandurdikar brought the plaintiff's brothers Tulshiram and Bhagirath to sign the engrossed agreement, but he was told that the agreement should be signed by the plaintiff himself. When Nandurdikar saw Manekshaw on July 11, he was told by the latter that the agreement was at an end. He saw Manekshaw again on July 13 in company of the plaintiff and offered to sign the agreement, but they were told that the agreement was cancelled.

Defendant No. 1's case was that when the price and some of the terms were settled between him and the broker, the former sent the latter in company of a clerk to the office of Wadia, Ghandy & Co. in order that the terms and conditions on which the sale of the factory was to be effected be properly discussed and settled between the attorneys and the broker. At the interview some more terms were discussed between the two, and a draft agreement was drawn up the same day. The earnest money was paid for which the attorneys passed a receipt. The matter stood over to July 8, the broker objected to the completion of the sale within one month; he also objected that he was not agreeable to apportioning the premium in respect of fire policy and that he did not want it at all. He further made it a condition that a watchman should be posted at the site of the factory on his behalf pending the completion and that he was not agreeable to the provision of costs as stated in the draft agreement. On July 9 when the broker saw Manekshaw he was told that defendant No. 1 was not agreeable to the terms proposed by him. The broker asked Manekshaw to press defendant No. 1 to agree to the terms proposed. On July 10 when the broker saw Manekshaw he was told that defendant No. 1 was not agreeable to the alterations proposed and that the negotiations for the sale of the factory were at an end.

On July 13, 1936, defendant No. 1 agreed to sell the factory in suit and another factory to defendants Nos. 2 to 5 for Rs. 1,25,000. The deed of sale was passed on July 29, 1936, and defendants Nos. 2 to 5 were put in possession of the factories.

On August 31, 1936, the plaintiff filed a suit in the Court of the First Class Subordinate Judge at Dhulia for specific performance of the agreement for sale against defendant No. 1 and for recovery of possession of the factory against defendants Nos. 2 to 5. The plaint alleged that—

"The plaintiff says that a binding agreement has been arrived at in terms of the said draft agreement and the engrossment thereof."

The plaintiff prayed :—

(a) That in and so far as may be necessary it may be declared that a valid and binding agreement was arrived at between the plaintiff and the 1st defendant company on July 7, 1936, and that the first defendant company is bound specifically to

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(c) that the first defendant company may be ordered to specifically perform the said agreement in favour of the plaintiff."

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Defendant No. 1 put forward his contentions in his written statement and concluded :—

"Without prejudice and in the event of its being held that a concluded agreement was arrived at between the parties on July 7, 1936, as alleged by the plaintiff in the plaint or at any other stage these defendants say that such contract was reopened and the parties entered into negotiations afresh, which negotiations did not result in a concluded agreement."

The trial Judge held that the Dhulia Court had jurisdiction to hear the suit, that the plaintiff had proved the agreement set up by him, that defendant No. 1 had not proved that the agreement to sell was re-opened after it was concluded, and that the plaintiff was entitled to specific performance. The reasons were as follows :—

"On these facts defendant No. 1's learned counsel argues that the Dhulia Court has no jurisdiction to try this suit so far as defendant No. 1 is concerned. He relies on the cases of *Hunsraj v. Runchordas* (7 Bom. L. R. 319), *Holkar v. Dadabhai* (14 Bom. 353), *Hatimbhai v. Framroz* (51 Bom. 516) and *Velliappa Chettiar v. Govinda Dass* (52 Mad. 809).

These cases show that the plaintiff could have instituted in the Bombay High Court the present suit for specific performance of the contract *without asking for possession of the suit property*. A suit for specific performance is a suit *in personam*. In such a suit the Court compels the performance of an obligation ; it acts as a Court of equity on the conscience. Neither title nor possession is in question in a suit for specific performance. The plaintiff therefore could have maintained this suit on the original side of the Bombay High Court provided he asked for specific performance only without asking for possession and cl. 12 of the Letters Patent would not have barred such a suit.

But the question for consideration is whether the Dhulia Court has no jurisdiction to try this suit...

The present suit is governed by the provisions of s. 16 of the Civil Procedure Code. Under cl. (a) of the said section suits for the recovery of immoveable property with or without rents or profits must be instituted in the Court within the local limits of whose jurisdiction the property is situate. Under cl. (d) of the said section, suits for the determination of any other right to or interest in immoveable property must be instituted in the Court within the local limits of whose jurisdiction the property is situate. In the case of *Maturi v. Kota* (28 Mad. 227) the suit was for recovery of unpaid purchase money under a contract for sale of land. It was held that it was a suit 'for determination of any right to or interest in immoveable property' within the meaning of s. 16, cl. (d), of the Code of Civil Procedure.

Leaving aside cl. (d) of s. 16, the present suit is one for the recovery of immoveable property under cl. (a) of s. 16 of the Civil Procedure Code. This Court has therefore jurisdiction to try this suit.

It is argued that this is a suit for possession of the immoveable suit property and that the leave of the Court has not been obtained for joining other causes of action. I am unable to accept the contention. The plaintiff has instituted this suit as a result of the alleged agreement to sell the suit property on July 7, 1936. The cause of action for this suit arose as soon as defendant No. 1 resiled from the contract. The plaintiff therefore has sued for specific performance and for possession of the suit factory. The various reliefs for specific performance, damages, possession of the suit factory and refund of the earnest money are based on the same cause of action. Hence, no leave of the Court is necessary. One of the reliefs claimed is for a declaration that the sale-deed passed by defendant No. 1 in favour of defendants Nos. 2 to 5 is null and void and is not binding on the plaintiff. Strictly speaking there was

no need of asking for this relief and it may be ignored altogether. Defendants Nos. 2 to 5 are impleaded as subsequent purchasers with notice of the suit agreement. As they claim under defendant No. 1 under a title arising subsequently to the contract, they are bound by the contract which may be enforced against them. Hence, the relief for a declaration that their sale-deed is null and void, etc., was unnecessary. The cause of action for this suit is one and the same against all the defendants. There was no agreement between the plaintiff and defendants Nos. 2 to 5 and the plaintiff has no independent cause of action against them. The cause of action arose where the agreement was made and when defendant No. 1 resiled from it. As defendants Nos. 2 to 5 claim under defendant No. 1 subsequently to the contract, specific performance of the contract can be enforced against them unless they bring their case under the exception of s. 27 (b) of the Specific Relief Act. The contention that the plaintiff has joined other causes of action in this suit for possession of immoveable property is erroneous. The various reliefs sought are based on one and the same cause of action. The suit as framed is therefore maintainable though no leave of the Court was taken...

In July, 1936, Sir Shapurji asked his clerk to write to Nandurdikar to come down to Bombay as shown by the letter (exhibit 145) dated July 3, 1936. Accordingly Nandurdikar saw him in his office on July 6, 1936, and offered Rs. 62,000 as price of the suit factory. Sir Shapurji declined. Nandurdikar came to his office again on July 7, 1936, at 4 p.m.; he offered Rs. 63,000 and Sir Shapurji accepted the offer. Sir Shapurji told Nandurdikar that the earnest money was to be Rs. 10,000, that half the costs were to be borne by each party, that the completion period was to be one month and that there were to be other usual terms which are incorporated in agreements by solicitors. He accepted Nandurdikar's suggestion to pay brokerage at two and a half per cent. Nandurdikar accepted the terms and went to fetch the earnest money. Sir Shapurji called Antia who is a clerk of defendant No. 1 company and told him the terms agreed upon between him and Nandurdikar. He told Antia to take Nandurdikar to Mr. Manekshaw to have the usual agreement drawn up. He told Nandurdikar when he came back to go with Antia. Sir Shapurji left his office at 5-30 p.m. or thereabout. He got a telephone call at his bungalow from Mr. Manekshaw to the effect that the party was offering Rs. 7,000 by way of deposit though he had agreed to pay Rs. 10,000 as earnest. Sir Shapurji agreed to accept Rs. 7,000 on the suggestion of Mr. Manekshaw.

Sir Shapurji admits that when next day Mr. Manekshaw informed over the phone that the party was haggling over the terms agreed between him and the party, he felt that party was resiling from the agreement.

It will be seen thus from the versions of Nandurdikar and Sir Shapurji that they had come to a final agreement and that the terms were to be embodied in a formal instrument by Mr. Manekshaw. The formal instrument was to contain the usual other terms which are incorporated by the solicitors in such documents. The versions of Nandurdikar and Sir Shapurji differ as to the earnest settled between them in his office. But finally Sir Shapurji agreed to have Rs. 7,000 as earnest after talking over the matter on the phone with Mr. Manekshaw. There was therefore a concluded contract between Nandurdikar and Sir Shapurji on July 7, 1936, and only a formal agreement remained to be drawn up. In the case of *Whymper v. Buckle* (3 All. 469) it is held that where two parties have come to a final agreement, the mere fact that at the time of their doing so they intend to embody the terms of such agreement in a formal instrument does not make such agreement less binding on them."

Defendants appealed to the High Court.

*Sir Jamshedji Kanga* and *R. J. Colah*, with *Wadia, Ghandy & Co.*, and *J. M. Pochkhanavala* and *D. A. Patel*, for the appellants.

*M. P. Amin*, with *W. B. Pradhan*, *M. W. Pradhan* and *S. A. Merchant*, for the respondent.

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BROOMFIELD J. This is an appeal by the defendants from a decree of the First Class Subordinate Judge at Dhulia allowing the plaintiff-respondent's suit for specific performance of a contract for sale of a cotton factory at Dhulia. The factory was one of several belonging to defendant No. 1, a limited company with its registered office in Bombay which was in liquidation.

The plaintiff's case is that the agreement was finally concluded in Bombay on July 7, 1936, when as the result of a conversation between one Nandurdikar, a broker acting for the plaintiff, and Sir Shapurji Billimoria, one of the liquidators, and of a further conversation between Nandurdikar and the company's solicitor Manekshaw the terms of the bargain were all settled and a draft agreement containing these terms was drawn up which was engrossed on the following morning. Neither the draft agreement nor the engrossment was signed by either party, and after several more meetings between Nandurdikar and Manekshaw, the latter, acting under instructions from Sir Shapurji, declined to proceed further and said that the negotiations were at an end. This happened on July 10 according to the defendants and on July 11 according to the plaintiff. On July 13 an agreement was entered into to sell the factory and another factory to defendants Nos. 2 and 5 and a conveyance in their favour was executed on July 29. The plaintiff claimed to be entitled to specific performance of the agreement contained in the draft agreement and the engrossment thereof. Among other reliefs he asked for possession of the factory. The subsequent purchasers were made parties under s. 27(b) of the Specific Relief Act.

The defendants challenged the jurisdiction of the Dhulia Court to try the suit as against the company and also alleged misjoinder of causes of action. On the merits their case was that there was no concluded agreement and that the matter never went beyond the stage of negotiations. In the alternative they said that if there had been a concluded agreement, it had been re-opened by the plaintiff.

The trial Court made the following decretal order :—

"(1) It is declared that the plaintiff is entitled to specific performance of the contract mentioned in the plaint.

(2) The plaintiff do deposit in Court Rs. 56,000 within a fortnight and recover possession of the suit factory.

(3) Defendants Nos. 1 to 5 do execute a conveyance in favour of the plaintiff in respect of the suit factory as claimed within a month from to-day.

(4) The plaintiff do recover interest at six per cent. per annum on Rs. 7,000 from defendant No. 1 from the date of the suit to the date of depositing Rs. 56,000 into Court provided he pays the requisite Court-fee in execution proceedings.

(5) The plaintiff is entitled to get mesne profits from the date of depositing Rs. 56,000 in Court to the date of obtaining possession of the suit property. An inquiry to be made about it on the application of the plaintiff.

(6) Defendant No. 1 do pay half costs of the plaintiff. Defendants Nos. 2 to 5 do pay the remaining half costs of the plaintiff. Defendants shall bear their own costs.

(7) The plaintiff is entitled to be paid the costs awarded from defendants Nos. 2 to 5 out of the money which he will deposit in Court. The balance of the money to be paid to defendants Nos. 2 to 5."

I will deal first of all with the question of jurisdiction. The trial Judge held that the case fell under s. 16, cls. (a) and (d), of the Civil Procedure



Code. That section provides that subject to the pecuniary or other limitations prescribed by any law, suits (a) for the recovery of immoveable property with or without rent or profits and (d) for the determination of any other right to or interest in immoveable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. There is a proviso that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant resides or carries on business. Learned counsel for the appellants has argued that as against defendant No. 1 this is a suit for specific performance and nothing more. That is to say, it is a suit *in personam* and does not come under either cl. (a) or cl. (d) of s. 16. In that connection he cited *Hunraj v. Runchordas*<sup>1</sup> and *Velliappa Chettiar v. Govinda Dass*<sup>2</sup> in which the nature of a suit for specific performance is explained. But those were not cases in which possession was or could have been asked for. In our case the question of jurisdiction has to be determined on the footing that specific performance and possession of the property are both asked for.

It is conceded that the plaintiff is entitled to pray for possession and that the suit, so far as it is a suit for possession, was only triable in the Dhulia Court. But it is urged that there should have been two suits, one against defendant No. 1 in Bombay, where the contract was entered into and was to be performed, and another against defendants Nos. 2 to 5 in Dhulia where the property is situated. There is no doubt I think that separate suits would have been permissible. The learned trial Judge's view that the plaintiff's cause of action for this suit was one and the same and that he could not split it up by bringing one suit against defendant No. 1 at Bombay and another against the other defendants at Dhulia, in view of the provisions of O. II, r. 2, of the Code, seems to be clearly untenable. The cause of action is not the same in respect of specific performance of the contract and possession of the property. The trial Court's view is clearly contrary to *Nathu valad Pandu v. Budhu valad Bhika*<sup>3</sup> and numerous cases in which that decision has been followed. The cause of action for specific performance is on the contract; the cause of action for possession is on the conveyance resulting from the contract.

However, it does not follow that the combination of the two suits in one is repugnant to any provision of the law. Order I, r. 3, as well as s. 27 of the Specific Relief Act would permit the joinder of all these defendants provided that the Court has jurisdiction to try the suit as against them all. The Dhulia Court and that Court alone would have jurisdiction to try the suit against defendants Nos. 2 to 5. The only question is whether it had jurisdiction against defendant No. 1. It has been argued on behalf of the plaintiff that the suit against defendant No. 1 can be brought under s. 16 (a) because, although the company has parted with possession, the effect of a decree in plaintiff's favour would be that the conveyance to defendants Nos. 2 to 5

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1 (1905) 7 Bom. L. R. 319.

3 (1893) I. L. R. 18 Bom. 537.

2 (1928) I. L. R. 52 Mad. 809.

A. C. J. would be annulled and the company would be in the same position as though  
 1940 possession had not been parted with. In other words it is said a suit to recover  
 — possession can be brought against defendant No. 1 even though possession has  
 NEW been parted with. But it must be admitted that this argument is not very  
 MOPUSSIL convincing.  
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 v. On the other hand the language of s. 16 (d) seems to be wide enough to  
 SHANKERLAL cover the case. Sir Jamshedji Kanga says that this clause means the determi-  
 — nation of an existing right, and not a right claimed. But *Sitabai v. Laxmibai*<sup>1</sup>  
 Broomfield J. is an authority which I think is inconsistent with that view. That was a suit for  
 — maintenance together with a prayer for a charge on lands situated in the Poona  
 District. The defendants were not resident in Poona. Nevertheless it was  
 held that the Court had jurisdiction under s. 16(d). The argument put for-  
 ward in that case to show that the Court had no jurisdiction was that a claim  
 for maintenance is not a charge upon land unless expressly made so by a deed  
 or decree. Therefore at the time of the suit there was no charge on im-  
 moveable property and for the purposes of s. 16 it is immaterial if the order  
 of the Court would create a charge. However, the Court rejected that argu-  
 ment. Sir Basil Scott C. J. said in his judgment (p. 340) :—

"On the plaint as framed, the question which has to be decided before the Court will be enabled to pass a decree is whether or not the plaintiff is entitled to a right to, or interest in, immovable property in the Bhimthadi Taluka by way of charge as security for the maintenance which may be decreed. That being the question to be determined, it is a question directly within the terms of section 16(d) of the Civil Procedure Code."

The learned counsel for the appellants seemed to rely mainly on the alleged misjoinder of causes of action. It is provided in O. II, r. 4, that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof; (b) claims for damages for breach of any contract under which the property or any part thereof is held; and (c) claims in which the relief sought is based on the same cause of action. According to the trial Judge the case comes under (c). But this view seems to be clearly wrong. If the cause of action for specific performance and possession were the same, the reliefs could not be split up. Order II, r. 2, would forbid it. But it is settled law that the cause of action for specific performance is distinct from that for possession and therefore a subsequent suit for possession is not barred by *res judicata* or O. II, r. 2; *Nathu valad Pandu v. Budhu valad Bhika*<sup>2</sup>, *Krishnaji v. Sangappa*<sup>3</sup> and *Krishnammal v. Soundararaja Ayyar*<sup>4</sup>. The latter case was doubted in *Sundara Ramamujam v. Sivalingam*<sup>5</sup> but our own High Court has followed it.

These same cases, however, show that though a separate suit for possession is not barred, the two causes of action may be joined in the same suit for the sake of convenience or to avoid multiplicity of suits. Learned counsel for the appellants says that the leave of the Court is necessary under O. II, r. 4. But in none of the above cases was there any reference to this rule

1 (1915) I. L. R. 40 Bom. 337,

\* s. c. 18 Bom. L. R. 67.

2 (1893) I. L. R. 18 Bom. 537.

3 (1924) 27 Bom. L. R. 42.

4 (1913) I. L. R. 38 Mad. 698.

5 (1923) I. L. R. 47 Mad. 150.

and there is nothing to show that the option to join the prayer for possession was held to be dependent on the leave of the Court. In that connection we were referred to some observations of Mr. Justice Barlee in *Bhagwandas v. Narani*<sup>1</sup>. He thought that the joinder of the two causes of action was dependent upon the leave of the Court under O. II, r. 4, but that, as the objection to misjoinder had been waived in that case, the point was immaterial. However, Mr. Justice Patkar who delivered the leading judgment in the case said nothing to suggest that he thought that the leave of the Court was required.

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As far as defendant No. 1 is concerned the suit seems to fall under cl. (d) of s. 16, as I have said, rather than cl. (a), and that being so, there is no difficulty. The rule in question does not apply to a suit under s. 16 (d). But as against the other defendants the suit comes under s. 16 (a) and undoubtedly the rule does cause a difficulty. The words "for the recovery of immoveable property" presumably mean the same in both cases. It is a possible view perhaps that the rule does not apply where the recovery of immoveable property is sought as a relief consequential on the relief of specific performance of a contract. Certainly in practice the leave of the Court has not been asked for in such cases, though it is a little difficult to see on what principle one can say it is not required. Assuming, however, that the leave of the Court was necessary strictly speaking—and that seems to be the better view—the case is covered by s. 99 of the Code, and the absence of leave, which could be granted even in appeal, is not a ground on which the decree could be reversed or varied.

I now come to the merits of the case, and for that purpose it is necessary to state some further facts. Nandurdikar saw Sir Shapurji first towards the end of May, 1936, and offered Rs. 62,000 for the factory, which offer was refused. On July 3 the liquidators wrote and asked him to come to Bombay to discuss the matter and settle the terms. From letters exchanged between Nandurdikar and the plaintiff it appears that plaintiff was very anxious to purchase the factory and that Nandurdikar had authority to raise his offer to Rs. 65,000 if necessary. There seems, however, to have been some doubt as to whether the liquidators really meant business. Nandurdikar went to see Sir Shapurji on July 6 and made the same offer as before, Rs. 62,000, with the same result. But this was obviously only a try on, as appears from a letter which Nandurdikar wrote to the plaintiff after the interview. He was hopeful of success but did not think that Sir Shapurji would accept less than Rs. 65,000.

Next day, which is the important day, Nandurdikar went to see Sir Shapurji again and made an offer of Rs. 63,000 which was accepted. The other terms agreed upon were that the sale was to be completed within one month, that the costs of the conveyance, etc. were to be borne half and half and that brokerage at two and a half per cent. was to be paid to Nandurdikar by both vendor and purchaser. The amount of the earnest money was also discussed, and this is the only point as to which there is any disagreement between Nandurdikar and Sir Shapurji. The former says that Rs. 7,000 was the

A. C. J. amount fixed, the latter says it was Rs. 10,000. Nothing turns on this, however, as Rs. 7,000 was the figure ultimately agreed on. Nandurdikar went away to fetch the earnest money and on his return Sir Shapurji sent him with Antia, one of the company's clerks, to the office of Messrs. Wadia, Ghandy & Co., the company's solicitors, to get the draft agreement prepared. Manekshaw after ascertaining what had been settled between Nandurdikar and Sir Shapurji drew up the draft agreement and read it over to Nandurdikar.

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Broomfield J. A discussion then took place.

There is a conflict of testimony as to the character of this discussion. Nandurdikar says that he queried the clause in the draft agreement about apportioning the fire policy between the vendor and purchaser and also wanted provision made about a watchman on the premises until delivery of possession; but as Manekshaw was not agreeable he did not press his points and agreed to all the terms. According to Manekshaw, Nandurdikar not only objected to the fire policy clause but also argued about the costs and wanted the time of completion extended from one month to three months. However, whatever Nandurdikar may have said, Manekshaw cannot have taken his objections very seriously, for he gave orders the same evening for the draft agreement to be engrossed. Moreover, Nandurdikar wrote that night to the plaintiff saying "I saw the liquidator to-day according to my yesterday's letter and the contract is settled to-day. It is settled at Rs. 63,000 and a *bayana chithi* has been passed. Rs. 7,000 have been paid as earnest and the sale deed is to be completed within a month. Costs are to be paid half and half." It can hardly be doubted that the parties were substantially in agreement on all points, or at any rate Nandurdikar was prepared to conclude the bargain on the terms of the draft agreement. That this was Manekshaw's own view of Nandurdikar's attitude on the 7th is clear from his letter of July 17 in the correspondence before the suit.

Nandurdikar says that the draft was initialled by him and Manekshaw. Manekshaw denies this. In the correspondence plaintiff's solicitors repeatedly asked for copies of the draft and engrossment and defendants' solicitors refused to furnish copies or give inspection. This conduct I think was rather pernickety, but it does not justify the inference that the document, exhibit 149, which was ultimately produced is not the original draft. There are no initials on it. It is to be noted that nothing was said about initials in the correspondence or even in the plaint. The trial Judge left the point undecided. I do not think it makes much difference whether the draft agreement was initialled or not. But if it had to be decided, I should say on the evidence that there were no initials.

Nandurdikar was given a receipt for the earnest money in this form :

"Received from Mr. Shankerlal Naraindas Mundade through Mr. Damodar Trim-buck Rs. 7,000 as earnest and on account of Rs. 63,000 being the price for the sale of the Pressing and Ginning Factory of the New Mofussil Company Limited at Dhulia with the land, building, machinery and stores in the factory on the terms of the draft agreement prepared this day."

There is a dispute between Nandurdikar and Manekshaw as to which was written first, the receipt or the draft agreement. Nandurdikar says the receipt was written last of all and that seems most probable as it refers to the draft

agreement. The point is not of material importance.

The terms of the draft agreement which were fair copied in the engrossment made on the morning of July 8 were as follows :—

1. That the vendor agrees to sell and the purchaser to purchase the land hereditaments and premises situate at Dhulia and more particularly described in the schedule hereto the Ginning and Pressing Factory thereon with their appurtenances free from incumbrances at the price of Rs. 63,000 to be paid as follows ; that is to say Rs. 7,000 as deposit on the signing of this agreement and Rs. 56,000 on the completion of the purchase.

2. The purchase shall be completed at the office of Messrs. Wadia Gandhi & Co., within one month from the date hereof. Up to the day of completion the vendor will receive the rents and profits and pay the outgoings of the premises and such rents and profits and outgoings and the amount of the premium (if any) on the fire policy effected on the said premises will be apportioned between the vendor and the purchaser.

There is a press pool agreement for the Pressing Factory which runs from year to year subject to notice of termination as therein provided. There is also a Gin Pool Agreement from November 16, 1935, to August 31, 1936. The purchaser will be bound by these agreements.

3. The vendor shall make out a marketable title to the said premises free from all reasonable doubts and clear at its own expense all claims and incumbrances of whatever nature on the said premises.

4. The vendor shall immediately on the signing of this agreement deposit with the purchaser's solicitors all the title deeds relating to the said premises.

5. The purchaser shall furnish to the vendors' solicitors his requisitions (if any) on the title within 10 days after receipt of the title deeds or after inspection thereof and if he does not do so he shall be deemed to have accepted the title.

6. If the purchaser shall make any objection or requisition which the vendor shall be unable or unwilling to remove or comply with the vendor may notwithstanding any intermediate attempt to remove or comply with the same rescind this agreement by notice in writing to the purchaser unless the purchaser shall within 7 days after such notice unconditionally withdraw such objection or requisition. In case of rescission the vendor shall repay the amount of earnest money without costs or interest.

7. Upon payment of the purchase money at the time and in the manner aforesaid the vendor shall make and execute to the purchaser or such person or persons as he may nominate a proper assurance of the said premises prepared by the purchaser's solicitors and approved by the vendors' solicitors.

8. On the completion of the purchase as aforesaid the vendor shall put the purchaser in possession of the said premises.

9. The vendor has not received any notice for the acquisition of the property under the Land Acquisition Act. If, however, pending the completion of the purchase any such notice is received it shall be optional to the purchaser to put an end to this agreement in which case the vendor shall repay to the purchaser the amount of the earnest money without interest or costs.

10. Except where otherwise provided all the costs and expenses of the vendor and the purchaser of and incidental to this agreement and the sale including investigation of title searches advertisements in one English and one vernacular paper *battakee* survey preparation of plans and conveyance including stamp duty and registration charges and certified copies (if any) and of correspondence (if any) shall be borne by the vendor and the purchaser in equal shares.

11. The broker in this transaction is Mr. Damodar Trimbeck Nandurdikar of Jalgaon. If the sale and purchase is completed but not otherwise the vendor and purchaser respectively shall pay him brokerage at the rate of two and a half per cent. on the amount of the purchase money.

It will be seen that there are a number of other terms besides those agreed on between Nandurdikar and Sir Shapurji. Some of them may be said to be

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A. C. J. matters of form, that is terms which would have been implied anyhow under  
 1940 the Transfer of Property Act. But this does not by any means apply to all  
 — of them, for instance the provision about the fire policy and about the press  
 NEW pool and ginning pool agreements in cl. (2). This latter provision not being  
 MOFUSSIL in the standard cyclostyled form had to be written in by hand. Clauses (6)  
 Co., LTD. and (7) and cls. (9) and (11) also contain important provisions for the benefit  
 v. of the vendor and purchaser respectively which would not have been implied  
 SHANKERLAL without special agreement.

*Broomfield J.*

On the afternoon of July 8, Nandurdikar went to the solicitors' office accompanied by plaintiff's brothers Tulshiram and Bhagirath who happened to have come to Bombay. He went again with the same two persons on the 9th, again with Tulshiram on the 10th, and again with one Sathe, a partner of Bhagirath, on the 11th. According to his story the only purpose of these visits was to arrange about the signing of the engrossment. He had at first offered to sign himself but was told that that would not do as he was mentioned in the agreement as the broker. Then he suggested that Tulshiram should sign and Manekshaw said he would consult Sir Shapurji about it. That was on the 8th, on which day according to Nandurdikar the description of the property was also not ready. On the 9th Nandurdikar says Manekshaw merely told him that he had not yet consulted Sir Shapurji and on the 10th he said that plaintiff must sign. Bhagirath left Bombay that evening to fetch plaintiff and on the 11th Nandurdikar looked in to tell Manekshaw that plaintiff would be coming on the 13th. Manekshaw then told him that the negotiations were at an end, and he protested against this. On the 13th he took plaintiff along with him to the office and asked Manekshaw to take his signature on the engrossment but Manekshaw refused and said that the agreement was broken and the earnest money should be taken back.

Manekshaw's story about the events of these days is that there was no difficulty about the description of the property—it was already sufficiently described in the schedule to the engrossment—and there was also no difficulty about Tulshiram signing. It did not matter to them who signed. But Nandurdikar was pressing for changes in the terms, in particular he wanted provision made for a watchman and he wanted the time for completion extended. Sir Shapurji was consulted and said that he was not agreeable to any change. He (Manekshaw) told Nandurdikar so on the 9th and Nandurdikar asked him to try and persuade Sir Shapurji. Next day he informed Nandurdikar that the transaction was at an end. . . . As to the 11th and the 13th Manekshaw's account does not differ materially from Nandurdikar's.

The learned trial Judge believed Nandurdikar who is supported by plaintiff's brothers. He was favourably impressed with Sir Shapurji's evidence but has criticised Manekshaw severely and refused to believe him even in matters where he is corroborated by Sir Shapurji. The learned Judge had of course the advantage of seeing the witnesses. I must say that in some respects Nandurdikar's story is to my mind a good deal less than completely convincing. I cannot help thinking that there must have been a certain amount of haggling on his part to account for all those interviews from the 8th to the 11th. It could not have taken long to settle who was to sign, and if that was the only point it is difficult to see why Nandurdikar did not wire or write to the plaintiff.

iff on the 8th or 9th and simply tell him to come to Bombay and sign. On the other hand it is scarcely credible that he was seriously insisting on any variation of the terms. Most of the things he is said to have argued about were trivial matters. He knew his principal was anxious to buy the factory. It was to his own interest to conclude the transaction. There is no reason to suppose that plaintiff was in any difficulty about finding the money. He had told Nandurdikar to arrange for two or three weeks' time and a month's time had been allowed. It does not stand to reason therefore that Nandurdikar would have risked a breakdown of the negotiations by standing out for a longer period. I think the trial Judge was clearly right in rejecting this part of the defendants' case.

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It was part of the plaintiff's case, though not expressly mentioned in the plaint, that Sir Shapurji resiled from the agreement because of the more advantageous offer from defendants Nos. 2 to 5. The evidence on this point is as follows. On July 12, a pleader from Dhulia acting for defendant No. 4 had a long talk with Manekshaw about purchasing the factory. On the 13th defendants Nos. 2 to 5 who had travelled from Dhulia to Bombay on the 12th (in the same train as the plaintiff as it happened) came to see Sir Shapurji and settled to purchase this factory and another one. Sir Shapurji says that he knew nothing about the new purchasers before the 13th. But on that day their broker Birmadutta, who used to visit Sir Shapurji's office from time to time on insurance business, wrote a letter to Sir Shapurji reporting the completion of the transaction and in this letter he said: "I shall thank you to reserve for me the agreed commission of three per cent. on the sale price as intimated on the 11th instant." This evidence certainly does not justify the trial Judge's finding that Sir Shapurji was negotiating a sale to defendants Nos. 2 to 5 from July 8. It may justify an inference that the negotiations began on the 11th, which is the date on which Manekshaw told Nandurdikar that his business was at an end. But in the view which we take of the law Sir Shapurji's motive for turning down the plaintiff's offer is immaterial. Indeed every item in the plaintiff's case might be conceded and he would still not be entitled to specific performance.

On the question whether what happened on July 7 amounted to a binding agreement between the parties many authorities were cited, the effect of which is summed up in Halsbury, Vol. XXIX, p. 237, paragraphs 321 and 322:—

"An acceptance must be absolute and unqualified. There is no completed contract if the acceptance is 'subject to approval of terms of contract'; or 'subject to a formal contract being prepared and signed by both parties as approved by their solicitors'; or simply 'subject to contract'; or where it otherwise appears that all the terms of the contract are not definitely settled or that additional terms are to be agreed to and inserted in the formal contract.

On the other hand, if it appears that the parties have agreed upon the essential terms of the sale, a mere intimation of a desire that the agreement shall be embodied in another document of a more formal nature, or the expression of what is necessarily a condition, not of the acceptance, but of the contract itself, does not prevent the agreement being enforceable.

It is a question of construction whether the parties have come to a final agreement, though they intend to have a more formal document drawn up".

I may also refer to Dart, Vendor and Purchaser, eighth edition, p. 227. Before referring to the cases I may point out that the law is the same in India as in

A. C. J. England : *Harichand Mancharam v. Govind Laxman Gokhale*<sup>1</sup> and *Currimbhoy & Co. v. Creet*.<sup>2</sup>

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The earliest important case on the subject is *Winn v. Bull*.<sup>3</sup> In that case there was a lease by written agreement of a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract." No other contract was in fact entered into by the parties and it was held that there was no final agreement which could be enforced. Sir George Jessel M. R. said (p. 30) :—

"I am of opinion that there is no contract. I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, 'We will have the terms put into form', then all the terms being put into writing and agreed to, there is a contract.

If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled."

Further on in his judgment he said (p. 32) :—

"It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."

These latter observations show that the decision did not turn on the fact that the stipulation about a formal contract was express.

*Winn v. Bull* was approved by Mr. Justice Parker, afterwards Lord Parker, in *Von Hatzfeldt-Wildenburg v. Alexander*.<sup>4</sup> In the course of his judgment his Lordship said (p. 288) :—

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

These observations have become classic and have been cited with approval in *Rossdale v. Denny*<sup>5</sup> and in many other cases.

Pausing here for a moment I may say that although the trial Judge in one place in his judgment has expressed the view that there was a concluded contract as the result of the conversation between Nandurdikar and Sir Shapurji on July 7, and that only a formal agreement remained to be drawn up, that is not and never has been the plaintiff's case. Neither in the plaint nor in Nandurdikar's evidence has it been stated or even suggested that the agree-

1 (1922) L. R. 50 I. A. 25.  
s.c. 25 Bom. L. R. 531.  
2 (1932) L. R. 60 I. A. 297.  
s. c. 35 Bom. L. R. 223.

3 (1877) 7 Ch. D. 29.  
4 [1912] 1 Ch. 284.  
5 [1921] 1 Ch. 57.



ment was finally concluded at the interview between Nandurdikar and Sir Shapurji. It is not even plaintiff's case as appearing in the pleadings and the evidence that the agreement was finally concluded by the oral discussion between Nandurdikar and Manekshaw, without reference to the written agreement. Nandurdikar has admitted that Sir Shapurji sent him to the solicitors' office to get the draft agreement prepared. It was the terms of the draft agreement which he discussed with Manekshaw. In the correspondence before the suit plaintiff's solicitors stated that they based their case on the draft agreement and the engrossment, and in paragraph 13 of the plaint it was quite definitely stated that the agreement of which specific performance was sought was the one contained in these two documents. In such a case it is difficult to see how Lord Parker's rule can assist the plaintiff. It is impossible to hold that the oral agreement only need be looked at and that the documents may be ignored, for it was admittedly part of the understanding between the parties that these documents should be prepared and the suit is actually founded on them. The question to be decided seems to me to be, not whether these documents were necessary or whether the agreement was complete without them, but whether, a draft agreement and engrossment being evidently contemplated by the parties, the contract can be said to be complete without the formal agreement being signed and executed.

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In that connection we have to refer to the line of authorities beginning with *Coope v. Ridout*.<sup>1</sup> The facts of that case are thus stated in the head-note :—

"Purchasers made an offer by letter to a vendor to purchase his freehold property at a specified sum 'subject to title and contract'. Negotiations followed, and the purchasers alleged that all the material terms were subsequently agreed to between the parties at an interview and by letters, and were embodied by the purchasers in a draft contract which the vendor returned unaltered with the words: 'it seems to be all in order.' The vendor having refused to complete, the purchasers brought an action for specific performance of the contract contained in the draft."

It was held that even assuming that all the terms of the agreement had been settled one by one and embodied in the draft, the condition contained in the offer required that a written agreement made *inter partes* should be formally entered into, and in the absence of such a document there was no enforceable contract. The case was originally tried by Mr. Justice Eve (1920, 2 Ch. 416) who said in the course of his judgment (p. 419) :—

"That brings me to the question of what is the true meaning of the condition. Is it fulfilled as soon as you can assert with confidence that the parties are *ad idem* and that a consensus on all material points has been reached? I do not think so. I think the condition contemplates and requires a written contract *inter partes* and formally entered into."

This view was affirmed by the Court of Appeal.

A similar decision was given by the Court of Appeal in *Chillingworth v. Esche*.<sup>2</sup> In that case there was an agreement to purchase land "subject to a proper contract to be prepared by the vendor's solicitors". A proper contract was subsequently prepared by the vendor's solicitors, approved by the purchasers as well as executed by the vendor and tendered to the purchasers for execution. The purchasers refused to sign. Nevertheless it was held not

1 [1921] 1 Ch. 291.

2 [1924] 1 Ch. 97.

A. C. J. only that there was no contract but that the purchasers were entitled to recover the deposit. Pollock M. R. seems to have attached some importance to the expression "proper contract", but the decision did not turn upon that. 1940  
 —  
 NEW *Coope v. Ridout* was followed among other cases by all the Judges and it was MOFUSSIL held that in the absence of an executed agreement either party was entitled CO., LTD. to break off negotiations "for reasons good, bad or indifferent", on the simple v. SHANKERLAL ground that there was no contract capable of enforcement.

— In *Lockett v. Norman-Wright*<sup>1</sup> Mr. Justice Tomlin (as he then was) held Broomfield ]. that an agreement "subject to suitable agreements being arranged by solicitors" was in the same category as agreements "subject to contract" "subject to formal contract" and "subject to proper contract" and that the principle laid down in *Coope v. Ridout* and *Chillingworth v. Esche* applied. It was not sufficient that the draft agreement should be approved by the solicitors. They were not agents to conclude a bargain for their clients. Execution of the agreement was essential.

I have already mentioned that the English law applies in this country. It must be applied *mutatis mutandis*. As we have no Statute of Frauds the agreement need not be in writing and therefore it may be a matter of oral agreement or even of inference from the conduct of the parties that the terms of their bargain are to be reduced to a formal contract. But once it is clear that that is the understanding the consequence must be the same as under the English law where the words "subject to contract" or similar words are used.

The understanding here was that there was to be a draft agreement and an engrossment of that draft. That I think is beyond dispute. It has never been suggested in the pleadings or the evidence that the preparation of these documents was in any way superfluous or contrary to the understanding between Nandurdikar and Sir Shapurji. I may at this point refer to the actual evidence. Sir Shapurji says that when Nandurdikar went away to get the earnest money he sent for Antia, the company's clerk, and told him the conditions agreed to between Nandurdikar and himself. Then I quote his own words :

"I asked him to wait until Nandurdikar came and to take him to Mr. Manekshaw to have the usual agreement drawn up. He came at about 5-30 p.m. and in his presence I again gave instructions to Antia to take him to Manekshaw to have the agreement drawn up."

In cross-examination on this point he said :

"Mr. Manekshaw had to take instructions from me about the terms. He had to put them into legal form and incorporate such other terms as to safeguard the interests of the client. In the present case the main terms were settled between me and Nandurdikar. The solicitors were to insert other terms about fire insurance and other usual terms."

Drawing up a draft agreement and engrossing it would naturally mean that the document was not to be a mere memorandum of terms already agreed on but was to be signed and executed. It seems to me that the plaintiff's case can only be taken out of the ordinary rule if he is able to show that execution was not necessary because the agreement or understanding between Nandurdikar and Sir Shapurji rendered it unnecessary. But Nandurdikar has never

said or suggested that the engrossment was not to be signed and his whole conduct even on his own showing indicates that he knew it had to be signed. He says that he had three interviews with Manekshaw to settle who was to sign it and even after he had been told that the negotiations were at an end he produced the plaintiff for the purpose of getting it signed. On what principle then can it be said that the agreement was complete without execution of the document? It seems to me that the case clearly falls within the principle of *Coope v. Ridout* and the other authorities cited.

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It may be mentioned, though learned counsel for the plaintiff did not make a point of it, that there was no written agreement in the case of the subsequent agreement of sale to defendants Nos. 2 to 5. According to Sir Shapurji a written bargain paper was dispensed with by consent in that case to save expense. We are informed that the receipt for the earnest money gave full details. But anyhow the absence of a writing in a different transaction cannot assist the plaintiff. Whether a written agreement is necessary and if so whether execution of the written agreement is necessary must obviously depend on the intention of the parties in the particular case. In our case the only possible inference seems to me to be that Sir Shapurji accepted Nandurdikar's offer subject to the execution of a written agreement and that Nandurdikar acquiesced.

Mr. Amin, I think, conceded that if that was our view of the evidence he would have no case. He cited some English cases, *Bornmewell v. Jenkins*,<sup>1</sup> *Bolton Partners v. Lambert*<sup>2</sup> and *Filby v. Hounsell*.<sup>3</sup> As to these it is only necessary to say, firstly, that they were all cases where there was originally a completed agreement. There was no doubt a stipulation for a formal contract, but the contract was to contain no new terms. These cases are therefore distinguishable from the present one on that ground. Secondly, they were all prior to *Coope v. Ridout*. Halsbury in his note to paragraph 322 already referred to says: "In practice the reference to a future contract is now treated as making the acceptance conditional on the signing of a formal contract."

We were also referred to *Bijoya Kanta Lahiri Chowdhury v. Kailash Chandra Bhosumik*.<sup>4</sup> The facts in that case were that the defendant entered into an oral agreement to grant the plaintiff a lease of his specified share in certain *mouzas* at a fixed annual rent and a stipulated premium, and a draft lease was to be prepared and approved of by his pleader. Part of the premium was paid at once and accepted by the defendant as earnest money. No draft lease was prepared and approved of, but it was held that the agreement was complete and enforceable notwithstanding the omission of the approved draft. The view which the Court took of the evidence was that the draft was intended by the parties to be merely commemorative of the terms already agreed upon and not a condition of the completion of the agreement. It is to be noted that this was a second appeal and the High Court was therefore bound to accept the findings of fact of the Court below. Mr. Justice Richardson in his judgment said (p. 777): "It is said that the mere fact that a formal document was contemplated was *prima facie* an indication that the parties did not

1 (1878) 8 Ch. D. 70.

2 (1889) 41 Ch. D. 295.

3 [1896] 2 Ch. 737.

4 (1919) I. L. R. 46 Cal. 771.

A. C. J. intend to be bound till it was executed. That may be so, but there was other evidence before the Court." He went on to say that the finding of the lower Court must be accepted because it could not be held that there was no evidence to justify it. Another point to be noted with regard to this case is that it is of the year 1919 and is therefore prior to *Coope v. Ridout*.

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The strongest case in favour of the plaintiff is *Harichand Mancharam v. Govind Laxman Gokhale*.<sup>1</sup> That was a case of a suit for specific performance based on two writings, practically in identical terms and signed respectively by the two parties. The conditions of sale were set out in considerable detail, and one of the conditions was that the bargain paper in respect of the sale was to be made through a vakil within two days. It seems that formal documents were prepared by the defendants' solicitors in which some additional terms were inserted, but the parties did not agree as to these terms. Their Lordships of the Privy Council agreeing with the judgment of the Appeal Court held that the plaintiff was entitled to specific performance. The case was decided in 1922 and *Coope v. Ridout* was not cited. But apart from that the case is clearly distinguishable from the present. Their Lordships said after referring to *Von Hatzfeldt-Wildenburg v. Alexander* (p. 31) :—

"The facts of that case were wholly different from the present, but the judgment marks the difference between a completed and binding agreement and one subject to a condition. Here exhibits A and A1 [those were the two documents signed by the parties containing the terms of the bargain] show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a Vakil only means that it should be put into proper shape and in legal phraseology, with any subsidiary terms that the vakil might consider necessary for insertion in a formal document."

Evidently therefore their Lordships thought that it was a case where according to Lord Parker's dictum the further writing could be ignored because it was to be merely a record of what was already agreed upon. The case would only have been similar to the present case if the plaintiff here had sued on the basis of the oral agreement between Nandurdikar and Sir Shapurji and not, as in fact he has done, on the draft agreement and engrossment.

I think, therefore, this appeal must succeed on the merits and plaintiff is not entitled to specific performance.

The trial Court has awarded plaintiff some small amounts by way of mesne profits and damages. In the cross-objections a larger amount is claimed. Learned counsel for the appellants argues that plaintiff is entitled to nothing under these heads. He is not entitled to mesne profits because he has no right to possession until the execution of a conveyance and therefore defendants' possession was not wrongful, and he is not entitled to damages because no specific amount was claimed, no Court-fees were paid for this relief and there is no evidence that any loss has been caused to him. I think there is a good deal of force in these contentions, but as the suit fails altogether in our opinion they need not be further discussed.

1 (1922) L. R. 50 I. A. 25, s.c. 25 Bom. L. R. 531.

DIVATIA J. I concur.

The main point arising for decision on the arguments urged before us is whether there was a concluded contract between the parties. In India an oral contract to sell is valid and binding on the parties. But where a dispute arises after a draft agreement in pursuance of the alleged contract is made, the question would be whether it was the intention of the parties to be bound by the contract as embodied in the written document or by the contract on the terms agreed upon orally before the draft was executed. That intention may be inferred in the absence of definite evidence by comparing the terms alleged to have been agreed before the draft with the further terms discussed or agreed as appearing in the draft. In the present case the evidence shows to my mind that the contract by which the parties were to be bound was to be embodied in a formal document prepared by the solicitor of the first defendant and signed by or on behalf of both the parties. The evidence of the plaintiff's broker is sufficient to show that although the main terms of the contract had been agreed to between him and Sir Shapurji on the 7th, there was a further discussion after he went to the office of the defendants' solicitors at least with regard to one topic which according to the plaintiff's broker did not form part of the terms discussed between him and Sir Shapurji. That term was about fire insurance. He says that he told Manekshaw that fire insurance was not agreed to but the latter told him that it was the usual form, that the sum was trifling and hence he did not ask Manekshaw to delete the clause. He further says that he told the solicitors to allow the plaintiff to put a watchman until the sale-deed was made, although according to him the keeping of the watchman was not going to be a term of the contract itself. In the draft agreement as well as the unsigned engrossment there are certain terms which were admittedly not agreed to between the plaintiff's broker and Sir Shapurji and which must be regarded as new and additional terms between the parties. Some of those terms were not merely formal provisions to be put by the lawyer in the document. The principal out of these terms are those relating to the pool agreement between the parties and the terms under clauses 6, 9 and 11 of the draft. Sir Shapurji says in his evidence that his solicitors had to put the main terms agreed upon in the legal form and incorporate such other terms as to safeguard the interests of his client. According to the evidence of the plaintiff's broker he sent the receipt to the plaintiff at Dhulia and when he was told that the plaintiff's presence was necessary for his signature on the engrossment, he sent word to him to come to Bombay for that purpose. That was so because it was the written contract containing all the terms agreed upon that was to govern the legal relation between the parties. Besides, it must be noted that what the plaintiff seeks to enforce in the present suit is specific performance of the contract as embodied in the draft agreement and the unsigned engrossment and not of the terms agreed upon between the plaintiff's broker and Sir Shapurji. That is a material point because it shows that the intention of the parties was to be bound by the terms as embodied in the written agreement.

If therefore the plaintiff seeks to enforce specific performance of the contract embodied in the draft agreement, it must be shown that that particular contract was concluded. It is, however, urged by learned counsel for the plaintiff

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A. C. J. that there were two contracts, one between Sir Shapurji and the plaintiff's  
 1940 broker and the other containing the additional terms in the draft agreement  
 — which were agreed to between the broker and the defendants' solicitors. As  
 NEW has been observed by Parker J. in the leading case on the subject in *Von*  
 MOFUSSIL *Hatzfeldt-Wildenburg v. Alexander*<sup>1</sup> the criterion in such cases is whether the  
 Co., LTD. execution of a further contract was a condition or term of the bargain or  
 v whether it was a mere expression of the desire of the parties as to the man-  
 SHANKERLAL ner in which the transaction already agreed to will in fact go through. Now  
 — here if all the terms which were embodied in the draft agreement had been  
 Divatia J. agreed to by the parties and what remained was for the lawyer of the party  
 — or parties to embody them into legal forms, the result might have been  
 different. But admittedly there were several terms which were discussed after  
 the main terms were fixed and the plaintiff's broker was sent to the solicitors  
 for the purpose of preparing a written agreement after discussion of those  
 other terms. The further contract was therefore a term of the bargain and  
 not merely an expression of desire. The question therefore is not whether  
 there was another contract after the first contract was completed, but whether  
 the intention of the parties was to make a proper contract by the execution of  
 a written document, and on that point I think the evidence points to the con-  
 clusion that it was the written contract between the parties that was to  
 govern the relations between them. That being so, the authorities relied upon  
 by the learned counsel for the appellants would apply to the present case.

Out of a number of authorities which have been cited before us I think the  
 material authorities are the decisions in *Coope v. Ridout*<sup>2</sup> and *Chillingworth*  
*v. Esche*<sup>3</sup> and *Lockett v. Norman-Wright*.<sup>4</sup> All of them proceed on the basis  
 that where the agreement was to be subject to a contract or subject to a proper  
 contract or subject to a suitable arrangement being made between the solicitors  
 of the parties, it is the finally executed contract that governs the legal relation  
 between the parties. In India, as I said before, there can be an oral agreement  
 to sell. But there also the principle applicable would be the same if from the  
 oral agreement between the parties it can be concluded that the parties were to  
 execute a written document containing the terms of the agreement as a condi-  
 tion of the contract.

On this view of the law it is not necessary to dwell upon a good deal of the  
 evidence which has been discussed by the learned Judge. But I may say  
 briefly that in my opinion the defendants have not proved that the plaintiff's  
 broker objected to the two conditions about the period of completion and the  
 cost of execution. On the other hand it appears from the letters exhibits 147,  
 148 and 150 that the plaintiff was very eager to conclude the bargain and that  
 the broker had informed plaintiff on the evening of the 7th as to what had  
 happened between him and the defendants' solicitors. But the question is not  
 what the plaintiff thought about the result of the arrangement but what would  
 in law be the result if the intention of the parties was to be governed by the  
 terms of the written agreement. Plaintiff says that the defendants backed  
 out because they had a better offer. The evidence shows that on the 11th

1 [1912] 1 Ch. 284.

2 [1921] 1 Ch. 291.

3 [1924] 1 Ch. 97.

4 [1925] 1 Ch. 56.

when the defendants' solicitors told the plaintiff's broker that the negotiations were at an end the defendants had some talk with the agents of the subsequent purchasers. The question, however, is not whether the conduct of the subsequent purchasers is, as has been put in one case, good, bad or indifferent, but whether there had been a concluded contract between the parties. The learned Judge below has based his decision on the defendants' failure to prove that the plaintiff's broker backed out after the terms were settled, but the legal relations between the parties as urged before us on behalf of the defendants had not been put or at any rate stressed before the learned Judge. The decisions in *Harichand Mancharam v. Govind Laxman Gokhale*<sup>1</sup> and *Currimbhoy & Co. v. Creel*<sup>2</sup> make it clear that on this point the English law applies to contracts for sale in India and that being so, the law as laid down in the latest rulings under the English law must apply to the facts of the present case.

It has been conceded by the learned counsel on behalf of the respondent that if the agreement between the parties is to be read subject to a contract or subject to the terms being embodied in a written document, then the authorities relied upon on behalf of the appellants would apply to the present case, and, as on the evidence it appears to me that the parties were to be bound by the written agreement, those authorities would apply with the result that till defendant No. 1's solicitor told the plaintiff's broker that the matter was off it was only in the stage of negotiations between the parties and had not reached the stage of a concluded contract. I therefore agree that the contract having not been concluded it was open to defendant No. 1 to break off the negotiations before the engrossment was executed by both the parties.

On behalf of the respondent reliance has been placed upon the decision of their Lordships of the Privy Council in *Harichand Mancharam v. Govind Laxman Gokhale*. That case bears some resemblance to the facts of the present case. But I do not think it is on all fours with our case. There were two writings there passed by the parties to each other in which all the material terms of the contract were embodied and a lawyer was to put those terms into legal shape. Subsequently certain subsidiary terms were introduced in the document and it was put into proper legal form. Here, however, the terms alleged to have been agreed to in the first instance were not all the terms embodied in the document but only the main terms and the other terms embodied in the draft agreement cannot in my opinion be regarded as merely subsidiary. Besides, in that case the action was brought not on the terms as appearing in the written document prepared by the lawyer but on the terms agreed to by the parties in the two written documents. Here, as I said before, the plaintiff seeks specific performance not of the terms agreed to between the plaintiff's broker and Sir Shapurji but of the terms in the draft agreement about which there was no discussion in the alleged first contract. The decision in *Harichand Mancharam v. Govind Laxman Gokhale* therefore would not apply to the facts of the case before us.

With regard to the points of jurisdiction and leave required under O. II,

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1 (1922) L. R. 50 I. A. 25,  
s.c. 25 Bom. L. R. 531.

2 (1932) L. R. 60 I. A. 297,  
s.c. 35 Bom. L. R. 223.

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r. 4, I think the lower Court had the jurisdiction to entertain the present suit as it falls in any case under s. 16 (d) of the Civil Procedure Code, and under the combined operation of O. I, r. 3, as well as O. II, r. 3, it would be open to the plaintiff to seek specific performance of the contract as well as possession of the property. It is true that it has been laid down in several cases that specific performance of a contract and possession of the property agreed to be sold are two different causes of action and therefore they cannot be combined in one suit except with the leave of the Court, and indeed there are observations in one decision of this Court, viz. *Bhagwandas v. Naran*,<sup>1</sup> that leave should be obtained under O. II, r. 4. It may be more proper to ask for such leave on the ground that the causes of action are distinct, although they could be combined in one suit. Here, however, the point is academical because I do not think that even if leave was necessary it would affect the merits of the case under s. 99 of the Civil Procedure Code. The suit therefore was properly brought in the Dhulia Court and the want of leave under O. II, r. 4, would not necessarily result at the present stage in the dismissal of the suit. But, as the plaintiff fails on the merits in proving that there was a concluded contract between the parties, I am of the opinion the suit must be dismissed on that ground.

PER CURIAM. Appeal allowed, the decree of the lower Court is set aside and the suit dismissed with costs throughout. Cross-objections dismissed with costs.

*Appeal allowed : cross-objections dismissed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Wassoodew.*

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—

APYA SHETTYA TALAWAR

v.

RAMMAKKA APYA TALAWAR.\*

*Hindu law—Adoption—Illegitimate son—Mother whether competent to give him in adoption.*

Under Hindu law, even among Shudras, a woman is incompetent to give in adoption her son born of adulterous intercourse.

SUIT for declaration.

The parties to the suit were Mahars, a sub-caste of Shudras.

The plaintiff Ramakka was the widow of one Apya. She adopted Shettya, who was married to Mallawa. After Shettya's death, Mallawa adopted Apya (defendant) on November 15, 1928.

<sup>1</sup> (1932) 34 Bom. L. R. 1322.

\* Second Appeal No. 26 of 1939, from the decision of T. B. Shanbhag, Assistant Judge at Belgaum, in Appeal No. 229 of 1937, confirming

the decree passed by B. K. Khade, Additional Joint Subordinate Judge at Belgaum, in Regular Civil Suit No. 130 of 1935.



The defendant was the son of his mother Malli and was born of adulterous intercourse. He was born years after the death of Malli's husband.

Mallawa remarried after she took defendant in adoption.

The plaintiff was in possession of the property of Shettya.

On April 9, 1935, the plaintiff sued for a declaration that the defendant was not the validly adopted son of Shettya.

The trial Court granted the declaration sought, observing as follows :—

"It is inconceivable to think that the parents who are said to possess the power to give a son in adoption are not the duly wedded husband and wife. It is repugnant to the notions of the Hindus and against the spirit of the Hindu law of adoption that a child that is born of illicit intercourse can be an adoptee. The text on the point as to who has the power to give in adoption means that the father, i.e. the duly wedded husband of the mother of the boy, has a primary right to give the boy in adoption, and that after his death the mother has the power to give a son in adoption. It would appear from this that the adoption of an illegitimate son is not favoured by the Hindu law and the illegitimate son cannot be an adoptee.

The objects of adoption are two-fold : The first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering the funeral cakes and libations of water to the manes of the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adoptee's name. If the primary object of adoption was to gratify the manes of the ancestors by annual offerings, it was necessary to delude the manes as it were into the idea that the offerer really was the descendant. He was to look as much like a real son as possible, and certainly was not to be one who could never have been a son. As the chief reason for adoption is the performance of funeral ceremonies it follows that one who from any personal disqualification would be incapable of performing them and who for that reason would not look as much like a real son would be an unfit person to be adopted. A son born of illicit intercourse is disqualified from performing the funeral ceremonies. If such a boy is adopted it can hardly be conceived that he would become competent to secure spiritual benefit to the adopter and his ancestors by offering funeral cakes and libations of water. So from this point of view also an illegitimate son is not eligible to be an adoptee.

An illegitimate son has not the status of a son even among Shudras and is not entitled to a share of the inheritance. He is entitled to a share of the inheritance only in the case when it is proved that he is a *dasi-putra* and that he is not the fruit of an adulterous or incestuous intercourse. He is not competent at all to perform any funeral ceremonies or offer any libations of water to his putative father or his putative father's ancestors. The result of an adoption is that the adopted boy gets all the rights and privileges of a legitimate son. He gets the status of a son. He is entitled to inherit to his father and to collaterals of his adoptive father. He becomes competent to offer funeral cakes to the adoptive father and his ancestors. If an illegitimate son is deemed to be eligible to be an adoptee, he shall come to possess this status, these rights and this competence which he originally never possessed. This position is really inconceivable and against the general principles and spirit of the Hindu law of adoption. Looked at from any point of view an illegitimate son cannot be eligible to be an adoptee even among Shudras."

On appeal the decree was affirmed by the Assistant Judge, for the following reasons :—

"It is an established principle of Hindu law that among the regenerate classes an illegitimate son born as *dasi-putra* is entitled to maintenance and nothing more. The rights of an illegitimate son are enlarged among Shudras when he is not born of incestuous or illicit intercourse...An illegitimate son even among Shudras is ranked much inferior to a legitimate son in that he gets half a share of the latter. It is, therefore, clear that under the Hindu law an illegitimate son when his rights are enlarged among Shudras does not rank or does not occupy the same status as a

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A. C. J. legitimate son. Running through the principles of Hindu law the son that is considered to be fit for adoption is a legitimate son. I agree with the argument of the learned pleader for the appellant that the spiritual aspect of adoption among Mahars must be negligible. It may be even nil, but there is the other aspect to adoption which is secular. But even under that aspect I cannot think that an illegitimate son can be allowed to occupy the same status as a legitimate-born child."

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The defendant appealed to the High Court.

*P. S. Bakhale*, for the appellant.

*P. B. Gajendragadkar*, for the respondent.

WASSOODEW J. This is a second appeal from a decree of the Assistant Judge of Belgaum. The dispute relates to the validity of the adoption of the defendant to the action. The suit was instituted by one Ramakka, a Holer or Shudra by caste, for a declaration that the defendant was not legally adopted on November 15, 1928, to her deceased son Shettya by the latter's widow Mallawa; and for confirmation of the plaintiff's possession of her son's estate owing to the remarriage of Mallawa. The validity of the adoption was questioned on two principal grounds: (1) that the defendant was born of an adulterous intercourse, his conception and birth having taken place long after his mother's husband's death, and (2) that the mother, although a Holer or Shudra, had given him in adoption after her remarriage. Both the Courts below have found, and the finding is not challenged before us, that the defendant was an offspring of adulterous intercourse and that he was given in adoption before his mother's remarriage. On account of the former defect the Courts below have held that the adoption is invalid in law and accordingly the plaintiff's claim was allowed. The defendant has appealed against that decree and he maintains that that view of the law is erroneous.

The question of the validity of the defendant's adoption has to be considered from different stand-points: first, the capacity of the adoptive parent to take in adoption; secondly, the capacity of the natural parent to give in adoption; and, thirdly, the capacity to be given or taken in adoption. As to the capacity of the adoptive parent there is no dispute. The controversy centres round the last two points.

The capacity of the mother to give the defendant in adoption has been challenged on the ground that the mother's capacity is restricted to her legitimate son and does not extend to a son of an adulterous or incestuous intercourse. The argument is that an illegitimate son does not fall in any of the recognized classes of sons under the Hindu law, and that not being specially referred to in the texts as a fit object for being given in adoption it must be assumed that the Rishis discouraged the adoption of such a son. The capacity to be given and taken in adoption is also similarly challenged, for, it is said that the defendant not being a son of the recognized description will be unable to fulfil the spiritual object of adoption by giving the pinda. It is also contended that as an adopted son must be of the same caste as the adopter even among Shudras, the defendant could not be adopted as an offspring of an adulterous intercourse belongs to no caste.

Now, ordinarily a mother is capable of giving her son in adoption according to the Hindu law. The basis for that authority is the following text of Manu (c. IX, 168):

"That (boy) equal (by caste) whom his father or his mother affectionately give, (confirming the gift) with (a libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son Dattrima (दत्त्रिम),"

(See F. Max Muller's Sacred Books of the East, Vol. XXV, p. 361). Yajñavalkya (II, s. XI, v. 130) says the same thing :

"He, whom his mother or father may give (in adoption) shall be considered as 'the adopted son'."

Baudhayana (c. II, 2, 3 and 20) declares thus :

"He is called a Dattaka son who being given by his father and his mother or by either of the two, is received in the place of a child."

(Dattaka Mimamsa, s. IV, 14) :

"Both parents alone have the power, for the connection to them is equal."

According to the texts, if both the parents are alive, their concurrence seems to be necessary. Mitakshara, while explaining Yajñavalkya's definition of a Dattaka son (c. I, s. XI, 9), says :

"He, who is given by his mother under her husband's direction, when her husband is absent on a journey or is dead (after her husband's decease), or who is given by the father, or by both, to a person of the same class, becomes the adopted son (दत्तक) of him to whom he is given."

The author of the Viramirodaya (see Golapchandra Sarkar's translation, p. 115) observes thus :

"He, whom the mother with her husband's assent, or the father gives to another, becomes his adopted son."

In his Vyavahara-Mayukha referring to the above description by Manu of a Dattaka son, Nilakantha observes (Vyavahara-Mayukha, p. 50, Mandlik's Edition) :

"From the particle 'or' (in the passage 'the mother or the father give') it appears that in default of the mother, the father alone may give ; and in default of the father, the mother alone ; but if both are in existence, then even both ; this, Madana (says)."

The relative rights of the father and the mother to make the gift of a son in adoption do not seem to have been discussed in detail in Dattaka-Chandrika ; but the following observations of Devanda-Bhatta are important (Dat. Chand. 1. 31-32) :—

"But, by a woman, the gift may be made with her husband's sanction if he be alive or even without it, if he be dead, or remotely absent, or retired from the world."

Accordingly Vasistha ordains,—

"Let not a woman, either give or receive a son, except with the assent of her husband." (Sutherland's translation.)

According to Dattaka-Mimamsa there is no express recognition of the right of a woman to adopt, but in reference to Vasistha he admits that a woman is also competent to give a son with the husband's assent. In relation to the texts of Manu and Yajñavalkya Nanda Pandita says that "what is said of the mother in these passages must be taken to be subject to the assent of her husband." (See Dattaka-Mimamsa, s. IV, 11).

Upon the parental proprietorship of a child the above texts are in my opinion easily explainable. The limitation on the mother's sole power to give must

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A. C. J. necessarily operate during the lifetime of the husband. Therefore as the child  
 1940 belongs to both the parents, when one dies, the survivor has the right to give.  
 — The instances given in the texts indicated above whereunder the mother is per-  
 APYA mitted to give her son during the lifetime of her husband are in my opinion  
 SHETTYA merely illustrative of the circumstances under which that power can be exer-  
 v. cised.  
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 — son in adoption was considered, and it was held that that right was not de-  
 Wassoodew J. rived by delegation from her husband and that it was the result of the mater-  
 — nal relation. The Court there was considering whether the mother retained the  
 right to give her son in adoption upon her remarriage, and it was held that  
 the Hindu Widow Remarriage Act (XV of 1856) did not afford any indi-  
 cation that the Legislature intended to deprive her of it. The question was  
 again considered by the full bench of this Court in *Fakirappa v. Savitrewa*,<sup>2</sup>  
 where it was held that a Hindu widow on her remarriage loses all power of  
 giving her son by her first husband in adoption, because her connection with  
 the family of her husband, which is necessary for the act of giving in adoption,  
 ceases on remarriage. It was pointed out that the Smriti-writers did not con-  
 template a remarriage of a Hindu widow, and that as they prohibited widow  
 remarriage it could not be assumed that the right to give the son in adoption  
 was retained upon remarriage. The full bench does not expressly overrule  
 the view adopted in *Putlabai v. Mahadu* that the right of a female parent  
 to give the son in adoption results from the maternal relationship and is not  
 derived by delegation from her husband. All that it says is that the maternal  
 relationship ceases on remarriage. A step-mother is unable to give her step-son  
 in adoption because there is absence of parental relationship (see *Papamma*  
*v. V. Appa Rau*<sup>3</sup>). Where there is such relationship, it has been held that the  
 right to give is not affected by the conversion of the parents [see *Shamsing*  
*v. Santabai*<sup>4</sup>.] There is no doubt that parental relationship does exist bet-  
 ween a mother and her adulterous offspring—there is indeed hereditary blood  
 between the mother and her illegitimate child [see *Mayna Bai v. Uttaram*<sup>5</sup>]  
 —and the mother of an illegitimate son may on that account claim domain  
 over him. The right of a mother to give her son in adoption independently  
 of the father is however founded upon the existence of special circumstances  
 such as those enumerated in the texts. The conditions governing that right  
 are that the child to be given is the son of her husband and that the latter is  
 incapable of giving his assent. Prima facie these two conditions are impossible  
 of fulfilment in the case of a bastard child.

As I shall presently show, an illegitimate son is not the son contemplated  
 by the Rishis and the Codes who can be a fit object of a gift within the capa-  
 city of the mother. It appears that there is no clear text dealing with the  
 gift of a son of an adulterous intercourse born to a Hindu widow, for the  
 Rishis did not consider such a contingency. At least, we have not been re-  
 ferred to any textual authority suggesting that such a son could be given in

1 (1908) I. L. R. 33 Bom. 107,

s. c. 10 Bom. L. R. 1134.

2 (1920) 23 Bom. L. R. 482, F.B.

3 (1893) I. L. R. 16 Mad. 384.

4 (1901) I. L. R. 25 Bom. 551,

s. c. 3 Bom. L. R. 89.

5 (1864) 2 M. H. C. R. 196.

adoption. Whilst it is said for the plaintiff that the Hindu law treats with disfavour and attaches stigma on an adulterous intercourse, it is contended to the contrary for the defendant, namely, that there is no disabling stigma about adultery amongst Hindus, particularly among Shudras, to which class the parties belong, as illegitimate children have been allowed to inherit and claim maintenance among Shudras. Reliance was placed on the observations of Cowell in his Treatise on Hindu Law (Part I, *vide* pp. 170-171) where he says as follows :—

“There is no disabling stigma about adultery amongst Hindus, and it follows that illegitimacy does not confer disgrace. Sonship confers so great advantages upon fathers, that the question of legitimacy is one which originally had no effect, even in excluding from inheritance. The son whether of concealed birth, or born before marriage, belonged to the husband.”

We were also referred to *Hargovind Kuari v. Dharam Singh*,<sup>1</sup> *Ram Kali v. Jamma*,<sup>2</sup> and *Mayna Bai v. Uttaram* for the view that an illegitimate son is not regarded by the Hindu law *quasi filius nullius* and that an illegitimate son could claim, among the regenerate classes, maintenance and among Shudras, a share in the inheritance out of the estate of his putative father [see *Inderun Valungypooly Taver v. Ramaswamy Pandia Talaver*.<sup>3</sup>] But those cases are clearly distinguishable on the facts. In the first Allahabad case the Court was considering the question of maintenance claimed by a *dasi-putra* and the observations were made with regard to the social status of an illegitimate son of a ‘*dasi*’ or a female slave living in continuous concubinage with the father. In *Ram Kali*’s case the Court was considering the question of the claim of an illegitimate son of a Shudra to inheritance out of the estate of his putative father. These are particular instances where the Courts have allowed the custom among Shudras to prevail. But it cannot be said on that account that Hindu law tolerated or even encouraged loose morals. On the other hand, it is noticeable that it set a high moral standard both for men and women. Adultery was regarded as *उपपत्तिक* (sin) on the part of both men and women. Manu says (c. VIII, vv. 371 and 372) :

“The king shall cause her (the wife who violates the duty to her lord) to be devoured by dogs in a place frequented by many.”

The punishment was death for the adulterous wife and the adulterer (see Manu VIII, v. 359). Such was the severity of the law that it prescribed punishment for visiting a house of ill repute. Mayne has quoted Mitakshara on Yajnavalkya, Part I (Achar) 90, 222, in support of his statement that under the Hindu law the marriage tie was extremely strict and the offspring of adulterous intercourse (कुल or गोलक) was excluded from social intercourse as well as from invitations to Shradhas or obsequial ceremonies (*vide* Mayne on Hindu Law and Usage, 10th Ed., p. 109). According to Apastamba Sutra,

“If a man approaches a woman who had been married before, or was not legally married to him, or belongs to a different caste, they both commit a sin Through their (sin), their son also becomes sinful.”

(See Buhler’s Sacred Laws of the Aryas, Part I, Prasna II, Patala 6, Khanda 13, p. 130, 4 and 5).

1 (1884) I. L. R. 6 All. 329.

3 (1869) 13 M. I. A. 141.

2 (1908) I. L. R. 30 All. 508.

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- A. C. J. . In summarising the view of the texts relating to secondary sons the following observations occur in Mayne on Hindu Law and Usage (c. IV, pp. 122-123, paragraph 81):—
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- "It is beyond doubt that, so far as spiritual benefit was concerned, there was none to the husband from the issue of his wife's adulterous connection. The assumption sometimes made by modern writers on Hindu law, that, as the first duty of a man was to become the possessor of male offspring either the Veda or the Dharmasastras directed him somehow to procure a son, even though such a son was born to his adulterous wife, is wholly baseless. On the contrary, far from declaring these sons, the Kshetrāja, the Gudhaja, the Sahodhaja and the Kanina, to be necessary for a man's spiritual benefit, they emphatically condemned, for that very reason, the acceptance of such secondary sons... The condemnation from such ancient times shows that it could not have been at any time a widely prevalent usage, but must have been limited to a few tribes or families. The hopeless confusion and contradiction which prevail amongst the writers as to the respective rank of these sons and the shares to which they were entitled and on the question which of them were kinsmen and heirs and which of them were kinsmen only, make it very probable that they were not dealing with any living institution but were merely discussing for completeness the tradition of a bygone age, the exact scope and meaning of which were not within their own knowledge."

Golapchandra Sarkar's view of the texts on subsidiary son is thus summarised by him in his lectures (Hindu Law of Adoption, 2nd Ed., Tagore Law Lecture Series, p. 66):—

- "The conclusion to which any one carefully perusing the subject of sonship as dealt with in the Codes, must come, is that the usage of secondary sons was not introduced by them. It had been an existing institution from before the time when the Codes were composed, and was disapproved by all of them. The doctrine of spiritual benefit conferred by sons, was introduced by the Rishis with a view to raise the position of the real legitimate son and to suppress the institution of the secondary sons. The passages in the Codes, extolling the possession of a son for spiritual purposes, do most if not all of them, relate to the real legitimate son; the secondary sons being declared worthless for those purposes. But although disapproving of the institution of the secondary sons the sages did not declare invalid any one of them, though more or less condemned and censured".

The view of Cowell has perhaps been expressed with reference to the primitive state of Hindu society and to the tolerance of loose morals amongst the very lowest strata of society. He was apparently referring to the rules of heritage among secondary sons. But the secondary sons except Dattaka are now obsolete and strictly forbidden—(see Dattaka Mimansa, I, 64, quoting Saunaka—Sutherland's Ed., p. 16). Having regard to the rigorous injunction against adultery, it is difficult to conceive that the Rishis had accepted the possibility of Kunda or Golaka, born of incestuous connection, procuring salvation and conferring spiritual benefit on the receiver, particularly when according to Yajñavalkya even his presence at a shraddha was inauspicious (see Yajñavalkya, I, 222).

Apart from the question of practical expediency as to the disposal of a bastard child in a manner most convenient to both the child and the parent, it will be interesting to ascertain whether an adulterous son would conform to the description of a son which the Rishis recommended for adoption. It is suggested that the twelve classes of sons, which are enumerated in ancient Smritis, might well include an illegitimate son. According to Vishnu-Smṛiti

(XV, 1-30,—Asiatic Society's Sanskrit Edition, pp. 43-44) the twelve sons which the ancients recognized were :

"The real legitimate son, the son of the appointed wife, the son of the appointed daughter, the son of the twice-married woman, the son of an unmarried daughter, the secretly born son of an adulterous wife, the son received with a pregnant bride, and the son given, the son purchased, the son self-given, the deserted son and the son begotten on any woman."

He then adds,—

"Of these the first in order is the most worthy ; he alone is entitled to the heritage, and he shall maintain the rest."

He apparently omits the *kritrima* or the son made and includes Yatrakvachanotpadita as one description of son and thus completes the number twelve. Vasistha also enumerates the sons in the same order as Vishnu, substituting, however, the Shudra-putra or the son born of a Shudra wife for Yatrakvachanotpadita, but he divides them into two groups of six each and declares that the first six are heirs and kinsmen and the second six are only kinsmen but not heirs. So Yajnavalkya, after describing the different sons, declares,

"On failure of the legitimate son, the next in order is the giver of the pinda and the taker of the heritage."

(Yajnavalkya II, 132 or 134) (Pindadah, i.e. performer of Sraddha, and Ansaharah, successor to the effects). (See Mitakshara I, XI, 22).

The above classification of sons under twelve heads by the commentators is as I have said not recognized in modern Hindu law. In *Nagindas Bhugwandas v. Bachoo Hurkissondas*<sup>1</sup> their Lordships of the Privy Council were considering the relative position of an adopted son and a natural son in the same family, and they observed as follows (p. 67):—

"...it is sufficient to say that, whatever may have been the position and rights between themselves of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and the adopted, are long since obsolete. A discussion as to their rights and interests, even if they could now be ascertained, would be beside the point and could throw no light on the construction of paras. 24 and 25 of s. 5 of the Dattaka Chandrika or upon the position and rights of an adopted son. Hindu law and customs have not stood still, and what we are now concerned with is the position at the present time of an adopted son in a Hindu family."

They held that an adopted son occupied the same position in the family as a natural born son except in a few instances which were actually defined in the Dattaka Chandrika and the Dattaka Mimansa and which related to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father.

What kind of son Manu (Sacred Books of the East, Vol. XXV,) had in contemplation when he recommended the taking of a son in adoption will be understood from the following passage (c. IX, vv. 137 and 138):

"Through a son he conquers the worlds, through a son's son he obtains immortality, but through his son's grandson he gains the world of the sun.

"Because a son delivers (trayate) his father from the hell called Put, he was therefore called put-tra (a deliverer from Put) by the Self-existent (Svayambhu) himself."

1 (1915) L. R. 43 I. A. 56, s. c. 18 Bom. L. R. 172.

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Manu evidently contemplated by the term *गृह्य* a son begotten by a man and his wife duly married. That is obvious from the division of wives into *patnis* and *non-patnis* and the exalted principles of morality which he preached in order to elevate the position of women and the discouragement of subsidiary sons. I do not think it necessary to enter into a discussion of the motive underlying the ancient usage prior to the Codes which permitted a father to claim illegitimate sons as his own. It is sufficient to show that the Rishis in the Codes condemned the affiliation of subsidiary sons.

Yajnavalkya describes an 'aurasa son' to be one begotten on a lawfully wedded *patni*—(see Yajnavalkya II, 128). According to Manu :

"an 'aurasa son' is a son procreated by a man himself on his wife wedded with religious rites"—(see Manu, IX, 166).

Apastamba appears to require that the wife should belong to the same caste with the husband and be espoused with religious rites (*Sāstravihita*) in order that a son begotten on her may be an *aurasa* son—(see Apastamba, II, 5, 13, 1-2). Putra according to Manu therefore was a perfect son. The necessity of a pure offspring to perform the spiritual duties of a son is inculcated in the following passage in Atri-Smṛiti (Jibananda Bhattacharya's Edition of Smṛitis, Vol. I, p. 45):—

"A damsel who is purchased by price is not ordained to be a *patni*; sons born of her cannot present *पितृ* (funeral cake) to their father."

Dattaka Chandrika does not even permit a son of irregular marriage even if *औरस* to perform the obsequial ceremonies. It says that a son of a wife belonging to an inferior tribe is incapable of performing the religious rites conducive to the spiritual benefit of his father. (See Dattaka Chandrika, I, 14). He might be an *aurasa* son, but for spiritual purposes he has no value. He may serve the secular purposes, such as, the perpetuation of the line and the family name. That is an important consideration in the present case, for according to the Rishis although an *aurasa* son may occupy a foremost rank in the classification of sons, he may not be fit to confer spiritual benefit on his father if he is not the offspring of a wife duly married. If therefore according to the texts even an *aurasa* son of impure origin is not quite fit to offer the *पितृ*, any other kind of son not begotten of lawful wedlock will be much less competent to promote spiritual welfare.

It was contended on behalf of the appellant that having regard to the special place a *dasi-putra* has in Hindu law, particularly among Shudras, for he could claim inheritance in his father's estate, the circumstance of birth from illicit connection should not be regarded as a defect for conferring spiritual benefit on a Shudra father, as Shudras do not observe all the obsequial rituals commonly observed by the regenerate classes. It is also said that there is no express prohibition in the texts against the adoption of an illegitimate son among Shudras. That view does not seem to be correct. If the object of affiliation is principally to confer spiritual benefit on the father, it is difficult to discriminate between regenerate classes and Shudras in the matter of selection of a son in adoption. I think the rules as regards *Anuloma* and *Pratiloma* sons apply equally to Shudras, for they are entitled to practise the universal Dharmas or duties. We were referred to the text of Manu, (Sacred



Books of the East, Vol. XXV, c. X, 5, 41), to the following effect :—

“But all those born in consequence of a violation (of the law) are, as regards their duties, equal to sudras.” शूद्राणां तु सधर्माणः

It is urged that as the Shudras belong to the lowest varna and as persons born of adultery with regenerate classes are to be treated as equal to Shudras, it is not proper to say that among Shudras there should be a prohibition against the adoption of an adulterous son. Vijnanesvara in his commentary has explained the expression “as regards their duties are equal to Shudras” as merely implying that they are entitled to serve the twice born. Yajnavalkya says (c. IV, 90):

“By men of the same caste (Varna) in women of the same caste (Varna) are born सजातीय (sons of equal birth or caste). In blameless marriages sons (are begotten) continuing the line.”

That precept applies equally to Shudras. Manu (X. 5) says :—

“In all castes (Varna) those (children) only which are begotten in the direct order on wedded wives, equal (in caste and married as) virgins, are to be considered as belonging to the same caste (as their fathers).”

The word ‘varna’ is a generic term. There may be numerous ‘jatis’ in the same ‘varna’. A son produced by a lawfully wedded wife of a lower varna by a lawfully wedded husband of a higher varna is असवर्ण and not regarded as legitimate and is described as an Anuloma son. The sons produced of women of different varnas and not wedded to the begetter are Pratiloma sons. The word ‘sajati’ means one having the same jati as his father and mother if they are married. Yajnavalkya explains the ‘jatis’ of sons begotten of a Shudra woman by either a Brahmin, Kshatriya or Vaisya. For instance, a son begotten on a Shudra by a Brahmin father is termed Nisada or a Parasava, that on a Vaisya an Ambastha, and that on a Kshatriya a Murdhavasikta (see Yajnavalkya, I, 91, 92). I was unable to discover any text giving a particular ‘jati’ to a son born to a Shudra woman from an unknown father. No authority was cited in support of the view that an adulterous son could be taken in adoption by a Shudra, nor, as I have said, were we referred to any text recognizing the capacity of a mother to give her adulterous son in adoption.

It is necessary, in my opinion, that among Shudras a son in order to possess the capacity to be given and taken in adoption must be of the same class (सदृश) as that of the adopter (see Manu IX, 168, quoted in Mitakshara, c. I : c. XI, s. 9). The Mayukha quotes the following passage from Saunaka in support of the view that the son to be adopted by Shudras must be from amongst those of the Shudra caste (Mandlik’s translation, Parts I and II, p. 53) :

“Amongst Brahmanas, the adoption of a son should be made from amongst the sapindas, or in their absence, an asapinda [one not a sapinda] may be adopted, otherwise one should not be adopted; amongst Kshatriyas, one from their own class, or one whose gotra is the same as that of the [adopter’s] preceptor may be adopted; amongst Vaisyas, from amongst those of the Vaisya class; amongst Sudras, from amongst the Sudra class; amongst all classes, from amongst their respective classes only, not from others.”

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—  
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A. C. J. The Mitakshara on Yajnavalkya (c. II, on Achar, I, V. 90) states that sons  
1940 born of women of the same caste that are married to the man beget sons who  
— belong to the same caste and that persons like the kunda and golaka, the  
APYA maiden's son, the sahodhaja and the like are not of the same varna. All these  
SHETTYA differ from savarnas and are only entitled to perform the duties common to  
v. all, such as ahimsa (non-injury to life). Steele in his Book on the Law and  
RAMMAKKA Custom of Hindu Caste (p. 180) says that children of the women living in  
APYA adultery have no caste. There are similar observations in *Mayna Bai v.*  
— *Wassoodas J. Uttaram.*

It follows from what is stated above that persons born in lawful wedlock belong to the caste of their parents, whilst the apadhvasajas, that is born of adultery, belong to no caste, and are 'analogous to Shudras as to their duties.' As I have said, it does not follow from the text referred to that they belong to the 'Shudra varna'. The commentator merely describes what duties such sons should perform and he ascribes to them the lowest duties which befall to men. Yajnavalkya (c. II, 128-132) after enumerating the twelve kinds of sons (*see* Mandlik's Hindu Law, pp. 218-219) expressly says that all the twelve sons must be sajatiya, then only will they succeed to the estate of the father. The sages never contemplated that an adulterous son would be called upon to perform a religious ceremony. The Nirayasinidhu makes it clear (*see* p. 381 of Naure's translation, 2nd Ed.) that only an aurasa son can offer sraddha or pinda. It does not say that any son outside the description of sons, such as a son born of adulterous intercourse to a widow, could be taken to perform the spiritual duty to his adoptive parent. The fact that the Shudras do not observe the ceremonial of 'Datta homa' and that certain restrictions imposed by the texts on the regenerate classes as to the choice of the boy do not apply to them, would not in my opinion legalise the adoption of an illegitimate offspring by a Shudra.

It is important to bear in mind that a son entitled to perform sraddha in the adoptive family must be capable of performing sraddha to his own father. This a son born in adultery cannot do, for he has no known father. The rituals too do not permit a son to offer sraddha to his mother independently of the father. If, therefore, he is incapable of finding his natural father so as to perform his sraddha, in my opinion, it is difficult to see how he could minister to the spiritual requirements of the adoptive family. It appears from the following passage in Dattaka Mimansa (Stokes' Translation, Section VI, pl. 36, p. 609) that the adopted son must associate his genitive father when performing the funeral ceremony known as 'sapindi-karana':—

"'This is general':—that is, this ceremony of 'sapindi-karana', where the adopted son, and his son also are sons of two fathers must be equally performed [by their descendants] with both sets of forefathers." (*See also* Dattaka Chandrika—Stokes, III Ed., pl. 19-21, pp. 650-651).

If, therefore, he has no genitive father to whom he can offer pinda, he will not be able to perform the 'sapindi-karana' of the adoptive father. In that view of the matter it seems to me difficult to support the defendant.

Consequently I think the Courts below were right in holding that the defendant's adoption is not legal and valid. I would therefore dismiss this appeal with costs.

BEAUMONT C. J. I have had the opportunity of reading the judgment which my learned brother has just delivered, and I agree with the conclusions at which he has arrived. I do so with some reluctance, because I cannot help feeling that, if the mother of an illegitimate child desires to part with it in favour of some one anxious to take it, the arrangement is not one which the law should discourage. Moreover, a law which penalizes a man during the whole of his life on account of the accident of his birth seems to me essentially unjust. However, adoption under Hindu law cannot be regarded solely from the standpoint of social expediency, or abstract justice. The system is based, as the Privy Council has recently held, on the religious sentiments of the people and the belief that the soul of the deceased man will derive benefit from the performance of religious ceremonies by his surviving son, natural or adopted. The texts referred to by my learned brother seem to show that an illegitimate son, at any rate one who is not a *dasi-putra*, would not be regarded as qualified to perform the requisite religious ceremonies for his adoptive father, and, if that is so, the basis on which a valid adoption must rest is absent. I agree, therefore, that the appeal must be dismissed with costs.

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*Appeal dismissed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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—  
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*Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 22 †—Decree—Execution—Immoveable property—Attachment and sale—Status of agriculturist—When can such status be pleaded—Civil Procedure Code (Act V of 1908), Sec. 51.*

Under s. 22 of the Dekkhan Agriculturists' Relief Act, 1879, in cases where there is not a single order for attachment and sale in execution of a decree, but there is an order for attachment alone intended to be followed by an order for sale, it is open to the judgment-debtor to set up his status of an agriculturist both when an order for attachment is sought, and also subsequently on the application for an order for sale.

The expression "belonging to", used in the section, not being a term of art refers to the beneficial title, and the question which has to be determined under

\* First Appeal No. 145 of 1940, from the decision of S. T. Ranade, First Class Subordinate Judge at Poona, in Original Darkhast No. 121 of 1935.

† The material portion of the section runs as follows:

22. Immoveable property belong-

ing to an agriculturist shall not be attached or sold in execution of any decree or order passed whether before or after this Act comes into force unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates and the security still subsists.

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the section is whether at the critical moment the party to whom the property belongs beneficially is an agriculturist.

*Shamrao v. Malkarjun*,<sup>1</sup> explained.

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• *Maruti v. Martand*<sup>2</sup> and *Sopana v. Dattatraya*,<sup>3</sup> referred to.

v.

PROCEEDINGS in execution.

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The decree under execution, which was a preliminary decree on a mortgage dated April 8, 1925, was passed on January 21, 1931, against Vishvanath (defendant No. 3) and his three brothers for Rs. 12,478-8-0. It was made final on November 14, 1931.

On February 3, 1932, the decree-holder Balaram Anandram applied (dar-khast No. 263 of 1932) to execute the decree for recovering Rs. 14,773-11-3 by sale of the property mortgaged. The property was sold for Rs. 6,713-12-0, and the darkhast struck off on July 31, 1933.

On October 28, 1933, a personal decree against the judgment-debtors was applied for, and it was passed for Rs. 9,000 and costs on May 29, 1934.

On January 17, 1935, the decree-holder applied to recover Rs. 9,741-14-0 by sale of property belonging to defendants. An order for attachment of the property under O. XXI, r. 54, of the Civil Procedure Code, was passed on February 9, 1935. In those proceedings, Vishvanath (defendant No. 3) and his son (defendant No. 5) raised a contention for the first time that they were agriculturists, and that their property was exempt from attachment by virtue of s. 22 of the Dekkhan Agriculturists' Relief Act, 1879. The Subordinate Judge raised the following issue :—

“Whether defendants Nos. 3 and 5 were agriculturists at date of personal decree (May 29, 1934) or at date of attachment (February 9, 1935).”

The above issue was found in the negative on January 13, 1939, so far as defendant No. 3 was concerned.

On March 2, 1940, when the matter came up for passing an order for sale, defendant No. 3 once again raised the contention that he was an agriculturist at that date, but the Subordinate Judge negatived it, for the following reasons :—

“It is contended that once when the property is attached and again when the order for sale under r. 64 of the Civil Procedure Code is passed, i.e. on two occasions, and not on either of the two occasions, the plea of status can be raised. In support of this contention reliance is placed on 36 Bom. L. R. 804 (*Sopana v. Dattatraya*). In that case it was held that the material date for the purpose of status was the date on which the order for sale, under r. 64 of O. XXI, of the Civil Procedure Code, was passed. The order for sale in that case was passed on April 21, 1932, the property having been attached shortly before, i.e. on March 9, 1932. The intervening period being very short, a question of the kind that has arisen in the present case, did not arise there. A point was raised in that case by the judgment-debtor, in answer to the notice issued to him, under r. 66 of O. XXI, that he was an agriculturist; and therefore it was necessary in that case to consider whether he was an agriculturist at the time of the order for sale.

“In the present case, however, it has happened that the point was raised at the time of the attachment; and it has been held that the judgment-debtor No. 3 was not an agriculturist. Again taking advantage of the fact that, about three years have elapsed and the order for sale is now being proposed to be made, he wants

1 (1931) 33 Bom. L. R. 797.

3 (1934) 36 Bom. L. R. 804.

2 (1922) 24 Bom. L. R. 749.

to contend that at the present date he has become an agriculturist. In my opinion, however, it is not open to him to contend that he has now become an agriculturist. The reason is that the execution proceeding is one whole proceeding, and it cannot be the intention of the legislature to leave it open to a judgment-debtor to raise the point of status at different stages of the same proceeding. See *Shamrao v. Malkarjun* (33 Bom. L. R. 797). In that case, even before the attachment, it was contended by the legal representative of the judgment-debtor that he was an agriculturist; and it was held that he was not. Again he having contended at the time of the order of attachment that he was an agriculturist, it was held that it was not open to him to do so, the point being *res judicata*. ... In my opinion, taking into consideration the word 'or', the intention of the Legislature, and the anomalous position that may arise if again and again the same point is raised, and also the decision in 33 Bom. L. R. 797, I feel that the judgment-debtor cannot raise the same question again."

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Eventually on March 8, 1940, the Court ordered the property to be sold. Defendant No. 3 appealed to the High Court.

*P. B. Gajendragadkar*, for the appellant.

*S. R. Parulekar*, for the respondent.

BEAUMONT C. J. This is an appeal from the First Class Subordinate Judge of Poona raising a question in execution in a case falling within the Dekkhan Agriculturists' Relief Act, 1879.

The material facts are that in 1931 there was a mortgage decree against the judgment-debtor, the present appellant, for Rs. 12,000, and a decree was passed on the basis that he was not an agriculturist, and in 1932 his property was sold for appreciably less than the amount due. In 1934 the creditor obtained a personal decree against the judgment-debtor for the balance, and on January 19, 1935, the present darkhast was issued asking for attachment and sale of the immoveable property of the judgment-debtor, and on February 9, 1935, an order was made for the attachment of the immoveable property. The judgment-debtor on that occasion maintained that he was an agriculturist, having become so since the date of the decree; but it was held against him that both on the date of the decree, May 29, 1934, and on the date of the order of attachment, February 9, 1935, the judgment-debtor was not an agriculturist. Section 22 of the Dekkhan Agriculturists' Relief Act provides that immovable property belonging to an agriculturist shall not be attached or sold in execution of any decree, unless the property has been specifically mortgaged. In this case the property sought to be sold had not been specifically mortgaged, and the judgment-debtor now contends that an order for sale of the property cannot be made, because since the date of attachment he has become an agriculturist. A literal reading of s. 22 prohibits property belonging to an agriculturist from being either attached or sold, and suggests that the question of status arises both when the property is attached, and when it is sold. I think that the learned Subordinate Judge was disposed to adopt that construction of the Act, but he held, relying on a decision of this Court in *Shamrao v. Malkarjun*<sup>1</sup>, that the judgment-debtor, having raised the question as to his status at the time when the order for attachment was made, was bound by the finding against him

<sup>1</sup> (1931) 33 Bom. L. R. 797.

A. C. J. throughout the execution proceedings, and that the matter was really *res*  
1940 *judicata*.

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Now, in *Shamrao v. Malkarjun* it was held that where property, belonging to a non-agriculturist judgment-debtor passed on his death into the hands of his heir who was an agriculturist, the heir was entitled to the benefit of the Dekkhan Agriculturists' Relief Act, 1879. In so deciding, the Court followed an earlier decision of this Court, *Maruti v. Martand*,<sup>1</sup> and that view of the law is binding upon us, though the point does not directly arise in the present case. I take it that the expression "belonging to" in s. 22 of the Dekkhan Agriculturists' Relief Act not being a term of art refers to the beneficial title, and the question which has to be determined is whether at the critical moment the party to whom the property belongs beneficially is an agriculturist. But then the Court in *Shamrao's* case went on to hold, according to the head-note, that an order passed in the course of an execution proceeding was binding on the parties at subsequent stages of the same proceeding. At first sight that looks as if the decision was in favour of the view taken by the learned Subordinate Judge, but on reference to the *roznama* in that case it appears that the order there made was an order for both attachment and sale. So that no question arose in that case of different dates for attachment and sale. There was only one order, both for attachment and sale, and I agree with the view taken by the Court in that case, and also by this Court in *Sopana v. Dattatraya*,<sup>2</sup> that in the case of a sale the crucial date for the application of s. 22 is the date of the order for sale. It cannot have been the intention of the legislature that after an order for sale has been made, the judgment-debtor is still to be able to raise the question of change of status right up to the moment when the sale is confirmed. In my opinion, however, *Shamrao's* case does not support the view of the learned Subordinate Judge that the fact that the judgment-debtor was held to be an agriculturist in February, 1935, when the order for attachment was made, prevents him from contending that he is no longer an agriculturist when an order for sale is asked for.

Then it is argued that s. 22 of the Dekkhan Agriculturists' Relief Act does not really deal with two dates, but deals with two methods of execution, execution by attachment and sale, and execution by sale without attachment, both modes of execution being allowed under s. 51 of the Civil Procedure Code. It is said that the section should be read as meaning that the immovable property belonging to an agriculturist debtor shall not be attached, or, where there is no attachment, be sold. There is a certain amount to be said in favour of that construction from the point of view of expediency, as tending to reduce the already excessive number of opportunities allowed to an agriculturist debtor to delay his creditor. But the construction contended for by the respondent is not the most literal construction of the section, and a serious objection to adopting such construction is that s. 51 of the Civil Procedure Code was incorporated for the first time in 1908, long after the passing of s. 22 of the Dekkhan Agriculturists' Relief Act, and at the time when s. 22 was passed, the only method of executing a decree

1 (1922) 24 Bom. L. R. 749.

2 (1934) 36 Bom. L. R. 804.

against immovable property was by attachment and sale. The construction contended for would not have been open when s. 22 was passed. In my opinion, therefore, we must read s. 22 literally, and hold that where there is not a single order for attachment and sale, but there is an order for attachment alone intended to be followed by an order for sale, it is open to the judgment-debtor to set up his status of an agriculturist both when an order for attachment is sought, and also subsequently on the application for an order for sale.

The appeal, therefore, must be allowed. The learned Judge directed the sale of the appellant's property on March 8, 1940. That order will be set aside, if it is proved that the judgment-debtor is an agriculturist, and the matter must go back to the lower Court to consider whether at the time when the Court is asked to make an order for sale the judgment-debtor is an agriculturist.

The appellant to get the costs of the appeal. Costs in the lower Court will be costs in the cause.

*Appeal allowed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

GOVINDNAIK GURUNATHNAIK KALGHATGI

*v.*

BASAWANNEWA PARUTAPPA KARAJGI.\*

1940

November 14.

*Indian Limitation Act (IX of 1908), Art. 181, Secs. 6, 15—Civil Procedure Code (Act V of 1908), O. XXXII, r. 10—Mortgage—Preliminary decree—Final decree—Decree-holder minor—Stay of suit during minority—Whether application for final decree can be made after period of minority.*

On February 20, 1925, plaintiff No. 1, for himself and as next friend of his minor brother plaintiff No. 2, obtained a preliminary decree on a mortgage. Plaintiff No. 1 then died on January 20, 1927. In April 1933 plaintiff No. 2 attained majority, but died in September of the same year. Meanwhile in June 1933 the widow of plaintiff No. 1 adopted the applicant, who applied on July 31, 1934, for a final decree on the mortgage. A question having arisen whether the application was barred by limitation :—

*Held*, that the application was made within time, inasmuch as on the death of plaintiff No. 1, next friend of the minor plaintiff No. 2, the right to apply for a final decree was suspended during the period of plaintiff No. 2's minority in which the suit was stayed by virtue of O. XXXII, r. 10, of the Civil Procedure Code, 1908.

*Pulin Chandra Sen v. Amin Mia Musaffar Ahmad<sup>1</sup> and Lakhan Chunder Sen v. Madhusudan Sen,<sup>2</sup> followed.*

LIMITATION for application to make a preliminary decree on mortgage final.

\* Second Appeal No. 628 of 1939, from the decision of N. K. Dravid, Assistant Judge at Dharwar, in Appeal No. 271 of 1936, confirming the decree passed by R. M. Kulkarni, Joint Sub-

ordinate Judge at Hubli, in Application in Suit No. 682 of 1924.

1 [1933] A. I. R. Cal. 508.

2 (1907) I. L. R. 35 Cal. 209.

A. C. J. In 1920, one Parutappa (husband of Basawannewa) executed a mortgage  
 1940 in favour of one Govind (father of Gurunath and Ramchandra, plaintiffs  
 — Nos. 1 and 2).  
 GOVINDNAIK Govind died in 1924.  
 GURUNATH- On February 20, 1925, plaintiff No. 1 acting for himself and as the next  
 NAIK friend of his minor brother plaintiff No. 2 obtained a preliminary decree on  
 BASAWAN- the mortgage.  
 NEWA Plaintiff No. 1 died on January 20, 1927. Plaintiff No. 2 attained majority  
 PARUTAPPA on April 12, 1933, but died on September 13, 1933.

Meanwhile, in June 1933 the widow of plaintiff No. 1 adopted Govind (applicant) as son.

On July 31, 1934, the applicant applied for a final decree on the mortgage. Basawannewa (the widow of the mortgagor Parutappa) contended that the application was barred by limitation.

The trial Court dismissed the application as barred by limitation, observing as follows :—

“There is no provision in the Indian Limitation Act which is held to be exhaustive in scope, which can be invoked to suspend the running of limitation where a plaintiff or applicant dies after the cause of action had accrued until a minor co-plaintiff attains to majority or a legal representative is brought on record. It may be perfectly legitimate to hold as was done in 51 Mad. 701 and 4 Pat. 61 that when the next friend of a minor plaintiff dies and no new next friend is brought on record the suit cannot be dismissed as having abated but should be treated as held in abeyance until the minor attains majority, but in those cases the effect of art. 181 had not to be considered. To say in a case like the present one in which time had definitely begun to run from August 20, 1925, that because plaintiff No. 1 died in 1927 having a minor plaintiff on record and no next friend was appointed, the running of limitation came to a standstill suddenly on January 20, 1927, in the middle, would be to invent a new species of exemption which is not recognized in any provisions of the Indian Limitation Act. The Act specifically lays down the cases in which the running of limitation may be suspended for the specified time and also cases in which the periods should be computed from a particular starting point or excluded from calculation in certain circumstances. They can be treated as the only recognized exceptions to the general rule that when once time begins to run on the accrual of cause of action no subsequent events can stop it ... The statute of limitation does not distinguish the rights of a party but only bars the remedy after a prescribed period which is based on sound principle that a party should not sleep over his rights and harass the other side after an inordinate long period. In holding, therefore, that this application is barred by limitation, I should not be understood to be dismissing the suit itself or going against the law laid down in 4 Pat. 61, 5 Pat. 223, 49 All. 592 and 51 Mad. 701. I have already distinguished A. I. R. 1933, Cal. 508 as dealing with the case of a sole plaintiff who happened to be a minor. In this case, time began to run from August 20, 1925, when Gurunath was alive. He died without applying for a final decree. He was in a position to give full discharge for both the plaintiffs and time began to run against both. The subsequent events therefore of his death in 1927 and failure to bring another next friend on record cannot stop time running as they are not covered by any of the exceptions created in the Indian Limitation Act.”

The above order was, on appeal, confirmed by the Assistant Judge, for the following reasons :—

“As this case is governed solely by O. XXXII, r. 10, Civil Procedure Code, the conclusion must rest on the reasoning that no authority restricting or altering the



operation of art. 181 of the Indian Limitation Act exists either in the Indian Limitation Act or in the Civil Procedure Code. Hence, the application was barred by limitation after three years from August 20, 1925. Against this I was referred to A. I. R. 1933 Cal. 508, where a minor plaintiff ceased to be represented after the preliminary decree owing to the death of his next friend, but was allowed to make the application in suit for a final decree within three years of his majority. The lower Court distinguished this case from the present facts on the ground that there was a single plaintiff in that suit; so that s. 7 of the Indian Limitation Act was avoided. The application of s. 7 was to my mind misconceived; the Calcutta ruling indicates that art. 181 was considered as overcome by the stay of the suit under O. XXXII, r. 10. It is difficult to hold that this is so when neither the Civil Procedure Code nor the Limitation Act lays down that a stay under O. XXXII, r. 10, should be condoned. Section 15 of the Limitation Act refers to condonation only if there is a definite order from the Court. No such is involved by O. XXXII, r. 10, Civil Procedure Code."

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The applicant appealed to the High Court.

*K. G. Datar*, for the appellant.

*G. R. Madbhavi*, for the respondent.

BEAUMONT C. J. This is a second appeal from a decision of the Assistant Judge of Dharwar, which raises a question of limitation.

The material facts are that there was a mortgage passed in 1920, which became vested in plaintiffs Nos. 1 and 2, plaintiff No. 2 being a minor. They filed a suit to enforce the mortgage, plaintiff No. 1 being the next friend of plaintiff No. 2. On February 20, 1925, a preliminary decree was passed, and an application for a final decree could have been made at any time after August 20, 1925. In January, 1927, plaintiff No. 1 died, and no next friend of plaintiff No. 2 was appointed. The result was that under O. XXXII, r. 10, of the Civil Procedure Code, all further proceedings in the suit were stayed for the time being. Plaintiff No. 2 attained his majority on April 12, 1933, and he died on September 13 in the same year. The applicant was adopted by the widow of plaintiff No. 1 in June, 1933, and in July, 1934, applied, as legal representative and heir both of plaintiff No. 1 and of plaintiff No. 2, for a final decree. Both the lower Courts have held that the application is barred under art. 181 of the Indian Limitation Act, which provides that applications for which no period of limitation is provided elsewhere shall be barred after three years from the time when the right to apply accrues. The lower Courts have held that the right to apply for a final decree accrued on August 20, 1925, and as this application was not made until July, 1934, it is barred.

If the view of the lower Courts is right, the result is unfortunate. It seems unjust that time to make an application in a suit should continue to run during a period when the suit has been stayed by statute, and no application is possible. A next friend might die the day after the making of the preliminary decree, and in such case, if no new next friend be appointed for three years, the right to apply for a final decree is barred although it only existed effectively for one day. No doubt, if that is the effect of the Indian Limitation Act, we can only so hold.

Section 6 of the Indian Limitation Act, which excludes periods of minority, only applies to a person entitled to institute a suit or make an application

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for the execution of a decree, and the application for a final decree in a mortgage suit is not an application for the execution of a decree. That section therefore does not apply. Section 15 of the Act recognizes the principle that in computing the period of limitation prescribed for an application for the execution of a decree, any period during which the execution of the decree has been stayed must be excluded; and it would certainly seem right to apply a similar principle to applications in a suit which has been stayed; in terms, however, the section does not apply. The only authority on the point, to which we have been referred, and which was referred to in the lower Courts, is *Pulin Chandra Sen v. Amin Miah Muzaffar Ahmad*.<sup>1</sup> In that case there was a single plaintiff who was a minor and his next friend died. It was held that by virtue of O. XXXII, r. 10, the suit was in abeyance, and that when the minor plaintiff attained the age of majority, which was more than three years from the date of the preliminary decree, a right to apply for a final decree first accrued to him. We may, I think, properly follow that case which has stood for some years and not been dissented from, though I feel some doubt whether it is correct to hold that a fresh cause of action arose to the minor on attaining majority. I would rather base the appellant's case on the ground that the right to apply for a final decree was suspended during the period in which the suit was stayed. Such a principle was applied by the Calcutta High Court in *Lakhan Chunder Sen v. Madhusudan Sen*,<sup>2</sup> affirmed by the Privy Council in *Nrityamoni Dassi v. Lakhan Chandra Sen*.<sup>3</sup> In that case parties sued for recovery of certain property, and it was held that the right to bring the action was suspended during a period in which a decree, subsequently reversed in appeal, existed in the applicants' favour, and necessarily prevented them from filing a suit.

If the time during which this suit was stayed under O. XXXII, r. 10, be excluded, the application is in time. We, therefore, allow the appeal with costs throughout. The application will have to go back to the lower Court to be dealt with according to law.

SEN J. I agree.

*Appeal allowed.*

<sup>1</sup> [1833] A. I. R. Cal. 508.

<sup>2</sup> (1907) I. L. R. 35 Cal. 209.

<sup>3</sup> (1916) I. L. R. 43 Cal. 660,  
 s. c. 18 Bom. L. R. 418, P.C.

Before Mr. Justice N. J. Wadia.

THE VITA MUNICIPALITY

v.

GANGARAM TATYAJI JADHAV.\*

1940

November 11.

*Bombay District Municipal Act (Bom. III of 1901), See 86 †—Appeal to Magistrate—House-tax and water-tax—Decision by Magistrate—Magistrate acts as persona designata—Revision—High Court—Civil Procedure Code (Act V of 1908), Sec. 115.*

A Magistrate hearing an appeal under s. 86 of the Bombay District Municipal Act, 1901, acts as a *persona designata*; and therefore an order passed by him under the section is not open to revision by the High Court under s. 115 of the Civil Procedure Code, 1908.

In re *Dalsukhrām*<sup>1</sup> and *Ahmed Sullēman v. Municipal Commissioner of Bombay*<sup>2</sup>, referred to.

*Surat Municipality v. Hamiduddin*<sup>3</sup> and *Lokmanya Mills Ltd. v. Municipal Borough, Barsi*<sup>4</sup> considered.

THE opponent Gangaram owned a house within the limits of the Vita Municipality (applicant). The house was assessed by the applicant at Rs. 12 for house-tax and water-tax.

An appeal was preferred by the opponent against the assessment to the Second Class Magistrate at Khanapur under s. 86 of the Bombay District Municipal Act, 1901. On appeal, the assessment was reduced to Rs. 10.

The applicant Municipality applied to the High Court in revision under s. 115 of the Civil Procedure Code, 1908, against the reduction in the assessment.

At the hearing a preliminary objection was raised by the opponent that the High Court had no jurisdiction to interfere in revision with the order passed by a Magistrate as *persona designata* under s. 86 of the Bombay District Municipal Act, 1901.

*P. B. Gajendragadkar*, for the applicant.

*P. V. Kane*, for the opponent.

N. J. WADIA J. This is an application in revision against an order made by the Second Class Magistrate, Khanapur, under s. 86 of the Bombay District Municipal Act (Bom. III of 1901). The petitioner, the Vita Municipality, issued a notice of demand against the opponent in respect of a Municipal claim for house-tax and water-tax under s. 82 of the Bombay District Municipal Act. The opponent appealed to the Second Class Magistrate,

\* Civil Revision Application No. 63 of 1940, against an order passed by S. G. Chavan, Second Class Magistrate, Khanapur.

† The material portion of the section runs as follows :—

“Appeals against any notice of demand issued under sub-section (3) of section 82 may be made to any

Magistrate or Bench of Magistrates by whom, under the directions of the Provincial Government, or of the District Magistrate, such class of cases is to be tried.”

1 (1907) 9 Bom. L. R. 1347.

2 (1929) 32 Bom. L. R. 178.

3 (1937) 40 Bom. L. R. 387.

4 (1939) 41 Bom. L. R. 937.

A. C. J. Khanapur, against the notice of demand under s. 86 and the learned Magistrate reduced the tax from Rs. 12 to Rs. 10. Against that order the Municipality has applied in revision.

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A preliminary objection is raised by Mr. Kane for the opponent that no revision application lies. His contention is that under s. 86 of the Act the Magistrate to whom the appeal was made was a *persona designata*, and against his decision no appeal or revision application would lie to this Court. The section provides that appeals against any notice of demand issued under sub-s. (3) of s. 82 may be made to any Magistrate or Bench of Magistrates by whom under the directions of the Provincial Government, or of the District Magistrate, such class of cases is to be tried. The section lays down certain conditions which must be satisfied before such an appeal can be heard and determined, but we are not concerned here with those conditions. It has been held in *In re Dalsukh Ram*<sup>1</sup> that under s. 86 of the Bombay District Municipal Act, 1901, a Magistrate hearing an appeal of the kind mentioned in the section is merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability and he is therefore not an inferior criminal Court, to which alone the revisional jurisdiction of the High Court under s. 435 of the Criminal Procedure Code applies. The case did not deal with the question whether a revision application against a Magistrate's order would lie to the High Court on the civil side.

The power given to a Magistrate or Bench of Magistrates under s. 86 is analogous to the power which is given to the District Judge under s. 22 of the Act to determine disputes about the validity of elections. That section provides that if the validity of an election is brought in question by any person, such person may, subject to certain conditions, apply to the District Judge of the District within which the election has been or should have been held, and an inquiry into the matter shall be held by a Judge, not below the grade of an Assistant Judge, appointed by the Provincial Government either specially for the case or for such cases generally. The section provides that the decision or order of the Judge shall be conclusive. It is now well-settled that the Judge referred to in s. 22 is a *persona designata* against whose decision no appeal or revision application lies to this Court. Provisions exactly similar to those of s. 86 of the Bombay District Municipal Act are to be found in s. 110 of the Bombay Municipal Boroughs Act, Bom. XVIII of 1925, and ss. 217 and 219 of the City of Bombay Municipal Act, Bom. III of 1888. In the case of the latter Act, s. 219 provides that the decision of the Chief Judge of the Small Cause Court, to whom under s. 217 appeals against any rateable value or tax fixed or charged under the Act lie, shall be final. In *Ahmed Sulleman v. Municipal Commissioner of Bombay*,<sup>2</sup> it was held by a division bench of this Court that the decision of the Chief Judge of the Bombay Small Cause Court under s. 219 of the City of Bombay Municipal Act is as a *persona designata*, and no revision application lies to the High Court against the decision. The provisions of s. 110 of the Bombay Municipal Boroughs Act, 1925, are identical with the provisions of s. 86 of the Bombay District Municipal Act, but there is one important difference. Whereas

1 (1907) 9 Bom. L. R. 1347.

2 (1929) 32 Bom. L. R. 178.

the District Municipal Act contains no provision for any revision of the order made by the Magistrate or Bench of Magistrates, the Municipal Boroughs Act contains an express provision in s. 111 that every entry in the assessment list made under the provisions of the Act against which no objection is made as therein provided, and the amount of every sum claimed from any person under the Act on account of any tax, if no appeal therefrom is made as thereinbefore provided, and the decision of the Magistrate or Bench of Magistrates upon any appeal, shall, at the instance of either party, be subject to revision by the Court to which appeals against his or their decisions ordinarily lie. The question whether the High Court can entertain a revision application under s. 115 of the Code of Civil Procedure against an order made by the Sessions Judge in revision under s. 111 of the Bombay Municipal Boroughs Act came before this Court in *Surat Municipality v. Hamiduddin*,<sup>1</sup> and it was held by Mr. Justice Norman sitting singly that the High Court could entertain such an application. The question was again considered by a bench of this Court in *Lokmanya Mills Ltd. v. Municipal Borough, Barsi*,<sup>2</sup> in which it was held, agreeing with the decision of Mr. Justice Norman in *Surat Municipality v. Hamiduddin*, that an application lay to this Court against an order made by a Sessions Judge under s. 111 of the Bombay Municipal Boroughs Act. It is argued by Mr. Gajendra-gadkar for the applicant Municipality that the provisions of s. 110 of the Municipal Boroughs Act are exactly similar to the provisions of the Bombay District Municipal Act, and that therefore the decision in *Lokmanya Mills Ltd. v. Municipal Borough, Barsi*, must by analogy be held applicable. But although the provisions of the two sections are similar, the Legislature has deliberately made a distinction as to the effect which appeals under them would have. It would have been perfectly easy for the Legislature which had inserted s. 111 in the Municipal Boroughs Act of 1925 to insert a corresponding provision in the District Municipal Act. But it did not do so, and the only inference that can be drawn is that it thought that a provision for some revising authority was necessary in the case of the more important Municipalities to which the Act of 1925 was intended to apply, but that such a provision was not necessary in the case of the less important Municipalities governed by the District Municipal Act of 1901. The view taken by this Court in *Lokmanya Mills Ltd. v. Municipal Borough, Barsi*, was a necessary consequence of the distinction so made. Once the Legislature provided a remedy by way of an application in revision against an order of the Magistrate or Bench of Magistrates under s. 110 of the Boroughs Act to the Court to which appeals against the decision of the Magistrate would ordinarily lie, it impliedly made the decision of the Magistrate under s. 110 not a decision of a *persona designata*, but the decision of a Court, subject to revision by the Court to which appeals against the Magistrate's decision would ordinarily lie. There is therefore no reason for applying the decision in *Lokmanya Mills Ltd. v. Municipal Borough, Barsi*, by analogy to a decision of a Magistrate under s. 86 of the Bombay District Municipal Act. The Legislature has deliberately made a distinction between the appeals provided by the two

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sections, and the appeal to the Magistrate under s. 86 of the Bombay District Municipal Act must therefore be governed by the provisions of that section alone. The mere fact that s. 86 of the Bombay District Municipal Act contains no express provision that the decision of the Magistrate or Bench of Magistrates under that section is to be final does not mean that an appeal or application in revision lies against that decision. The view taken of the provisions of that section in *In re Dalsukhram* was that the Magistrate or Bench of Magistrates hearing appeals of the kind mentioned in s. 86 was merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability, in other words that the Magistrate or Bench of Magistrates was a *persona designata*, and on that view no application in revision would lie to this Court against the decision of the Magistrate. The rule must therefore be discharged with costs.

*Rule discharged.*

*Before Sir John Beaumont, Kt., Chief Justice and Mr. Justice Sen.*

1940

DOSSABHOY JAMSHETJI NANPORIA

v.

November 22.

EDULJI SORABJI DARUVALA.\*

*Bombay High Court Rules (Appellate Side), 1936, Appx. E—Advocate's fees—Rules for computation—Attorney instructing on appellate side advocate (O. S.)—Scale of fees applies to attorney.*

Where an attorney instructs an advocate (O. S.) to appear on the appellate side of the High Court, the costs of the attorney should be taxed by analogy on the scale allowed by appendix E to the Rules on the Appellate Side, Bombay High Court, 1936.

#### TAXATION of fees.

The applicant Dossabhoy filed a suit to recover damages for malicious prosecution. It was decreed in the trial Court, but dismissed by the Assistant Judge on appeal. The applicant appealed to the High Court on the appellate side; but the appeal was dismissed with costs. In the High Court, the opponent Edulji had engaged a firm of solicitors, *Smetham, Byrne & Lambert*, who instructed a counsel practising on the Original Side of the High Court to argue the case.

When the costs in the High Court came to be taxed, the Taxing Officer taxed the advocate's fees payable to the opponent at Rs. 30, for the following reasons:—

"It has been the practice to allow solicitors to appear for parties on this side. They are not prevented from appearing on this side by the rules, and so long as the ordinary scale of advocate's fee is not exceeded the party engaging them is

\* Civil Application No. 947 of 1940, against an order passed by K. A. Athalye, Taxing Officer, Assistant

Registrar, High Court, Appellate Side, in Second Appeal No. 5 of 1939.

entitled to one advocate's fee as in cases where an advocate A.S. is engaged. This has been the rule for a very long time and until now no body has raised any objection to it. As this point was tried to be raised for the first time in the history of a long series of years, it should have been raised in Court at the hearing, and not before me. Advocates' fees are really pleader's fees, and the definition of a pleader in the Legal Practitioners Act and in the Civil Procedure Code states that it 'includes an advocate, a vakil and an attorney of a High Court.'

The applicant applied to the Court.

*B. Moropanth*, for the applicant.

*N. H. C. Coyajee* instructed by *Smetham, Byrne & Lambert*, for the opponent.

BEAUMONT C. J. This is an application made under Rule 132 of the Appellate Side Rules complaining against the order of the Taxing Officer.

The point raised is a novel one. In a second appeal the respondent appeared by an attorney and an advocate on the Original Side; that is to say, the advocate on the Original Side was instructed by an attorney who was not an advocate on the Appellate Side. The appeal was dismissed with costs, and the contention of Mr. Moropanth for the applicant is that in such a case no costs are payable either to the attorney or to the advocate on the Original Side. It is very common for parties to appear in Appellate Side matters by an attorney instructing an advocate on the Original Side, and it is somewhat startling to hear it suggested that in such an event no costs are payable by the unsuccessful party either to the attorney or to the advocate. In my opinion, there is no substance in the point.

Under the Rules on the Appellate Side, Part II, relating to Legal Practitioners, it is provided in Rule 10 that no attorney, who is not also an advocate, shall address the Court; but such attorney may instruct an advocate. And then in r. 5 it is provided that advocates on the Original Side may appear and plead for suitors on any side of this Court, but not unless instructed by an attorney, or on the Appellate Side by an advocate (which is only an alternative). So that it is quite clear that an attorney may instruct a counsel on the Original Side to appear on the Appellate Side of the High Court, and as the rules allow him so to do, it seems apparent that the attorney must be entitled to be paid, and must in the ordinary course have his costs taxed before he can recover them. Now r. 128 of the Appellate Side Rules directs that where costs are awarded to a party in any proceeding the amount of the Advocate's fees to be taxed in the bill of costs recoverable by such party, if represented by an advocate, from his adversary, shall be computed in accordance with the rules in Appendix E, and then there is a provision that nothing contained in this rule shall apply to fees payable to advocates on the Original Side. It is argued, therefore, that that rule does not apply either to an attorney or to an advocate on the Original Side, and therefore no scale for taxing their fees has been laid down. If that be so, the taxing officer has a discretion as to the scale to be applied, and he exercises that discretion wisely in proceeding by analogy to Appendix E. The taxing officer says that the practice in the office is to tax the costs of the attorney on the scale allowed by Appendix E by analogy to that Appendix. That is to say, he allows the attorney the percentage costs specified

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A. C. J. in Appendix E, and the attorney makes his own arrangements as to the payment of the advocate who represented him. That is the course which the Taxing Officer says has prevailed for many years. It appears to me clearly to be the right course, and I can see nothing illegal about it.

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In my opinion the order made by the Taxing Officer is right, and this application must be dismissed with costs.

*Application dismissed.*

*Beaumont C.J.*

*Before Mr. Justice Divatia.*

1940

AKOBA LAXMAN PAWAR

v.

December 2.

SAI GENU LAXMAN PAWAR.\*

*Hindu law—Widow—Unchastity—Widow of gotraja sapinda inheriting property of husband's nephew—Unchastity of widow whether a bar to such inheritance—Hindu Women's Rights to Property Act (XVIII of 1937).*

Under Hindu law an unchaste widow is not incompetent to inherit property of her husband's kinsmen.

SUIT for possession of property.

One Sitaram and his brother Genu were members of a joint Hindu family. Genu died first leaving a widow Sai (defendant No. 1). Sitaram then died, and on his death his son Maruti came into possession of the joint family property as absolute owner. Maruti died in August, 1929, without leaving a widow or any issue. The property was taken possession of by defendant No. 1 as she was the widow of a gotraja sapinda of Maruti.

On August 10, 1936, one Akoba (plaintiff), who was a distant agnate of Maruti, filed the present suit against defendant No. 1 to recover Maruti's property from her contending that she was unchaste when Maruti died and was therefore incapable of inheriting the property. The defendant conceded that she was leading an unchaste life at the time of Maruti's death but contended that she was not thereby deprived of the right to succeed to the property of Maruti. The trial Judge held that defendant No. 1 was not debarred from succeeding to the property and dismissed the suit. He observed in his judgment as follows :—

"It is urged that the bar as to inheritance on the ground of unchastity is only against the widow of the person to whom the inheritance is claimed and not to other female heirs. Now according to the Mitakshara, which governs the present case, the only female liable to exclusion by reason of unchastity is the widow and no other female heir; see *Advya v. Rudra* (4 Bom. 104) which is followed in *Tara v. Krishna* (31 Bom. 495). The texts bearing on the point have been fully discussed in *Advya's* case, and it has been held that there is nothing in the texts to show that according to the law prevailing in Western India a daughter, who was the per-

\* Second Appeal No. 165 of 1940, from the decision of T. B. Shanbhag, Assistant Judge at Satara, in Appeal No. 300 of 1938 confirming the de-

cree passed by M. C. Shah, Joint Second Class Subordinate Judge, at Satara, in Civil Suit No. 1071 of 1936.



son sought to be excluded in that case, is, by her incontinence, debarred from succession to the estate of her father. Following this decision it has been held by the Madras High Court in *Kojiyadu v. Laxmi* (5 Mad. 149) that the texts debarring Hindu females from inheriting by reason of unchastity are confined in their application to the widow as such and do not debar the mother. This decision has been followed in *Vedammal v. Vedanayaga Mudaliar* (31 Mad. 100) where it is held that under the Mitakshara, female heirs other than the widow are not precluded from inheriting by reason of unchastity. As pointed out at page 106 of the report, under the Mitakshara unchastity is not a bar and has not been referred to in the general discussion of the several grounds of exclusion. On the other hand it has been made a preliminary condition to succession in the case of a widow; see pages 111, 112 of I. L. R. 4 Bom. But it is contended for the plaintiff that the term widow is a general term and covers widows of agnates also and is not confined to the widow of the person whose estate is to be inherited. This contention is, however, not sound since fidelity and faithfulness to the deceased is not expected of any female heir other than his widow. This is made amply clear in *Moniram v. Keri Kolitani* (5 Cal. 776, P.C.) where their Lordships of the Privy Council held that the texts bearing on this point have reference to the deceased owner of the estate and that the words 'property' etc., have reference "to the property of the lord, or husband mentioned in the preceding parts of the texts, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or Lord of the daughter or the daughter or the mother, as the case may be, of the deceased owner, who in default of a widow may be next in succession to inherit the estate." These observations apply with equal force to the case of an uncle's widow. There is no obligation of chastity, therefore, on defendant No. 1 and it is not a preliminary condition to her inheriting to the estate of the deceased Maruti. It follows, therefore, that she is entitled to the suit property as a limited owner and that the plaintiff's suit must fail."

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On appeal the appellate Judge confirmed the decree of the trial Court observing as follows :—

"This principle of exclusion on the ground of unchastity is strictly confined to a widow inheriting to a husband's estate. It is clear from the decision in *Vedammal v. Vedanayaga* (31 Mad. 100) that under the Mitakshara law, female heirs other than the widow are not precluded from inheriting by reason of unchastity. A similar view was taken by the Bombay High Court in *Advya v. Rudrava* (4 Bom. 104) where a daughter was held to be not debarred from succeeding to the estate of her father simply because she was leading an unchaste life. It is, therefore, clear that the learned trial Judge was perfectly correct in the decision that he arrived at."

The plaintiff appealed to the High Court.

K. B. Sukhtankar, for the appellant.

S. R. Parulekar, for respondent No. 1.

DIVATIA J. This case raises an interesting point of Hindu law which does not seem to be covered by authority. The appellant, who was the original plaintiff, sued to recover certain property as a distant agnate of one Maruti who died in 1929 without leaving a widow or any issue. His father Sitaram had a brother named Genu who died several years back leaving a widow Sai who is defendant No. 1 in this case. The property was taken possession of by Sai as she was the widow of the paternal uncle, i.e. a gotraja sapinda, of Maruti, and as such was entitled in our Presidency to inherit it as an heir in preference to a distant agnate under the ruling in *Lallubhai Bapubhai v. Manikvarbai*.<sup>1</sup> The plaintiff contended that Sai was unchaste at the time when

A. C. J. Maruti died, and was, therefore, incapable of inheriting the suit property.  
 1940 The only question at issue was whether Sai was debarred from inheriting the  
 — property of Maruti because of her unchastity. It was conceded by her that  
 AKOBA she was leading an unchaste life at the time of Maruti's death when the  
 LAXMAN succession opened.

v. Both the lower Courts held that under the Hindu law the bar of unchastity  
 SAI GENU applied only to a widow inheriting her husband's property, that in the present  
 LAXMAN case the widow Sai inherited not her husband's property but the property of  
 — her husband's nephew, and the bar therefore did not apply. The suit was,  
 Divatia J. therefore, dismissed on that ground.

It is contended here that for the purpose of the bar all widows inheriting property stand on the same footing, and that therefore the bar applied also to the case of a widow who inherits property as the widow of a gotraja sapinda. Now, it is important to note that under the Hindu law as such a widow of a gotraja sapinda does not inherit any property in her own right. It is only by virtue of "positive acceptance and usage," as held in *Lulloobhoy Bappoobhoy v. Cassibai*,<sup>1</sup> that in our Presidency she has acquired the right to stand in the same place as her husband, if living, would have occupied. Subsequent cases have made it clear that the widow of a gotraja sapinda takes the property in her own right as an heir and not only as representing her husband. The latest decision on this point is in *Kallava v. Vithabai*.<sup>2</sup>

The suit property in the present case was of the absolute ownership of Maruti after Genu's death, presumably because Genu and Sitaram were joint. On Maruti's death, therefore, Sai would inherit it not as the property of her husband Genu but as the property of her husband's nephew Maruti, and the question is whether the bar which applies to the case of a widow inheriting her husband's property could also be extended to a case where the widow inherits the property not belonging to her husband but belonging to her husband's nephew.

It has been contended by Mr. Sukhtankar on behalf of the plaintiff-appellant that the bar should be held as also applicable to the case of a widow inheriting property as the widow of a gotraja sapinda, because she inherits it from her husband's family and that too only in our Presidency by reason of usage. It is, therefore, necessary to examine the genesis of this bar. So far as inheritance is concerned, the only text in the Mitakshara relating to this bar is mentioned in Chapter II, section II, placitum 2, which runs as follows :—

Thus Katyayana says, "Let the widow succeed to her husband's wealth, provided she be chaste; and, in default of her, let the daughter inherit, if unmarried."

This bar, therefore, according to the text, applies only to a widow succeeding to her husband's wealth, and the case-law has also limited it to such estate. It has been held for instance that neither a mother nor a daughter is debarred from inheriting property on the ground of unchastity because both of them inherit in their own right: see *Vedammal v. Vedamayaga Mydaliar*<sup>3</sup> and *Advayapa v. Rudrawa*.<sup>4</sup> No authority has been cited before me to show that the bar has been applied to any female except a widow inheriting her husband's

1 (1880) L. R. 7 I. A. 212.

2 (1930) 32 Bom. L. R. 995.

3 (1907) I. L. R. 31 Mad. 100.

4 (1879) I. L. R. 4 Bom. 104.

property. But the matter does not rest here. In the recent Hindu Women's Rights to Property Act (XVIII of 1937), the bar of unchastity seems to have been removed even with regard to the widow inheriting her husband's property, because it says that its provisions shall apply notwithstanding any rule of Hindu law or custom to the contrary, and as observed in Mayne's Hindu Law, 10th edn., at p. 722, "as the Act confers upon the widow a right of succession notwithstanding any rule of Hindu law, an unchaste widow will not be disqualified from inheritance." The result is that the bar of unchastity has now been removed even in the case of a widow inheriting her husband's property, and it would indeed be incongruous to hold that it applies to the case of a widow inheriting the property of any person other than her husband when she can now inherit her husband's property in spite of her unchastity. The position, therefore, is that there is no authority for the proposition that any widow inheriting any kind of property must be chaste, that the bar was confined to only one particular case, namely, the widow inheriting her husband's property, and even that bar is now removed by legislation. If the Hindu community desires that the bar of unchastity should be applicable to all widows inheriting property, it might invoke the aid of Legislature, but on the law as it stands at present, it is clear that an unchaste widow of a gotraja sapinda is not incompetent to inherit property of her husband's kinsmen.

The decision of the lower appellate Court is, therefore, correct and the appeal is dismissed with costs.

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*Appeal dismissed.*

*Before Mr. Justice Wassoodew.*

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November 15

*Dekkhan Agriculturists' Relief Act (XVII of 1879), Secs. 2, 10A—Suit for redemption—Plaintiff not agriculturist at date of suit—Predecessor of plaintiff an agriculturist at date of transaction—Suit under s. 10A whether competent—Status of agriculturist, how determined.*

A plaintiff who invokes the Court's jurisdiction under s. 10A of the Dekkhan Agriculturists' Relief Act, 1879, must be an agriculturist within the meaning of s. 2 of the Act at the date when the suit is instituted.

*Gadadhar v. Gangaram*<sup>1</sup> and *Sultan Rahim v. Ranchhodji*,<sup>2</sup> followed.

In a suit for redemption under the Dekkhan Agriculturists' Relief Act, 1879, it is necessary for the plaintiff when claiming the benefit of s. 10A of the Act to prove that he was an agriculturist at the date of the suit and not merely

\* Second Appeal No. 647 of 1937, from the decision of A. K. Phadkar, Assistant Judge at Sholapur, in Appeal No. 173 of 1935, confirming the decree passed by S. M. Bhoj, Second

Class Subordinate Judge at Barsi, in Civil Suit No. 964 of 1930.

1 (1931) 33 Bom. L. R. 55, 73.

2 (1926) 29 Bom. L. R. 249.

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that the person through whom he claims was an agriculturist at the date of the transaction.

In order to claim the status of an agriculturist the plaintiff must prove that he ordinarily engages personally in agricultural labour, that is, he is regularly and habitually cultivating his fields. Mere initiation into the ways of husbandry is not enough.

SUIT for redemption.

One Kashinath passed a sale-deed in respect of the suit property in favour of Vishvanath and his two brothers on February 11, 1899. Kashinath died sometime before 1909 leaving a widow Laxmibai who took Gangadhar (plaintiff) in adoption in 1924.

On August 19, 1930, the plaintiff filed the present suit against Dattatraya (defendant No. 1) the son of Vishvanath and others (defendants Nos. 2-21) to redeem the suit property under s. 10A of the Dekkhan Agriculturists' Relief Act, 1879, alleging that the real nature of the transaction dated February 11, 1899, was a mortgage and not a sale out and out. In the plaint the plaintiff's status was described to be that of an agriculturist and it was stated that his adoptive father Kashinath was an agriculturist in 1899. The defendants denied the alleged nature of the transaction, the status of the plaintiff and that of his adoptive father, Kashinath. The trial Court upheld the defendants' contentions and dismissed the plaintiff's suit.

On appeal, the Assistant Judge held that Kashinath was an agriculturist in 1899, that the alleged mortgage could be inferred from circumstances; but that as the plaintiff was not an agriculturist at the date of the suit, the suit was incompetent. He therefore confirmed the decree of the trial Court.

The plaintiff appealed to the High Court.

*A. G. Desai*, for the appellant.

*D. A. Tulzapurkar*, for respondent No. 5.

*S. G. Patwardhan*, for respondent No. 4.

*P. V. Kane*, for respondents Nos. 1-3, 6-8, 10, 13, 14 and 18.

WASSOODEW J. This is a second appeal from a decision of the Assistant Judge of Sholapur. The only question that arises upon this appeal is whether a plaintiff, who is held not to be an agriculturist at the date of the suit purporting to be one for redemption under the Dekkhan Agriculturists' Relief Act, can invoke the provisions of s. 10A of that Act to show that the original transaction to which his predecessor an agriculturist was a party was in reality intended, contrary to the terms of the document, to be treated as a mortgage.

The suit was instituted in August, 1930, by the plaintiff as the adopted son of one Kashinath, the adoption having been made by Kashinath's widow in 1924. The plaintiff maintained that his father Kashinath, who died in 1909, had executed a formal conveyance of the property in dispute on February 11, 1899, in favour of the defendants, and that, although it was an out and out sale of the entire interest of the transferor, by a contemporaneous agreement it was intended to be treated as a mortgage. As regards the plaintiff's status it was described in the plaint to be that of an agriculturist. It was

also stated that Kashinath was an agriculturist in 1899. The alleged nature of the transaction, the status of the plaintiff and that of his adoptive father were denied by the defendants, and that denial was upheld by the trial Court. In appeal the learned Assistant Judge took the view that Kashinath was an agriculturist in 1899, that the alleged contemporaneous agreement could be inferred from circumstances, but that as the plaintiff was not an agriculturist at the date of the suit, the suit was incompetent. He, however, remarked in paragraph 7 of his judgment that "it appears that, pending the suit, the plaintiff has started working personally in the fields and has taken lands of others on leases;" but in his opinion that circumstance did not enable the plaintiff to claim the benefit of s. 10A of the Dekkhan Agriculturists' Relief Act. Accordingly the trial Court's decree was confirmed; but the defendants, except the Municipality, who had acquired a portion of the land, were deprived of their costs. Against that decree the plaintiff has filed this second appeal and the defendants, the transferees under the deed of 1899, have filed cross-objections for costs.

Two contentions have been formulated in support of the appeal by Mr. Desai. He argues, first, that it is not necessary, when calling in aid the provisions of s. 10A of the Dekkhan Agriculturists' Relief Act, for the plaintiff to show in a suit for redemption that he is an agriculturist; for it is sufficient that a person through whom the plaintiff claims was an agriculturist at the date of the transaction, and, secondly, that even if the plaintiff is not an agriculturist at the date of the suit, and if pending the suit and in the course of the hearing the plaintiff acquires the status of an agriculturist by working personally in the fields, he could be deemed to be a party agriculturist to the suit for the purpose of s. 10A, for, according to Mr. Desai, that section does not in terms require that the suit must be instituted by an agriculturist.

In my opinion the first contention is without any substance. Section 10A provides as follows:—

"Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this Chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, (or in section 49 of the Indian Registration Act, 1908) or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction...."

Apart from authority, the plain provisions of that section indicate that, unless an agriculturist is a party to the suit, the Court has no jurisdiction to disregard the provisions of s. 92 of the Indian Evidence Act. The basis of the plaintiff's claim to disregard the provisions of s. 92 of the Indian Evidence Act in order to grant him relief was that as an agriculturist party to the suit, he was entitled to rely on s. 10A of the Dekkhan Agriculturists' Relief Act. That claim could only be sustained if he proved that he was an agriculturist at the date of the suit and not merely that his predecessor was an agriculturist at the date of the transaction. The finding of fact is that the plaintiff was not an agriculturist and there was no other agriculturist party

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A.C.J. 1940 to the suit. Prima facie therefore the Court has no jurisdiction to apply s. 10A of the Dekkhan Agriculturists' Relief Act.

GANGADHAR KASHINATH v. DATTA TRAYA VISHVANATH Wasseodew J. In the consideration of Mr. Desai's alternative argument it will be interesting to note how the legislature has expressed itself in the different parts of the Dekkhan Agriculturists' Relief Act as to when the privilege can be asserted or established for the purpose of the several reliefs referred to. The language of s. 10A of the Dekkhan Agriculturists' Relief Act does not follow the language used in s. 3 or s. 15B or s. 20 of that Act. In s. 3(a) the legislature has stated that the provisions of Chapter II shall apply to suits for an account "instituted by an agriculturist." The legislature there expressly lays down that the plaintiff must be an agriculturist at the date of the suit. Section 20 says that "the Court may at any time direct that the amount of any decree, whether before or after this Act comes into force against an agriculturist... shall be paid by instalments with or without interest." Here it is obviously intended that the status must be that of an agriculturist at any time when the question of instalments arises. The provisions of s. 15B leave it to implication as to when the status has to be established. Although that section does not indicate clearly, as s. 20 does, the time when the claimant to the privilege should be an agriculturist, it has been construed as implying the time when the accounts are claimed, that is at the time of passing the decree (see *Devu Jetiram v. Revappa Satappa*,<sup>1</sup> and *Bal v. Maneklal*<sup>2</sup>). The language used by the legislature is not uniform in these two sections, and the proper time for claiming the privilege has to be fixed by reference to the language used and the provisions as to relief. In my opinion, the proper time when the jurisdiction to inquire into the real nature of the transaction could be assumed by the Court for the purpose of s. 10A is when the Court is requested to exercise that jurisdiction. That request is contained in the plaint when disclosing the essential cause of action, upon the averment that the plaintiff is an agriculturist and a party to the suit. Therefore if the plaintiff invokes the Court's jurisdiction under s. 10A, he must be an agriculturist within the meaning of s. 2 of the Dekkhan Agriculturists' Relief Act at the date when it is instituted. The question is really not of first impression and is covered by the authority of this Court (see *Gadadhar v. Gangaram*<sup>3</sup> and *Sultan Rahim v. Ranchhodji*,<sup>4</sup>). Although the question in the form in which it is presented was not raised in those cases, this Court has held that the provisions of s. 10A require that there should be an agriculturist plaintiff to a suit for redemption at the time of its institution.

But even upon the assumption of the correctness of the construction suggested by Mr. Desai that the plaintiff's status has to be considered only at the stage of hearing, for it is then that the question of abrogating the general rule of evidence arises, the plaintiff in this case cannot succeed. There is no warrant for the view that even at that stage the plaintiff was an agriculturist. In fact no such plea was raised in the plaint. All that the plaint stated was

1 (1921) I. L. R. 46 Bom. 964.

s. c. 24 Bom. L. R. 370.

2 (1931) 34 Bom. L. R. 55, 73.

3 (1931) 33 Bom. L. R. 825.

4 (1926) 29 Bom. L. R. 249.

that the plaintiff was an agriculturist when the suit was instituted. It was not said that he had changed his original status at any time and acquired a new one. The suit was filed in August, 1930, and the plaintiff was not examined till October, 1934. At that time in one statement in his deposition it was elicited that in that year he had taken kabulayats and had started working personally in the fields. Assuming that he had done so, that was insufficient to clothe him with the privileged status. The privilege of an agriculturist is not hereditary but personal (see *Martand v. Amritrao*<sup>1</sup> and *Dharāmsey v. Balkrishna*<sup>2</sup>). Nor can that privilege be acquired by birth (see *Gadadhar v. Gangaram*). If so, it must be assumed that merely upon adoption the plaintiff could not acquire the status which his adoptive father possessed in 1899. He had other landed estate whose income fell in the category of non-agricultural income. If suddenly three years after the suit he began to hold a plough, he could not come within the definition of the first paragraph of s. 2 of the Dekkhan Agriculturists' Relief Act, for he must in order to claim that status prove that he ordinarily engaged personally in agricultural labour, that is, he was regularly and habitually cultivating his fields. Mere initiation into the ways of husbandry is not enough. Consequently it cannot be said that even pending the suit the plaintiff had acquired the status of an agriculturist. Therefore the plaintiff's appeal must be dismissed with costs (two sets—one set to defendant No. 4).

As regards the cross-objections it seems to me having regard to the view upon the evidence of the lower appellate Court the discretion as to costs was properly exercised. The cross-objections are therefore disallowed with costs.

*Appeal dismissed.*

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<sup>1</sup> (1925) 27 Bom. L. R. 951  
R. 44.

<sup>2</sup> (1928) 31 Bom. L. R. 984.

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

Present :

VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT,  
SIR GEORGE RANKIN, AND MR. M. R. JAYAKAR.

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THE GENERAL ACCIDENT FIRE AND LIFE ASSURANCE  
CORPORATION, LTD.

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v.

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v.

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*Indian Limitation Act (IX of 1908), art. 68—Administration bond—Breach of condition by administrator—Bond assigned to heir on attainment of majority—Suit against administrator—Period of limitation applicable—Construction of statutes of limitation—Indian Succession Act (XXXIX of 1925), Sec. 292—Assignment of administration bond—Whether such assignment creates new cause of action.*

An assignment of an administration bond under s. 292 of the Indian Succession Act, 1925, does not create thereunder a new cause of action so as to give a fresh starting point for the purposes of limitation to the assignee who sues for a breach of a condition in the bond.

A suit by the assignee of an administration bond to enforce the bond is a suit "on a bond subject to a condition" within the meaning of art. 68 of the Indian Limitation Act, 1908, and the period of limitation is three years from the date of the last breach and not the date when some person able to give a valid discharge for the estate claims it from the administrator or his representatives and fails to obtain it.

*Mamubhai Chenuilal v. General Accident Fire and Life Assurance Corporation Ltd.*,<sup>1</sup> overruled.

*Maung San U v. Maung Kyaw Mye*,<sup>2</sup> approved.

The Indian Limitation Act ought to receive such a construction as the language in its plain meaning imports. A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but it must, if unambiguous, be applied with stringency. The law must be enforced even at the risk of hardship to a particular party. The Court cannot, on equitable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it.

Mitra on the Law of Limitation and Prescription (Tagore Law Lectures), Vol. I, p. 256 (6th edn.), referred to.

1 (1936) I. L. R. 60 Bom. 1027,  
s. c. 38 Bom. L. R. 632.

2 (1923) I. L. R. 1 Ran. 463.



An administrator of an intestate is merely the officer of the Court in whom the deceased himself has reposed no trust. On the death of the former the estate of the intestate does not pass to his heirs or representatives and no authority whatever can be transmitted by him, nor has anyone claiming under him any right to interfere with or to complete the administration of the property of the intestate. The office comes to an end on death and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non*, and the person to whom such grant is made will be entitled to take possession of the property.

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THESE were two consolidated appeals from a judgment and decree of the High Court of Judicature at Bombay (Beaumont C. J. and Kania J.) dated March 3, 1938, in its appellate jurisdiction, confirming, with a minor variation, a judgment and decree of that Court (Engineer J., dated May 24, 1937) in its ordinary original civil jurisdiction.

2.  
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One Jaffer Allarakhia died intestate on September 20, 1918, leaving him surviving a widow Fatmabai, three sons, Abdul Rahim, Ahmed and Allarakhia, two married daughters, and a son Abdul Karim and a daughter Hajrabai of a predeceased son Abubakar. Of these Allarakhia, Abdul Karim and Hajrabai were minors.

The estate of Jaffer Allarakhia consisted of moveable and immoveable properties exceeding in value at the time of his death Rs. 6 lacs.

On August 22, 1919, letters of administration to the estate of Jaffer Allarakhia were granted by the High Court to his eldest son, Abdul Rahim, who administered and managed the estate up to the time of his death.

On September 18, 1924, Abdul Rahim died intestate leaving him surviving a widow (Havabai), three sons, Janmahomed, the plaintiff, Yusuf and Usman, and three unmarried daughters. All his children were then minors.

On March 17, 1925, Havabai, the widow of Abdul Rahim, having been duly empowered by the High Court, filed a petition in the High Court for the grant to her of letters of administration to the estate of her deceased husband for the use and benefit of his three minor sons and limited to the period of minority of any of them.

On May 6, 1925, the High Court made an order granting letters of administration to her, upon the filing of the requisite administration bond.

On May 14, 1925, Havabai and the General Accident Fire and Life Assurance Corporation, Limited, (defendant) as surety, executed an administration bond, in favour of the Registrar of the High Court in its testamentary and intestate jurisdiction, and Head Assistant to the Prothonotary and Registrar, their executors, administrators and assigns, in the sum of Rs. 3,98,060. The conditions of the bond were that Havabai as administratrix of the estate of Abdul Rahim—

(1) should make or cause to be made a true and perfect inventory of the property and credits of the deceased which had or should come to her hands, possession or knowledge, or to the hands or possession of any other person or persons for her, and should exhibit or cause to be exhibited to the High Court such inventory on or before November 14, 1925 :

(2) should well and truly administer such property and credits according to law :

F. C. (3) should make or cause to be made a true and just account of her administration on or before May 14, 1926 :

1940 (4) should deliver and pay all the rest and residue of the property and credits found remaining upon such account, after examination and allowance thereof by the High Court, to such person or persons respectively as should be lawfully entitled to such residue.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED On June 9, 1925, letters of administration of the property and credits of Abdul Rahim were issued to Havabai on behalf of Janmahomed (plaintiff) Yusuf and Usman, minor sons of the deceased, for their use and benefit and limited until one of them attained majority.

JANMAHOMED On July 2, 1925, Havabai executed a power-of-attorney in favour of one Haroon Mahomed Bhatra. The circumstances in which the power was executed were that Havabai was a pardanashin lady and illiterate; that Bhatra was closely related to Havabai, being the son of her maternal uncle; that he was a business-man who was assisting Ahmed in the management of Jaffer Allarakhia's estate and had the confidence of Ahmed; that the power was given on the suggestion and with the approval of Ahmed and Abdul Karim; and that there was no reason to doubt the honesty or financial solvency of Bhatra. On October 22, 1928, Haroon Mahomed Bhatra committed suicide after misapplying some of the property.

On October 31, 1928, Havabai, for herself and the other creditors of Bhatra, filed suit No. 2290 of 1928 in the High Court, for administration of Bhatra's estate, and, on her application, a receiver was appointed of Bhatra's estate.

On April 27, 1929, Havabai died.

On April 29, 1929, upon the petition of one Abdul Majid Ebrahim, an order was made by the High Court, under ss. 10 and 11 of the Administrator General's Act (III of 1913), directing the Administrator General of Bombay to collect and take possession of all the movable and immovable properties forming part of the estate of Abdul Rahim and of Havabai, and to hold, deposit and realise the same according to the directions of the Court.

On October 15, 1929, an order was made by consent of the parties in suit No. 2290 of 1928 that it be referred to the Commissioner of the Court to take (1) an account of the debts of Haroon Mahomed Bhatra, (2) an account of the funeral expenses, and (3) an account of the movable and immovable properties of the deceased, if any, come to the hands of the defendants (the heirs and legal representatives of Bhatra) or any of them, or to the hands of any other person, it being further ordered with the like consent that the said property be applied in due course of administration.

On April 4, 1930, the Administrator General, as administrator of the estates of Abdul Rahim and of Havabai, made an affidavit before the Commissioner, claiming the sum of Rs. 1,30,476-4-9 from the estate of Bhatra.

On May 30, 1930, the Commissioner delivered his decision on the claim of the Administrator General. He came to the conclusion that Bhatra stood in a fiduciary relationship to Havabai, and in such relation received moneys on her behalf; that he violated his duty to the extent of nearly Rs. 90,000, which moneys he carried into two shops conducted by him in the names of Mahomed Yusuf and Bros., and Haroon Mahomed & Sons, in which, though the

moneys were credited to Havabai, they were not kept apart but were mixed up with other funds of his own; that Bhatra had left no property other than these two shops, and that the only assets available for payment of his creditors were the sale proceeds and outstandings of such shops. He held that, in such circumstances, Bhatra was a trustee for Havabai of such moneys and that, as he mingled the property which he received as such trustee with his own, the Administrator General, who was the beneficiary, had a right to follow such moneys and was entitled to a charge on the funds available for the amount in priority to other creditors. He, therefore, allowed the claim of the Administrator General for Rs. 1,21,838-0-9, together with interest from March 17, 1930, at nine per cent. per annum.

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On December 11, 1930, a decree was passed in suit No. 2290 of 1928, confirming the report of the Commissioner. The Administrator General received under this decree Rs. 35,000.

Thereafter, a claim was made upon the Administrator General, as representing the estates of Abdul Rahim and Havabai, for a sum exceeding Rs. 1,38,000 alleged to be due to Allarakhia Jaffer as his share of the estate of Jaffer Allarakhia.

Upon the hearing of such application, the Administrator General gave to the Court an assurance that he did not intend to make any payment to the creditors or heirs of Abdul Rahim or of Havabai pending adjudication upon the claim of the applicant.

On November 14, 1931, the plaintiff attained majority.

On January 8, 1932, Allarakhia filed suit No. 44 of 1932 in the High Court against the defendant herein (as surety for Abdul Rahim, as administrator of the estate of Jaffer Allarakhia), the plaintiff herein and his two minor brothers (as heirs of Abdul Rahim) and the Administrator General of Bombay, as representing the estate of Abdul Rahim, claiming the sum of Rs. 12,26,980 or such part thereof as represented the loss to the estate of Jaffer Allarakhia due to the failure of Abdul Rahim, as the Administrator of such estate, to carry out his obligations under the administration bonds and for other relief. He sued as assignee of such administration bonds.

On March 9, 1932, a summons was taken out on behalf of the plaintiff herein and served on the defendant for an order that the administration bond dated May 14, 1925, should be assigned to him to enable him to sue on it.

On March 24, 1932, an order was made on such application that the Court should assign the administration bond to the plaintiff, his heirs, executors or administrators, it being further ordered that, on such assignment, the plaintiff, his heirs, executors or administrators should be entitled to sue on the bond in his or their name or names as if the same had been originally given to him or them, and should be entitled to recover thereon, as trustee or trustees for all persons interested, the full amount recoverable in respect of any breach thereof. By an order of the Chief Justice dated July 14, 1932, expressed to be made under the powers vested in him by the Letters Patent, the Prothonotary and Senior Master of the High Court and the Assistant Prothonotary were appointed to assign the bond to the plaintiff. By a deed of assignment, dated August 13, 1932, the officers so appointed assigned the bond to the plaintiff "to hold the same unto the said assignee absolutely with all such powers,

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rights and remedies as are now subsisting thereon."

On November 2, 1932, the plaintiff filed the present suit for the recovery from the defendant of the sum of Rs. 3,98,060 or such lesser sum as represented the loss to the estate of Abdul Rahim due to the alleged failure of Haya-bai, as administratrix of that estate, to carry out her obligations under the administration bond. The specific charges of breach of duty by the adminis-tratrix were :—

(1) the appointment of Bhatra, described as a distant relative of the Adminis-tratrix, as her constituted attorney to manage the estate of Abdul Rahim and gen-erally to do all acts and things in relation to the estate as he might think fit :

(2) allowing the sum of Rs. 50,003-13-2 shown in the inventory and accounts filed by her on June 2, 1927, as being in her hands on that date, to remain in the hands of Bhatra, and failure to invest the same in authorised securities :

(3) failure to realise the undivided one-fourth share of Abdul Rahim in the estate of Jaffer Allarakhia, as from the date of the death of Ahmed Jaffer on May 22, 1926, and to invest the same in authorised securities, and allowing such share to remain in the hands of Bhatra :

(4) failure to hand over to the Accountant General of Bombay the estate of Abdul Rahim, all his heirs being minors.

On May 19, 1933, the defendant filed a written statement not admitting the alleged loss to the estate of Abdul Rahim ; denying the alleged breaches of duty ; contending, *inter alia*, that the bond had not been validly assigned in law to plaintiff ; that the purported assignment was the transfer of a mere right to sue and, as such, was void and inoperative ; that the plaintiff was, therefore, not entitled to maintain the suit ; and that the claim of the respon-dent was barred by the law of limitation.

Engineer J., who heard the suit, decided (May 24, 1937) the issues as to limitation and the validity of the assignment of the bond against the defend-ant. The following is his Lordship's judgment.—

ENGINEER J. This is a suit filed to enforce against the defendants, who are an insurance company, an administration bond which they joined the administratrix in giving to the Court for the due administration of the estate of Abdul Rahim Jaffer Allarakhia. The bond is put in action by the plaint-iff to whom it was assigned under an order of the Court.

The defences to the action are :

(1) Limitation,  
(2) that the assignment of the bond is not valid,  
(3) that in fact the administratrix was not guilty of such devastavit as to make her liable to make good the loss, and that therefore the defendants are not liable, and

(4) the defendants put the plaintiff to proof of the actual loss and dam-age sustained by the estate.

As regards the points of limitation and validity of the assignment of the bond, it is contended on behalf of the defendants that art. 68 of the Indian Limitation Act governs the case, and that the breach of obligation of the bond occurred at the latest on the death of the administratrix, which was more than three years before the commencement of the suit. The plea of invalidity of the assignment is raised on the contention that if at the date of the assignment there was no sum recoverable as the claim was time-barred, the assignment

cannot help the plaintiff to recover anything. Both the points were decided by the Appeal Court in *Manubhai Chunilal v. General Accident Fire and Life Assurance Corporation Ltd.*,<sup>1</sup> where similar contentions of the defendants were negatived. The defendants in that case were the same as the defendants in this case. The Appeal Court there held that a bond like the one in this suit is a bond upon a condition, but a suit to enforce the bond by a person to whom it has been assigned is not a suit upon a bond within the meaning of art. 68 of the Indian Limitation Act. The suit is not a suit merely on the bond, but is a suit on the bond coupled with the statutory assignment on proof of title to the estate. It was held that s. 292 of the Indian Succession Act, 1925, which provides for the assignment of administration bonds, does not deal only with the procedure in case of assignment, but confers substantive rights, and that it provides a new starting point of time for the purpose of limitation and the assignee acquires by virtue of the assignment a fresh and independent cause of action, and that limitation would run from the time the assignment is made.

So long as that decision stands, the findings on the issues raised by the defendants must be against them. The defendants, however, do not abandon their submissions. The defendants in the suit decided in *Manubhai Chunilal's* case applied for leave to appeal to the Privy Council, but leave was refused by the Appeal Court on the ground that no leave to the Privy Council could be obtained at that stage. An application to the Privy Council for special leave to appeal was also rejected by the Privy Council on the same ground. The question, however, is to be taken up to the Privy Council and the defendants, therefore, desire to keep their submissions on these two questions alive.

The question whether the administratrix was guilty of devastavit, and would have been liable to make good to the estate the loss which the estate has suffered in this case, depends upon the answer to the question whether she was justified in delegating certain powers to one Bhatra to whom she gave a power-of-attorney in wide terms. But before I consider that question, it is necessary to give certain facts, figures, and dates relating to the estate in question.

One Jaffer Allarakhia, a Cutchi Memon, Mahomedan inhabitant, died on September 20, 1918. Being a Cutchi Memon he was governed in matters of inheritance and succession by Hindu law. He died leaving as his heirs three sons, namely, Abdul Rahim, Ahmed and Allarakhia, and a grandson named Abdul Karim by his predeceased son Aboobaker. Each of these four persons became entitled to a one-fourth share in the estate of Jaffer Allarakhia. When Jaffer Allarakhia died his third son Allarakhia and his grandson Abdul Karim were both minors.

The estate left by Jaffer Allarakhia consisted of four immovable properties in Bombay. He had also shortly before his death entered into an agreement for the purchase of another immoveable property in Bombay. The moveable properties left by him consisted of his share in the partnership firm of Jaffer Allarakhia & Co., some outstandings and some shares in the Century Mills. Letters of administration to the estate of Jaffer Allarakhia were granted to his eldest son Abdul Rahim on August 22, 1919. Abdul Rahim duly carried

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out the agreement for purchase of the fifth property which was entered into by Jaffer before his death. Abdul Rahim as the administrator of the estate of his father Jaffer realised his share in the partnership firm of Jaffer Allarakhia & Co., and also recovered such of the outstandings of Jaffer as were recoverable. In the inventory and accounts relating to the estate of Jaffer Allarakhia, which were filed by Abdul Rahim as his administrator on December 20, 1920, he showed as the estate in his hands on November 10, 1920, in addition to the five immoveable properties aforesaid cash in hand amounting to Rs. 2,32,031-15-0, seven shares of the Century Mills of the value of Rs. 2,940, securities of the value of Rs. 200 and two carriages and a horse of the value of Rs. 1,200. The accounts show that up to November 10, 1920, some payments had been made to each of the four persons entitled to the estate of Jaffer, but the payments were not made in equal amounts. Abdul Rahim had himself by that time, i.e. November 10, 1920, taken Rs. 33,933-10-0, Ahmed had been paid Rs. 10,254-13-0, Allarakhia had been paid Rs. 4,115-4-9, and Abdul Karim had been paid Rs. 5,221-2-6.

Although Jaffer died in September, 1918, and letters of administration to his estate were granted to Abdul Rahim on August 20, 1919, Abdul Rahim did not distribute the estate up to the time of his death which occurred on September 18, 1924. By that time, however, further payments had been made to each of the four persons entitled to the estate of Jaffer. Abdul Rahim, instead of either distributing the estate among the persons entitled thereto or investing the cash realised in authorised securities kept the moneys in his own name in various banks and invested a part of the moneys in giving loans on hundis and otherwise to various persons at interest. The moneys kept in banks and the advances made by Abdul Rahim were kept and made not in the name of Abdul Rahim as administrator of the estate of Jaffer but in his own personal name. At the date of the death of Abdul Rahim, the moneys paid to each of the four persons entitled to the estate of Jaffer were as follows :

|                                  |                 |
|----------------------------------|-----------------|
| Abdul Rahim had withdrawn in all | Rs. 69,059 14 9 |
| Ahmed .. .. .                    | Rs. 37,240 13 6 |
| Allarakhia .. .. .               | Rs. 5,644 7 9   |
| Abdul Karim .. .. .              | Rs. 17,201 9 0  |

In addition to the five immoveable properties, Abdul Rahim had in his hands, after taking into consideration the withdrawals aforesaid, a sum of Rs. 1,64,819-14-7 as belonging to the estate of Jaffer Allarakhia. These moneys, as I mentioned above, stood in the name of Abdul Rahim himself, some in banks, and some by way of advances made to several persons.

Abdul Rahim died leaving a widow Havabai, three sons, and three daughters; all the sons and daughters were minors at the time of the death of Abdul Rahim. His three sons became entitled to his estate in equal shares subject to the right of the widow to maintenance during her lifetime, and subject to the right of the three daughters to maintenance till marriage and marriage expenses. The widow Havabai applied for letters of administration to the estate of her husband for the benefit of her sons and limited until any of them attained majority. Letters of administration were granted to her on June 9, 1925. Prior to that, she and the defendants entered into a bond with the Registrar of the High Court in its testamentary and intestate jurisdiction

and the Head Assistant to the Registrar for Rs. 3,98,060, being double the amount of the net estate shown in the schedule to the petition for letters of administration. One of the conditions of the bond was the due administration by the said Havabai of all the property and credits of the deceased which have or shall come to her hands or to the hands of any person or persons for her. On July 2, 1925, Havabai gave a power-of-attorney to one Haroon Mahomed Bhatra, exhibit A-14. The terms and recitals of the power-of-attorney are important. It states that Havabai being a pardanashin lady is desirous of appointing a fit and proper person to be her attorney to act for her in all matters relating to the estate of Abdul Rahim Jaffer Allarakhia.

The power authorises Haroon Mahomed Bhatra to call for and settle all accounts relating to the estate, to demand and receive from all persons moneys and securities belonging to the estate and to give receipts in discharge for the same, to commence, prosecute and enforce any action or proceeding in relation to the estate, and to compromise, abandon, submit to judgment, or become non-suited in any such actions or proceedings, and to deposit the moneys received by him by virtue of the power in banks, and to invest them in the name of Havabai in or upon such investment authorised by law for investment of trust funds, and,—and this is a very important part of the powers—"to withdraw such sums from time to time as her attorney should deem necessary, proper or expedient, and to endorse or sign her name to any cheque, dividend or interest warrants or other instruments payable to her as administratrix of the said estate of Abdul Rahim Jaffer Allarakhia," and lastly generally to do all acts and things in relation to the premises as her attorney should think fit.

Thereafter Bhatra managed the estate of Abdul Rahim, and in doing so dealt with the moneys which belonged not only to Abdul Rahim himself but which were in the hands of Abdul Rahim at the time of his death as belonging to the estate of Jaffer Allarakhia. The moneys were not invested in authorised securities, but large sums were allowed to remain in banks, some of them as fixed deposits and some in current account. Various large sums were also advanced to people at interest. Some of these sums were lost to the estate as the borrowers became insolvents, but the principal loss caused to the estate was not caused by the failure of some of the borrowers, but because Bhatra under the power-of-attorney given to him withdrew large sums from the moneys which were kept in banks in the name of Havabai and misappropriated them for his own purpose. Several cheques signed by Bhatra as the constituted attorney of Havabai in favour of his own firm were put in as exhibits, being exhibit 1 collectively. These cheques cover a period from August 5, 1926, to June 22, 1927. These moneys, however, do not exhaust the amounts wrongfully withdrawn and misappropriated by Bhatra. It is in evidence that the total amount thus misappropriated by Bhatra came to about Rs. 90,000.

For the defendants it is contended that Havabai was entitled to delegate the powers which she delegated to Bhatra, and that she could not be held liable to make good to the estate the loss caused by the misappropriation and fraud of Bhatra, and that, therefore, the defendants also are not liable under the bond. This contention, if accepted, goes to the whole root of the defendants' liability.

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The contention on behalf of the defendants is based on certain answers given by the plaintiff's witness Joosab Esmail in the witness box. He admitted that Bhatra managed the estate of Jaffer after Ahmed's death which occurred in May, 1926, and that Abdul Karim was also taking part in the management. He admitted that Bhatra was trusted as an honest man by Ahmed, and that he was also a business man. He further said in evidence as follows :—

"When Ahmed died Bhatra was the only person familiar with the affairs of the estate. He was the only person then alive who had taken part in the management of the estate. He was the obvious person for Havabai to look to in order to manage the estate. Up to the time of Bhatra's death there was never any suggestion that he was anything but honest or that he was in any way financially embarrassed."

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It was further contended on behalf of the defendants that as Havabai was ill it was necessary for her to give a power-of-attorney to Bhatra. The only evidence in support of the illness of Havabai are certain letters written on her behalf by her attorneys to the defendants between April 19, 1926, and June 15, 1927. These letters were written in answer to demands made by the insurance company calling upon Havabai to file her inventory and accounts and to explain the delay in doing so. It was stated in two of the letters that the delay was due to her illness. In the letter of April 19, 1926, Messrs. Payne & Co. on her behalf wrote to the insurance company stating that Havabai had gone upcountry owing to her illness. In another letter of June 15, 1927, they wrote to the insurance company informing them of the inventory and accounts having been filed, and stating that the delay was due to her illness from which she had not yet completely recovered. These letters were no doubt tendered in evidence by the plaintiff himself, but I do not think that the mere statement in these letters that Havabai was ill is proof of Havabai's illness. The plaintiff does not claim through Havabai but against her, and the statement cannot be said to be an admission binding on the plaintiff. The power-of-attorney itself does not recite that it was given by reason of any illness of Havabai. The only reason given in the power-of-attorney was that she was a pardanashin lady and was desirous of appointing a fit and proper person to be her attorney.

I hold that it is not established by the defendants that Havabai was in fact ill or so ill or for so long as to justify her in giving the power-of-attorney, or that the power-of-attorney was given because of such illness. As a matter of fact the illness of Havabai could not have been a good ground for delay in filing the inventory and accounts, because it is in evidence that Havabai did not know anything about the accounts or in fact about the administration of the estate. According to the evidence everything was done by Bhatra, and the inventory and accounts could have been prepared only by him and under his instructions. Havabai could not have done anything more than merely put her signature to them.

But it seems to me that the real question at issue is not whether Bhatra was the proper person to whom the powers of Havabai could be delegated, or whether Havabai exercised due care and caution in selecting an agent, or whether she had any reason to doubt the honesty of Bhatra, but whether Havabai could be said to be justified at all in giving a power-of-attorney to anybody in the wide terms in which it was given. What Havabai in fact did



was to renounce all her powers as administratrix, and to hand over the whole administration of the estate to Bhatra, and the question is whether she was justified in doing so. Even if she was justified in doing so, a further question arises whether she exercised proper or any supervision over Bhatra's management. As I have said before, the misappropriation by Bhatra extended over a considerable period, and Havabai never took the least trouble to look into the accounts, or to see that the moneys were safe in the banks. Jusub Ismail in his evidence said :—

"After the death of Abdul Rahim the books of account of the estate of Jaffer Allarakhia were under the control of Bhatra. Up to November, 1928, Havabai took no steps to realise the share of Abdul Rahim in the estate of Jaffer Allarakhia. Havabai never looked into the books of accounts maintained by Bhatra of the estate of Jaffer or Abdul Rahim. She never made any inquiries as to what Bhatra was doing in respect of these estates. Havabai did not know what Bhatra was doing with the moneys belonging to the estate. Whenever moneys were required for the purpose of the estate of Jaffer, Bhatra was paying the moneys. He paid on behalf of Havabai."

Bhatra committed suicide on October 22, 1928. Thus it is clear that Havabai left him to do what he liked with the estate and the moneys belonging to the estate for more than three years. In fact the first misappropriation proved was on January 22, 1926, within six months of the power-of-attorney being given to him and nearly two and a half years before his death.

About nine days after his death, viz. on October 31, 1928, Havabai filed a suit for administration of Bhatra's estate. I will later on further refer to this suit as well as to another suit filed by her on November 17, 1928, for administration of Jaffer's estate.

The Trustee Act of 1925, 15 Geo. V, c. 19, of course does not apply in India. We are, therefore, not concerned with some of the radical extensions of the principles of trustees' indemnity effected by s. 23(1) of that Act. The law applicable in India is to be found in s. 47 of the Indian Trusts Act, 1882, which says that :—

"A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation.

The explanation to the section says that—

"The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section."

Whether this section applies in terms to the case of an administratrix or not, I think those are the principles which should be applied to the present case.

The English authorities cited by the learned Advocate General on behalf of the defendants need only be examined very briefly. In *Lord Dorchester v. The Earl of Effingham*<sup>1</sup> an executor who had deposited moneys belonging to the estate with the same persons with whom the testator had deposited them in his lifetime, although they were not bankers, was held not liable. There was no corrupt motive, and it was held that he was not guilty of gross negligence. I do not think this decision is relevant to the facts of this case.

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In *In re Bird : Oriental Commercial Bank v. Savin*<sup>1</sup> a solicitor was engaged to compromise a claim against the estate. He wrote to the executor that the claim had been compromised and obtained moneys from the executor for making the payment, but instead of making the payment he misappropriated the moneys to his own use. It was held that the executor had done just what any prudent man would think himself safe in doing. There was no negligence on his part and no incautious trusting to some other person's representation.

In *In re Speight : Speight v. Gaunt*,<sup>2</sup> it was held that trustees may employ brokers and agents in cases in which they are employed in the ordinary course of business, and that trustees do not guarantee the solvency or honesty of the agents they employ.

In *In re Brier : Brier v. Evison*<sup>3</sup> the trustee had employed an agent to collect moneys. He was held not liable for moneys misappropriated by the agent.

In *Lakhmichand v. Jai Kuwarbai*<sup>4</sup> it was held that in appointing an agent the trustee should use the same degree of care as a man of ordinary prudence would in his own affairs. There the agent was employed for the purpose of conducting a business. But at the same time it was laid down in that case that the trustee would be liable if there was want of diligence either in selecting an agent or supervising his work.

I do not think any of these cases helps the defendants in this case. A personal representative ought not to employ an agent to perform the duties which by accepting the office he had taken upon himself except where the employment of the agent was reasonable. Delegation, of course, is necessary and would be reasonable in the regular course of business where, for instance, legal work is to be done for which a solicitor is to be employed, or where property is to be sold for which an auctioneer is to be employed, or where securities are to be purchased for which brokers are to be employed, or where business is to be conducted, or outstandings and rents are to be recovered for which collectors are to be employed. But a trustee or an administrator cannot delegate to others the confidence reposed in himself. Even where an agent has to be employed to receive moneys, the trustee would be liable if he allowed the agent to retain the moneys in his hands uninvested for a longer time than is reasonably necessary. Trustees have no right to shift their duties on other persons, and if they employ agents, they remain subject to responsibility towards their *cestuis que trust* for whom they have undertaken the duty.

I have already referred to the wide powers given by Havabai to Bhatra under the power-of-attorney, and I hold that the appointment of Bhatra as such constituted attorney of Havabai was in breach of her duty as administratrix. But even if the appointment could be justified, I have no doubt that Havabai became liable for the defalcations of Bhatra as she absolutely failed to supervise the management and dealings of Bhatra.

The next question to be considered is what is the loss or damage occasioned to the estate by the devastavit of the administratrix. [After discussing the evidence on this point his Lordship proceeded :]

In my opinion, therefore, the two sums for which the defendants are liable

1 (1873) L. R. 16 Eq. 203.

2 (1883) 22 Ch. D. 727.

3 (1884) 26 Ch. D. 238.

4 (1904) L. L. R. 29 Bom. 170,

s. c. 6 Bom. L. R. 907.

are the sum of Rs. 58,496-11-5, and the sum of Rs. 23,935-7-6. These are, in my opinion, the amounts lost to the estate of Abdūl Rahim by the mal-administration of Havabai.

The plaintiff claims interest on these sums relying on s. 23 (e) of the Indian Trusts Act at the rate of six per cent. per annum with half yearly rests. But, in my opinion, the case is not covered by s. 23(e) of the Indian Trusts Act. The loss which was occasioned was not due to the failure to invest trust moneys and to accumulate the dividends, but was due to the misappropriations made by Bhatra who ought never to have been delegated by Havabai with the authorities which she gave him. Nevertheless, the defendants are, in my opinion, liable to pay interest. If the moneys had not been lost they would have been available to be invested in authorised securities, and in my opinion, it is proper to allow interest on the two sums I have mentioned above at four per cent. from June 2, 1927.

At one time I thought that out of these sums the amounts for maintenance which the heirs of Abdul Rahim continued to get should be deducted. But, in fact, the moneys had been lost substantially by June, 1927, and the amounts for the maintenance of the heirs of Abdul Rahim received by them were really out of the rents of the immoveable properties. For the same reason it is not proper, in my opinion, to deduct from the above, the sum, small though it was, namely about Rs. 700 which the heirs of Abdul Rahim received from the estate of Jaffer as the result of the decree in the suit for the administration of Jaffer's estate.

Abdul Rahim left three sons and three daughters. One of the daughters was got married by Havabai after the death of Abdul Rahim, and in my opinion, the expenses of her marriage should be deducted from the above two sums. What the exact amount of this expense was is not before me, but it appears from two counterfoils of cheques, one dated January 21, 1926, and the other dated April 19, 1927, that Rs. 4,000 and 1,500 were spent for the wedding of the eldest daughter. These two cheques are drawn in favour of Haji Moosa & Co. The cheque for Rs. 4,000 is stated to be for ornaments, clothes, etc. for the wedding of the eldest daughter. The cheque for Rs. 1,500 is stated to be for wedding expenses. These could not be the only expenses incurred by Havabai for the wedding of her daughter. The plaintiff contended that it was for the defendants to prove how much was spent for the wedding of the daughter. But it seems to me that that fact would be especially within the knowledge of the plaintiff and the burden of proving that fact would be upon him. Although at the time the plaintiff's sister was got married the plaintiff was a minor, all the necessary information and materials ought to be within the reach of the plaintiff. The plaintiff's witness Joosab Esmail seemed to know all about the family and its affairs, and I think he would be in a position to depose to the expenses that were incurred on the wedding. At one time, I was inclined to refer the question of ascertaining the expenses made on the wedding of the daughter to the Commissioner, so that after his report the Court might be able to decide whether the amount found by him or a smaller sum should be deducted from the figures mentioned above. But on further consideration, I think it is possible to avoid a reference. At or about the time that the wedding

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P. C. took place the estate of Abdul Rahim consisted roughly of the two sums of  
 1940 Rs. 58,496-11-5 and Rs. 23,935-7-6 and a one-fourth share in the five im-  
 GENERAL moveable properties which when sold in 1934 realised a gross sum of  
 ACCIDENT Rs. 1,75,000. Taking the estate to be worth roughly Rs. one and a quarter  
 FIRE AND lacs and the persons entitled to it to be the three sons subject to the main-  
 LIFE tenance of the widow and the maintenance till marriage and the marriage  
 ASSURANCE expenses of the three daughters, I think a sum of Rs. 7,500 ought properly  
 CORPORATION to be allowed for the marriage expenses of each daughter. In view of the  
 TION, fact that Rs. 5,500 were spent for ornaments and clothes for the wedding of  
 LIMITED the daughter and considering the somewhat opulent manner in which the  
 v. parties were living (as appears from the household expenses debited in the  
 JANMAHOMED books), I think I would be justified in inferring that at least Rs. 2,000 more  
 must have been spent by Havabai on the wedding of her daughter. After  
 all, the loss caused to the estate and for which the defendants are sought to  
 be held liable cannot be weighed in scales of gold, and I think neither party  
 should be aggrieved, if I hold, as I do, that from the two sums aforesaid the  
 sum of Rs. 7,500 should be deducted as legitimately spent in fulfilment of  
 the estate's obligation to provide the wedding expenses of one of the  
 daughters. I hold that the defendants are liable to pay to the plaintiff the  
 sum of Rs. 74,932-2-11 being the total of the two sums of Rs. 58,496-11-5,  
 and Rs. 23,935-7-6, less the sum of Rs. 7,500. The defendants should pay  
 interest on Rs. 74,932-2-11 at four per cent. per annum from June 2, 1927.

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[After recording findings on the issues, the judgment concluded :]

There will be a decree for the plaintiff against the defendants for Rs. 74,932-2-11 and interest thereon at four per cent. per annum from June 2, 1927, till judgment.

The defendants must pay the costs of the suit to the plaintiff including the costs of the petition for assignment of the bond and the chamber summons relating to the same. The defendants must also pay interest on judgment at the rate of six per cent. per annum till payment. The decretal amount should be paid by the defendants into Court and the plaintiff should apply for further directions as regards the disposal of the amount after giving notice to the other parties now interested in the estate of Abdul Rahim.

The defendant company appealed against the decree of Engineer J., disputing liability of any kind and contending that the amount awarded was excessive.

The plaintiff cross-objected to the decree in regard to the alleged loss in respect of the immovable properties, the costs of the suit for the administration of Jaffer Allarakhia's estate and the rate of interest (four per cent. per annum) awarded up to judgment.

The appeal came on for hearing before Beaumont C. J. and Kania J., who dismissed the appeal and cross-objections (March 31, 1938) subject to a variation in the date from which interest should run.

The following are their Lordships' judgments.—

BEAUMONT C. J. This is an appeal against a decision of Mr. Justice Engineer.

The plaintiff is the assignee of an administration bond on which the defendants stood sureties. The bond was given on May 14, 1925, to secure due administration of the estate of one Abdul Rahim by his widow Havabai to whom letters of administration were granted on June 9, 1925. The bond has been assigned to the plaintiff under the Indian Succession Act, 1925.

Questions of limitation were raised in the written statement. These questions are covered by a decision of this Court in *Manubhai Chonilal v. The General Accident Fire and Life Assurance Corporation Ltd.*,<sup>1</sup> and the learned Judge in the Court below overruled the objections on the strength of that decision and we must adopt the same course.

The only questions which have been raised on the appeal are questions of account. The relevant facts are that Abdul Rahim was a Mahomedan but a Cutchi Memon and, therefore, the descent of his estate is regulated by Hindu law. He died on September 18, 1924, and as I have said letters of administration were granted to his widow. During his lifetime he had been the administrator of the estate of his father, Jaffer, who died in 1918, and that estate had not been completely administered at the date of the death of Abdul Rahim. Part of that estate consisted of some immoveable properties, but there was a good deal of personal estate which Abdul Rahim had received and to some extent mixed with his own money. There is no suggestion that Abdul Rahim had misappropriated any part of the estate of Jaffer, but undoubtedly Abdul Rahim's estate was a debtor to Jaffer's estate at the time of Abdul Rahim's death.

The administratrix, Havabai, is a pardanashin lady and illiterate. On July 2, 1925, i.e. within a month after the grant to her of the letters of administration, she executed a power-of-attorney in favour of one Bhatra. That power-of-attorney is expressed in wide terms and practically gives Bhatra complete control over Abdul Rahim's estate. It is alleged by the plaintiff in this suit that the administratrix had no right to grant a power-of-attorney in such wide terms to Bhatra. The learned trial Judge accepted that view, and I entirely agree with him. No doubt, Havabai, being a pardanashin lady, would require some assistance in the administration of the estate, and she could have appointed agents for specific purposes in the business of administration, but she was no more entitled than any other administrator to grant a general power-of-attorney which took the control of the estate out of her hands and placed it in the hands of somebody else. If she was not competent to attend to the business she ought to have stood aside and not taken out letters of administration. It seems to me impossible to contend seriously that she was justified in granting so wide a power-of-attorney to Bhatra. The result of the granting of the power-of-attorney was that a large part of the estate was lost. Bhatra misappropriated it and eventually committed suicide. The plaintiff now sues the defendants as sureties under the administration bond, and the real question in dispute in this appeal is as to the amount which the defendants are liable to pay. The learned Judge held in round figures that Havabai had received Rs. 58,000 in respect of immoveable estate of Abdul Rahim and that fact is not challenged in appeal. He also held that Havabai had received Rs. 23,000 in respect of moveable

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<sup>1</sup> (1936) I. L. R. 60 Bom. 1027, s. c. 38 Bom. L. R. 632.

P. C. estate of Jaffer and the receipt of that money is also not disputed, but it  
 1940 is argued that deductions should be allowed in respect of costs of mainten-  
 — ance; but the short answer to that is that there is no evidence that any  
 GENERAL money was applied for maintenance of Havabai and her family. It is com-  
 ACCIDENT plained that counsel in the Court below did not cross-examine witnesses  
 FIRE AND about the expenditure for maintenance because he was under the impression  
 LIFE that there would be a reference to the Commissioner for taking accounts.  
 ASSURANCE However that may be, the fact remains that there is nothing on record to  
 CORPORA- show that any part of the estate was applied in maintenance. The receipt  
 TION, of the amount being established, it is for the administratrix to show that  
 LIMITED she applied the same in due course of administration, and that she has not  
 v. done. I think she is liable for that sum as well as Rs. 58,000.

JANMAHOMED Then it is urged that she ought to be given credit for a sum of Rs. 35,000.  
 — Beamoni C.J. Now that sum was received under these circumstances: Havabai died on  
 April 27, 1929, and by an order of this Court made on April 29, 1929, the  
 Administrator General was appointed administrator under ss. 10 and 11 of  
 the Administrator General's Act to collect and get in the moveable and immo-  
 veable properties forming part of the estates of Abdul Rahim and Havabai.  
 Havabai, before her death, had started a suit against the representatives of  
 Bhatra to recover the loss which he had occasioned to the estate. The  
 Administrator General continued that suit after the death of Havabai, and  
 eventually recovered a sum of Rs. 35,000 in that suit. That was very much  
 less than the amount of his claim, but it was the total sum which he re-  
 covered, and he applied that sum in payment to the estate of Jaffer. It is  
 argued, and I think rightly, that there was no breach of trust or devastavit  
 in respect of that payment. Certainly there was no devastavit for which  
 the defendants are liable. Abdul Rahim's estate was undoubtedly a debtor  
 to the estate of Jaffer, and as the Administrator General represented Hava-  
 bai and Abdul Rahim, I think he was entitled to apply this sum in payment  
 of a debt due from Abdul Rahim's estate. But it does not follow from that  
 that the defendants are entitled to credit for that amount. Indeed I am  
 unable to see what the receipt and application of this sum of Rs. 35,000  
 has to do with the defendants. What it really comes to is that Havabai  
 received Rs. 74,000, which she has not accounted for. She or her estate  
 also received Rs. 35,000, which she has accounted for. The fact that she has  
 accounted for the Rs. 35,000 is no reason why she should not account for  
 the Rs. 74,000. I think the learned Judge was quite right in holding that  
 the amount for which she must account is Rs. 74,000. That really dis-  
 poses of the appeal.

Then there are cross-objections which relate to the immoveable estate  
 of Jaffer. Havabai and the other persons interested in the estate of Jaffer  
 agreed to partition the immoveable estate of Jaffer sometime in 1925 and in  
 1928 a suit was started for the purpose of partitioning the same. Even-  
 tually the property was sold in 1934. There is not a particle of evidence  
 that any loss was occasioned to the estate by any wrongful act of Havabai.  
 I do not think she was guilty of any unreasonable delay in her action in  
 relation to the immoveable properties, and even if she was, it is not establish-  
 ed that the estate suffered any loss thereby. In my opinion there is no sub-

stance in the cross-objections relating to the immoveable properties.

Then it is stated that the learned Judge made a wrong order with regard to interest. He allowed interest at four per cent. per annum from June 22, 1927, which was the date on which Havabai filed the inventory. I think the date should be from the expiration of the administrator's year, i.e. July 9, 1926. With that alteration in the date from which interest is to run I think there is no reason for interfering with the learned Judge's order. No doubt six per cent. is the usual rate of interest allowed in this Court, but the learned Judge was not bound to allow that rate. In my opinion there is no ground for interfering with the manner in which he exercised his discretion on that point.

The appeal will be dismissed with costs. The cross-objections will also be dismissed with costs subject to the alteration of the date from which interest is to run to July 9, 1926.

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KANIA J. The material facts to be considered for this appeal are these : Jaffer, a Cutchi Memon, died on September 20, 1918, leaving him surviving three sons, and a grandson by a predeceased son. Out of the three sons Allarakhia was a minor and the grandson Abdul Karim was also a minor. Abdul Rahim, the eldest son, obtained letters of administration to the estate of Jaffer. The estate consisted of four immoveable properties, a business, certain shares and cash. In respect of a fifth immoveable property a contract to purchase was made during the lifetime of Jaffer. That was completed by Abdul Rahim as his administrator. After obtaining letters of administration Abdul Rahim wound up the estate, collected the outstandings and paid the debts. The result was that at the end of October, 1920, there were in his hands five immoveable properties, seven shares of Century Mills and about three lacs of rupees in cash. Out of that sum Abdul Rahim had himself withdrawn before his death a sum of Rs. 69,000 and odd, Ahmed, the second son, had withdrawn over Rs. 37,000, while to the two minors Rs. 5,600 and Rs. 17,000 were given, or were utilised for their benefit. The estate of Jaffer, to the extent it consisted of cash, was deposited in banks, or with different firms, in the name of Abdul Rahim as administrator. Apart from the estate so held by Abdul Rahim he had his own independent business and his own estate. That also was invested in his own name. That was the state of the estate of Jaffer and Abdul Rahim when Abdul Rahim died on September 18, 1924. After the death of Abdul Rahim, Ahmed, another son of Jaffer, tried to collect some of the estate and outstandings. Abdul Karim, the grandson, who had by that time attained majority also assisted in the recovery. As most of the cash was however invested in the name of Abdul Rahim, Havabai, on March 17, 1925, applied for letters of administration to the estate of Abdul Rahim. On May 14, 1925, the defendants joined Havabai in executing the administration bond. On June 7, 1925, letters of administration to the estate of Abdul Rahim were granted to Havabai.

On July 2, 1925, Havabai, who was a pardanashin woman, gave a general power-of-attorney to one Bhatra and in fact Bhatra thereafter continued to administer, collect and dispose of the whole estate (the estate of Jaffer which

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stood in the name of Abdul Rahim and Abdul Rahim's own estate). The amounts lying with different banks and with different merchants were collected and accounts were opened in the banks in the name of Havabai, which were operated upon by Bhatra. In the accounts so opened in the name of Havabai cash which originally belonged to Jaffer's estate was deposited. The personal estate of Abdul Rahim, which was also deposited in different banks or lying with different merchants, was also collected and put in the same banking accounts. Bhatra operated on these accounts and eventually committed suicide. It was then discovered that he had misappropriated almost the whole cash. On October 31, 1928, Havabai on behalf of herself and other creditors of Bhatra filed a suit in this Court for the administration of Bhatra's estate. Soon thereafter she also filed another suit for the administration of the estate of Jaffer and for recovering the share of Abdul Rahim in the estate of Jaffer. Pending those suits she died on April 27, 1929. An application was made to this Court under ss. 10 and 11 of the Administrator General's Act and a combined order was made in respect of the estates of Havabai and Abdul Rahim. On the basis of that order the Administrator General of Bombay was made a party to the two pending suits in place of Havabai. In the suit filed for the administration of Bhatra's estate Rs. 35,000 were recovered, and it was declared that on that there was a first charge in favour of the Administrator General who was a party to that suit. Thereafter a consent decree was taken in suit No. 2414 of 1928 filed for the administration of Jaffer's estate. In that consent decree it was provided that Rs. 35,000, which was received from Bhatra's estate, should be paid over to Allarakhia the minor son of Jaffer. That appears to have been done because the adults had withdrawn larger amounts from the cash estate and the remaining cash estate had disappeared.

The present suit has been filed by one of the sons of Abdul Rahim, after obtaining an assignment of the bond passed by the defendants for the proper administration of Abdul Rahim's estate by Havabai. The first defence is of limitation. Ancillary thereto or as a part of it there is the contention that the debt having become time-barred, the assignment did not confer any title on the plaintiff to sue. These contentions are covered by grounds 1 to 4 in the memo. of appeal. The decision in *Manubhai Chunilal v. The General Accident Fire and Life Assurance Corporation Ltd.*<sup>1</sup> delivered by a bench of this Court is binding on us and the two contentions urged by the appellants were decided against them in that case. Those contentions must, therefore, be rejected in this appeal.

The next contention was that the defendant company was not liable because Havabai was justified in entrusting the management of the estate to Bhatra. The power-of-attorney given to Bhatra is in very wide terms and in fact left the whole administration to Bhatra. Even conceding that a pardanashin woman who obtained letters of administration was entitled to leave some part of the administration work, subject to her supervision, to a male person, the present case goes much beyond that. The terms of the power-of-attorney and the actual work done by Bhatra establish that excepting that she obtained letters of administration in her own name for the benefit

1 (1936) I. L. R. 60 Bom. 1027, s.c. 38 Bom. L. R. 632.



of her minor sons and limited to the period of their minority, Havabai did nothing and left the administration of the estate of the deceased completely to Bhatra. That cannot be supported in any event. That contention of the appellants must therefore fail.

The second contention was that Rs. 23,000 (the balance of the share of Abdul Rahim) which remained to be recovered from Jaffer's estate at the time of the death of Abdul Rahim were utilised in defraying the maintenance expenses of Abdul Rahim's children and of Havabai herself. The evidence on record contains an admission that this amount was withdrawn by Havabai from Jaffer's estate. There is no evidence to show that the amount so withdrawn was utilised for the maintenance of any of those parties. In the absence of any evidence to that effect the administratrix must be considered to have failed to establish her contention. A mere statement in the evidence that money was spent for the maintenance of the children and Havabai does not prove that those expenses were incurred from the estate. In the absence of such proof I am unable to differ from the conclusion of the learned Judge that the defendants were liable to make good that amount. It was suggested in the course of argument that the learned counsel for the defendants was under the impression in the trial Court that the matter was going to be referred to the Commissioner. If so, it is unfortunate, but that cannot help the defendants in appeal. The record does not show that at any stage the learned Judge had intimated to any party that the matter was to be referred to the Commissioner on any particular point or at all. Indeed the numerous entries and accounts put in before him lead to a contrary conclusion.

The third point urged on behalf of the appellants was that they were entitled to receive credit for Rs. 35,000 received from Bhatra's estate. The short answer to this contention appears to be that Abdul Rahim's estate consisted of various amounts which were deposited in various places and the estate was liable to pay different debts. Havabai, as administratrix, recovered different amounts which were deposited with banks and private firms. Instead of utilising the same in paying the debts, including the debt due to Ahmed, Allarakhia and Abdul Karim, she allowed the whole of the estate, which stood in the name of Abdul Rahim and which included the amounts which were payable to those parties and also the personal estate of Abdul Rahim, to remain in the hands of Bhatra. The result was that at the time the whole estate was handed over to Bhatra the debts due and payable by Abdul Rahim's estate remained unpaid. If, therefore, at a later stage some amount was recovered from Bhatra, it would not be improper to call it as estate of Abdul Rahim recovered from Bhatra. But there was no maladministration in paying over the money to a creditor of Abdul Rahim who had remained unpaid. If the amount was so paid over to a creditor, I do not see how the defendants could claim to be exonerated from that liability. The fallacy underlying the contention of the appellants is the assumption that only two sums of Rs. 58,000 and Rs. 23,000 were handed over to Bhatra and out of that Rs. 35,000 were recovered. The second assumption (for which there appears to be no justification) is that the amount so left in charge of Bhatra was free from any debt due by the estate of Abdul Rahim. Both these assumptions are unjustified, and in law the only thing

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done was that a certain amount which was treated as of the estate of Abdul Rahim was received and paid over to satisfy a debt of Abdul Rahim. In that light the defendants' contention to recover that amount must fail. Apart from these contentions the learned counsel for the appellants has not pressed any other points. He has quite rightly conceded that the separate estate of Abdul Rahim which is stated in the judgment of the trial Court to be Rs. 58,000 was the correct figure.

Coming to the cross-objections, it was first urged that Havabai had mal-administered the estate because she had failed to sell the immoveable properties soon after entering on the administration. That contention must fail on two grounds. Firstly, I do not consider a suit filed in 1928 to administer the estate of Jaffer as undue delay on the part of the administratrix to recover the undivided fourth share in the five immoveable properties. Secondly, (and that is a stronger answer to the contention of the respondent), there is no proof at all on record to show that there was any loss caused to the estate by reason of this delay. Indeed the evidence of Mr. Kanga (architect) led on behalf of the respondent himself is that there was no depreciation in the value of immoveable properties between 1925 and 1928. This contention must, therefore, fail. It was next urged before us that the balance-sheet of the estate of Jaffer up to October 17, 1925, which was signed by Havabai, disclosed that she had in her hands a sum of Rs. 1,64,000. The balance-sheet further showed that the claimants to that amount were the four heirs of Jaffer. It was contended that instead of paying over the sum to the claimants Havabai did nothing and the cash is now lost. The result was that when the immoveable properties were sold the sale proceeds had to be utilised in paying over the claimants. Therefore, there was devastavit for which the defendants, who had guaranteed proper administration, were liable. This point was not urged before the trial Court because there is no reference to this contention in the judgment. It was contended that grounds Nos. 11 and 12 of the cross-objections covered this contention. I am unable to accept that construction of grounds Nos. 11 and 12. They cover merely the claims to one-fourth share of Rs. 1,75,000, which were the sale proceeds of the five immoveable properties. I do not find anywhere in those grounds the contention that because Havabai had failed to pay off the debts in 1925 there was maladministration, and the liability was the one-fourth share in the five immoveable properties. I do not think it is permissible to the respondent to raise that contention for the first time in appeal. It would be obviously unfair because there may be evidence available to the defendants which would explain how and why the debts were not so paid off in 1925 or how that fund was utilised by Havabai.

The only other point urged on behalf of the respondent was in respect of interest. As regards the date, in my opinion, the same should be altered and interest should run on the expiry of the administrator's year, i.e. from July 9, 1926. As regards the rate it is a matter for the discretion of the Court, and having regard to all the circumstances the learned Judge allowed four per cent. interest. I am not prepared to interfere with the discretion exercised, and except for the variation about the date the contention must be disallowed. The result therefore is that the appeal and cross-objections

(except as to variation in the date as mentioned above) are both dismissed with costs.

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The learned Judges in accordance with their judgments passed a decree for the plaintiff for Rs. 1,07,524-8-0 and interest.

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The defendant company and the plaintiff being dissatisfied with the decree duly obtained certificates enabling them to appeal therefrom to His Majesty in Council. By an order of the High Court, dated October 14, 1938, the appeals were consolidated.

*Sir Thomas Strangman K. C.* and *W. W. K. Page*, for the appellants. We contend, first of all, that this action is clearly one on a bond, to which art. 68 of the Indian Limitation Act is applicable. Next, the latest date, it is submitted, at which the cause of action could arise was the death of the administratrix in April, 1929. Therefore this suit, instituted as it was in November, 1932, must be barred. [Counsel referred to the definition of "bond" in s. 3 of the Indian Limitation Act, and to clauses 45 and 46 of the Letters Patent, (dated December 8, 1823); founding the Supreme Court of Bombay.]

We submit that when the benefit of the bond is assigned to the heir, no new cause of action accrues to him: the starting point of time remains the date of the breach by the administrator. The grounds for the decision in *Manubhai Chavilal's* case are open to challenge. [Counsel referred to Blackwell J.'s judgment in that case, and to *Maung San U v. Maung Kyaw Mye*<sup>1</sup>; *Kanti Chandra Mukerji v. Al-i-Nabi*<sup>2</sup> and *In the Goods of Young*<sup>3</sup> as showing that such cases had been decided each way.]

*Pritt K. C.* and *S. C. Khambatta* for the respondent. Article 68 is, we submit, not applicable. The action is a peculiar one to which no article of the Act is specifically applicable. Therefore by art. 120, the plaintiff had six years in which to bring his action from the date when his right to sue accrued. The question is when his cause of action arose. This action is not on the bond at all. It could equally well have been instituted against the personal representatives of the administratrix to compel them to make good any loss to the estate for which she was liable. No cause of action can, it is submitted, arise until the loss is ascertained.

Supposing, however, that art. 68 applied: in such a case the cause of action would not arise until the heir or some one similarly entitled to do so had claimed the estate and failed to obtain his due or some part of it. Section 292 of the Indian Succession Act, 1925, does not merely give a new starting point by implication: it is submitted that it is to be construed as an express statutory provision to that effect. An application is made to the Court, which thereupon confers on the applicant a statutory right of action. What else can the words "who shall thereupon be entitled to sue" mean? This is clearly, we submit, an enabling section, such a section cannot be referable to a right which already existed before. It is not merely confirmatory, as its wording shows. It creates a new title to the estate.

*Khambatta*, following. If the assignee of such a bond were a minor,

1 (1923) I. L. R. 1 Ran. 463.

3 (1866) L. R. 1 P. & D. 186, 189.

2 (1911) I. L. R. 33 All. 414.

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[Counsel referred to *Maharaja Jagadindra Nath Roy Bahadur v. Rani Hemanta Kumari Debi*.<sup>1</sup>]

*Strangman*, in reply.

*Cur. adv. vult.*

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VISCOUNT MAUGHAM. There are here two consolidated appeals from a judgment and decree of the High Court of Judicature at Bombay in its appellate jurisdiction dated March 31, 1938, confirming with a variation a judgment and decree of that Court in its ordinary original civil jurisdiction. The facts are very complex and the questions raised on the appeals are questions of considerable importance. The appellants, however, who were the defendants in the suit, besides disputing liability on a number of grounds have raised the contention that the suit was barred by art. 68 of the Indian Limitation Act (IX of 1908). This question was based on substantial grounds and their Lordships thought it right to hear the arguments of both sides upon it before embarking on the other questions raised on the appeal and the cross-appeal; and in the result they have come to the conclusion that the point of limitation raised by the appellants is well founded and accordingly it has not been necessary for them to go into the other matters above referred to.

In order to deal with the question of limitation it is necessary to state the following facts.

On September 18, 1924, Abdul Rahim died intestate at Bombay leaving him surviving a widow, Havabai, three sons and three unmarried daughters. All his children were then minors. According to the law by which he was governed his three infant sons became entitled to his estate in equal shares subject to the right of his widow to maintenance pending re-marriage or death, and to the rights of his daughters to maintenance until marriage or death, and to their marriage expenses.

On March 17, 1925, the widow of Abdul Rahim (Havabai), having been duly empowered by the High Court, filed a petition in the High Court for the grant to her of letters of administration to the estate of her deceased husband for the use and benefit of his three minor sons and limited to the period of minority of any of them. It was stated in the schedule to the petition that the moveable and immoveable properties of Abdul Rahim were valued at Rs. 2,75,791 and for the purposes of probate duty the estate was valued at Rs. 1,99,025 after deducting funeral expenses and debts. On May 6, 1925, it was ordered that on the sureties being justified for the whole of the estate of Abdul Rahim and on filing the necessary administration bond, and on payment of fees and stamp duty, letters of administration should issue as prayed to Havabai.

On May 14, 1925, Havabai and the present appellants as sureties executed a bond for Rs. 3,98,060 in favour of the Registrar of the High Court in its testamentary and intestate jurisdiction and the Head Assistant to the Prothonotary and Registrar of the Court. The conditions of the bond were in the usual form. The obligation was to be void and of no effect if Havabai

(1) should make or cause to be made a true and perfect inventory of the property and credits of the deceased which had or should come to her hand, possession or knowledge or to the hands or possession of any other person or persons for her and should exhibit or cause to be exhibited to the High Court such inventory on or before November 14, 1925 ;

(2) should well and truly administer such property and credits according to law ;

(3) should make or cause to be made a true and just account of her administration on or before May 14, 1926 ; and

(4) all the rest and residue of the property and credits which should be found remaining upon the said account after being first examined and allowed by the High Court should deliver and pay unto such person or persons as shall be lawfully entitled to such residue.

On June 9, 1925, the letters of administration were duly issued to Havabai on behalf of the three minor sons of the intestate for their use and benefit until one of them should attain his majority.

It is alleged by the plaint that on July 2, 1925, Havabai, who was a pardanashin lady, and illiterate, appointed one Bhatra who was related to her, being the son of her maternal uncle, her attorney to act for her in all matters relating to the estate of Abdul Rahim. This person, however, misapplied the property and subsequently (on October 22, 1928) committed suicide. Havabai commenced various proceedings in an endeavour to recover the property forming part of the estate of Abdul Rahim, but on April 27, 1929, she died.

On November 14, 1931, the eldest son of Abdul Rahim, Janmahomed Abdul Rahim (who will be called "the plaintiff") attained his majority.

On March 24, 1932, an order was made by the High Court that the Court should assign the administration bond to the plaintiff, his heirs, executors or administrators, and it was further ordered that on such assignment the plaintiff, his heirs, executors or administrators should be entitled to sue on the bond in his or their name or names as if the same had been originally given to him or them, and should be entitled to recover thereon as trustee or trustees for all persons interested the full amount recoverable in respect of any breach thereof.

By a deed of assignment dated August 14, 1932, certain officers of the Court appointed for that purpose by an order of the Chief Justice purported to assign the bond to the plaintiff (the present respondent) "to hold the same unto the assignee absolutely with all such powers rights and remedies as are now subsisting thereon." The assignment was effected under s. 292 of the Indian Succession Act of 1925 which is in these terms :—

"The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the

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It should be added that under s. 291 every person to whom any grant of letters of administration, with an exception not material to the present purpose, is committed must give a bond to the District Judge with one or more surety or sureties engaging in the due collection and administration of the estate of the deceased. The bond is in the usual form. It is the usual practice in such a case to apply s. 292 and to cause the bond to be assigned to the intending plaintiff. It does not appear to be necessary to discuss the older practice under the Letters Patent of 1823 founding the Supreme Court of Bombay.

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On November 2, 1932, the plaintiff (respondent) filed the present suit claiming from the defendants, the present appellants, the sum of Rs. 3,98,060, or such lesser sum as represents the loss of the estate of Abdul Rahim due to the failure of Havabai as administratrix of that estate to carry out her obligations under the administration bond. The plaint alleged four specific breaches of duty by the administratrix which can be shortly stated as follows :—

(1) The appointment of Bhatra as her attorney to manage the estate of the intestate ;

(2) allowing the sum of Rs. 50,003 shown in the inventory and accounts filed by her on June 2, 1927, as being in her hands on that date to remain in the hands of Bhatra ;

(3) the failure to realise a certain share of the intestate in the estate of his deceased father and allowing such share to remain in the hands of Bhatra ; and

(4) the failure to hand over to the Accountant General of Bombay the estate of Abdul Rahim, all his heirs being minors.

The learned trial Judge and the Appellate Court (Sir John Beaumont C. J. and Kania J.) in the course of their judgments held that on the question of limitation they were bound by the decision of the Appellate Court of Bombay in the case of *Manubhai Chunilal v. The General Accident Fire and Life Assurance Corporation Ltd.*<sup>1</sup> That case related to a similar bond, similarly assigned, and the Appellate Court, Sir John Beaumont C. J. and Rangnekar J., overruling Blackwell J., decided that the defence of limitation under art. 68 of the Indian Limitation Act was not available. In that case as in the present the beneficiaries at the date of the grant of letters of administration were infants, and in other respects the facts are not distinguishable from those in the present case. The question, therefore, arises whether the decision in *Manubhai's* case is or is not correct.

Article 68 of the Indian Limitation Act, 1908, is one of the series of 183 articles in a schedule which relate to the limitation of suits, appeals and applications. The articles are introduced by s. 3 in the following words :—

"Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

The provision contained in art. 68 is to the following effect :—

“On a bond subject to a condition,” the period of limitation is to be three years and the time from which the period begins to run is stated to be “when the condition is broken.”

Article 120 is stated to relate to any suit “for which no period of limitation is provided elsewhere in this schedule.” The period of limitation is in that case six years and the time from which the period begins to run is “when the right to sue accrues.” The word “bond” is defined in s. 2 (3). The word is stated to include “any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be.” It is not in dispute that the bond in this case is a bond within the terms of that definition, and it is clear that art. 120 has no application if art. 68 applies to the present case. It may be added that s. 6 of the Act (which deals with suits by infants) clearly has no application.

Before considering the grounds on which the High Court in *Manubhai's* case came to the conclusion above referred to, it may be desirable to point out that a Limitation Act ought to receive such a construction as the language in its plain meaning imports. (See the decision of this Board in *Abhiram Goswami v. Shyama Charan Nandi*.<sup>1</sup> As was well stated by Mr. Mitra in his Law of Limitation and Prescription (Tagore Law Lectures), 6th ed. (1932), Vol. 1, p. 256 :—

“A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where such law has been adopted by the State . . . . it must, if *unambiguous*, be applied with stringency ; . . . The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot, on equitable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it.”

Very little reflexion is necessary to show that great hardship may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights ; yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases. Their Lordships think it is possible that sympathy for the plaintiff in the case which must now be considered was allowed to affect a pure question of construction. In the present case, however, it may be observed that an administration bond is as often assigned when persons of full age are concerned as when the beneficiaries are all of them infants ; and that such a bond is of the nature of an additional security taken by the Court for the benefit of the beneficiaries. If a right of action under the bond become statute barred by the operation of art. 68 of the Indian Limitation Act, that does not affect the rights of the beneficiaries against the administrator. While making these observations their Lordships think it right to repeat that mere considerations of hardship in such a case should not be taken into account.

In *Manubhai's* case Blackwell J. took the view that the bond being within the definition in the Indian Limitation Act and the action being on a bond subject to a condition, time began to run from the last date on which the condition was broken and no action could therefore be brought after the ex-

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<sup>1</sup> (1909) L. R. 36 I. A. 148, s. c. 11 Bom. L. R. 1234.

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piration of three years. In coming to this conclusion he followed the decision of the appellate Court of Rangoon in *Maung San U v. Maung Kyaw Mye*<sup>1</sup>. Blackwell J. in an admirable judgment dealt with the effect of an assignment of a bond under s. 292 of the Indian Succession Act and observed that in his opinion such an assignment merely deals with the question of title and confers upon the assignee a right to sue which he would otherwise not have had previously to the assignment, and that the section thus merely entitles the assignee to recover as a trustee for all persons interested the full amount recoverable under the bond in respect of any breach of it. On appeal it was not doubted that the bond was a bond upon a condition, but the Court held that a suit to enforce the bond by a person to whom it has been assigned under s. 292 was not a suit upon a bond within the meaning of the article because, it was said, the assignment confers substantive rights upon the assignee. Their Lordships, with all respect, are unable to follow this argument, nor can they agree that there is any difficulty as regards the consideration for the assignment. It is of course true that a suit by the assignee of such a bond is a suit by a person who derives title from the assignment which is authorised by the terms of s. 292 of the Indian Succession Act, 1925; but their Lordships are unable to see how this can be held to show that the action on the bond by the assignee is not a suit on a bond subject to a condition. Every valid assignment of a bond confers substantive rights upon the assignee, but those rights are not, in any case suggested to their Lordships, greater than the rights possessed by the assignor. It may be noted that the ordinary security bond which is given by receivers in India under the provisions of the Code of Civil Procedure, O. XL, r. 3, is given to an officer of the Court (see App. F. Form No. 10); yet it has never been suggested that a suit upon such a bond, if brought by an assignee, is in any way different from an ordinary suit by the holder of a bond, the condition of which has been broken.

There were two other grounds for the conclusion of the Court. First, it was held that, assuming that art. 68 applied to the case, it was impossible to say that the condition was broken until some person who was able to give a valid discharge for the estate claimed it from the administrator or his representatives and failed to obtain it. The consequence of that view was said to be that the condition was not broken within the meaning of art. 68 until the plaintiff attained his majority which was less than three years before the suit was filed. In other words the death of the administrator was held not to put an end to his liability as regards future events. Their Lordships cannot agree. An administrator of an intestate is merely the officer of the Court in whom the deceased himself has reposed no trust. On the death of the former the estate of the intestate does not pass to his heirs or representatives and no authority whatever can be transmitted by him, nor has anyone claiming under him any right to interfere with or to complete the administration of the property of the intestate. The office comes to an end on death (if not before) and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non*, and



the person to whom such grant is made will be entitled to take possession of the property. It therefore seems to their Lordships impossible to hold that the administratrix in the present case could possibly have been guilty of any default or misconduct in relation to the administration after the date of her death, though, of course, her representatives would continue liable in respect of any such default or misconduct committed by her during her lifetime. It seems equally impossible to suggest that the condition of the bond could be broken by the administratrix by the default of some person in relation to the estate of the intestate after the original letters of administration had ceased to have any operation by reason of the death of the administratrix. The condition of the bond according to its terms was therefore broken at the latest on her death, that is, more than three years prior to the suit.

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The other and perhaps the main ground for the conclusion of the Court in *Manubhai's* case was that s. 292 of the Indian Succession Act had the effect of conferring a new cause of action on the assignee, and therefore provided a fresh starting point for the purposes of limitation. If the language of s. 292 of the Indian Succession Act be examined, it is difficult to suppose that the draftsmen intended to provide for the creation of a new cause of action upon the assignment of a bond thereunder. The essential words are taken *verbatim* from s. 83 of the (English) Court of Probate Act, 1857 (20 & 21 Vic. c. 77) which provides that—

"The Court may, . . . on being satisfied that the Condition of any such Bond has been broken, order One of the Registrars of the Court to assign the same to some person" . . . "and such Person, . . . shall thereupon be entitled to sue on the said Bond in his own Name, . . . as if the same had been originally given to him instead of to the Judge of the Court and shall be entitled to recover thereon as Trustee for all Persons interested the full Amount recoverable in respect of any Breach of the condition of the said Bond."

(The modern provision to the same effect is to be found in s. 167 of the Judicature Act, 1925.) It has never been suggested that under either of these sections there is upon the assignment being made a fresh cause of action. The origin of the ancient practice of requiring the administration bond to be given to the Judge of the Court of Probate (s. 81 of the Court of Probate Act, 1857) was no doubt to enable that Court to have control over all matters relating to the enforcement of such bonds. It is scarcely necessary to add that it had obviously nothing to do with the English period of limitation as regards the enforcement of such a bond which was twenty years from the breach of the condition. It seems to their Lordships that the words used in s. 292 of the Indian Succession Act like those used in s. 83 of the Court of Probate Act, 1857, are far from assisting the contention that a new cause of action arises upon the assignment. The bond is assigned to a person who is thereupon to be entitled to sue on the bond in his own name "as if the same had been *originally* given to him, and he is to be entitled to recover thereon . . . the full amount *recoverable* in respect of any breach thereof." These sentences do not in the least support the view that a fresh cause of action arises and that therefore the condition of the bond is not broken for the purposes of the Indian Limitation Act until the date of the assignment. The

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judgments of the appellate Court of Rangoon in *Maung San U. v. Maung Kyau Mye*<sup>1</sup> and of Blackwell J. in *Manubhai's* case<sup>2</sup> are in the opinion of their Lordships correct and the decision of the Appellate Court in the latter case must be taken to be erroneous.

This view makes it unnecessary to consider any of the other questions raised on the appeal and cross-appeal. The defence of limitation under art. 68 was a good one, and the suit should have been dismissed with costs.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the cross-appeal should be dismissed, and that the respondent to the appeal should pay the costs here and below.

R. C. C.

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*Appeal allowed.*

Solicitors for appellants : *Smiles & Co.*  
Solicitors for respondent : *T. L. Wilson & Co.*

[On appeal from the High Court of Judicature at Lahore.]

Present :

VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT,  
SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

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July 22.

THE PUNJAB CO-OPERATIVE BANK, LTD.

v.

THE COMMISSIONER OF INCOME-TAX, LAHORE.

*Government of India Act, 1935 (26 Geo. V, c. 2), Sec. 205—Object of—Construction of—Whether High Court has to consider question of certificate in every case or only in cases where question of interpretation of the Act or any Order in Council arises—Direct appeal to Privy Council from High Court decree whether barred where question of certificate not considered by High Court and no certificate given—Question of certificate preferably to be considered by same bench that gave decision—Indian Income-tax Act (XI of 1922), Sec. 10—Profits made by sale of securities at enhanced value, whether taxable—Profits on sale of securities by bank to meet withdrawals by depositors whether taxable—Proof of separate business in buying and selling securities whether essential.*

The object of s. 205, Government of India Act, 1935, is to ensure that in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder, the appeal, if any, that is the direct appeal, shall lie to the Federal Court. The word 'direct' is used because s. 208 makes provision for an appeal in such a case on certain conditions from a decision of the Federal Court to His Majesty in Council. The section does not provide for a case where no such certificate is given, however plain it may be that it ought to have been given. There

1 (1923) I. L. R. 1 Ran. 463. -

2 Vide 38 Bom. L. R. 632, at p. 634.

is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal in such case, and *a fortiori* there is nothing taking away the right of direct appeal to His Majesty in Council in a case where no substantial question of law of the character specified in the section could by any reasonable possibility arise.

The language in the latter part of sub-s. (1) of s. 205 is of a very comprehensive kind and is directory. It imposes duty on the Judges of the High Court for the purpose of ensuring that, if the case involves a substantial question of law as to the interpretation of the Government of India Act or any Order in Council, the High Court will carry out the intention of the section by giving a certificate which will ensure that the appeal, if any, shall be to the Federal Court; but there is no condition precedent imposed on an appeal to His Majesty in Council in the absence of a certificate. The duty imposed on the Judges by words of a directory character is one which arises only in a case where there is some reasonable ground for thinking that a substantial question of law as to the interpretation of the Government of India Act or any Order in Council may be involved.

In construing s. 205, first, no question of the jurisdiction of His Majesty in Council can arise unless there is a certificate, in which case the direct appeal lies to the Federal Court; secondly, if in the absence of a certificate it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court and that they ought to have given or to have withheld a certificate, the Board ought to decline to hear the appeal until the High Court have had an opportunity of doing one or the other; thirdly, the cases dealt with by the section are cases where there is a reasonable possibility that a substantial question of law as to the interpretation of the Government of India Act or any Order in Council may arise, and the duty is imposed on the Judges of the High Court only in those cases.

Where s. 205 is applicable, it is the duty of the High Court to record a determination to withhold a certificate if it thinks that that is the right course. Preferably that should be done by the Judges who have heard the case, but it is not essential in every case and may sometimes be impossible.

*Errol Mackay v. Oswald Forbes*,<sup>1</sup> explained.

An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. It is sufficient if the plain object of the directory provision is carried out.

*Woodward v. Sarsons*,<sup>2</sup> *Earl of Mountcashell v. Viscount O'Neill*,<sup>3</sup> *Walter v. Rumbat*<sup>4</sup> and *Jarvis v. Hemmings*,<sup>5</sup> referred to.

Enhanced values obtained from realisation or conversion of securities may be assessable to income-tax where what is done is not merely a realisation or change of investment but an act done in what is truly the carrying on, or carrying out, of a business.

*Californian Copper Syndicate (Limited and Reduced) v. Harris*,<sup>6</sup> followed.

Where some of the securities of a bank are realised in order to meet withdrawals by depositors, it is a normal step in carrying on the banking business and the profits accrued therefrom are assessable for the purposes of income-tax.

In order to render taxable profits realised on sales of investments by an assessee it is not necessary to establish that the tax-payer has been carrying

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s. c. 42 Bom. L. R. 315.

2 (1875) L. R. 10 C. P. 733, 746.

3 (1856) 5 H. L. C. 937, 955.

4 (1695) 1 Ld. Raym. 53.

5 [1912] 1 Ch. 462.

6 [1904] 6 F. 894, 5 Tax Cases  
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on a separate business either of buying or selling investments or of merely realising them.

*Californian Copper Syndicate (Limited and Reduced) v. Harris*<sup>1</sup> and *Commissioner of Taxes v. Melbourne Trust, Limited*<sup>2</sup> followed.

Dicta in *The Commissioners of Inland Revenue v. The Scottish Automobile and General Insurance Co., Ltd.*<sup>3</sup> dissented from.

THIS was an appeal from the judgment and decree of the High Court of Judicature at Lahore.

The facts appear fully in the judgment of their Lordships.

*R. W. Needham K. C.* and *N. E. Mustoe*, for the appellant.

*J. M. Millard Tucker K. C.* and *W. Wallach*, for the respondent.

VISCOUNT MAUGHAM. This is an appeal from a judgment of the High Court of Judicature at Lahore, dated February 3, 1938, delivered on a reference under s. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces.

The appellant (hereinafter referred to as the bank) is a joint stock company, incorporated in the year 1905, carrying on the business of banking. The objects for which the bank was established are set out in paragraph 3 of its Memorandum of Association and include—

“(A) To carry on in India and elsewhere the trade or business of banking in all its branches, and to transact and do all matters and things incidental thereto, or which may at any time hereafter be usual in connection with the business of banking or dealing in money or securities for money.”

Paragraph 82 (i) of the articles of association provides that the directors—

“may invest funds of the Company upon such securities or investments as they may think advisable; from time to time, vary such securities and investments, and convert the same, as occasion may require or as they may deem expedient, but they shall not invest or employ any part of the funds of the company in the purchase of its own shares.”

The profits of the bank derived from its business during the year 1935 were assessable to income-tax in the year 1936-37 which is the year of assessment involved in this appeal.

The High Court on February 3, 1938, decided that on the facts stated in the statement of the case drawn up by the Commissioner of Income-tax under s. 66(2) of the Indian Income-tax Act a question propounded by the Commissioner must be answered in the affirmative, with the result that the amount of Rs. 1,42,588 realised by the bank on the sale in 1935 of certain securities and shares over their cost price is taxable as part of the profits or gains of the business of the bank which arose in 1935 (see s. 10 of the Indian Income-tax Act).

On June 17, 1938, the High Court certified under s. 66A of the Indian Income-tax Act on the petition of the bank that the case was a fit case for appeal to His Majesty in Council. As it happened the two learned Judges

1 [1904] 6 F. 894, 5 Tax Cases 159.

2 [1914] A. C. 1001, 1010.

3 (1931) 16 Tax Cases 381, 388, 389.

who gave this certificate were those who heard and decided the case on February 3, 1938.

On the appeal coming on for hearing before their Lordships a preliminary objection to the appeal was taken which has been elaborately argued, and it seems desirable in the first place to deal with this objection. It is based on the contention that no direct appeal now lies to His Majesty in Council from any judgment, decree or final order made by any High Court in British India unless that Court has recorded that it *withholds* the giving of a certificate that a substantial question of law as to the interpretation of the Government of India Act, 1935, is involved. That is said to be the effect of s. 205 of the Act, and reliance is placed on a decision of their Lordships in a recent case which must be considered later. Section 205 is in the following terms :—

“(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or withhold a certificate accordingly.

“(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.”

The object of this section is plain. It is to ensure that in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder (which for brevity will be referred to hereafter as the “specified question of law”), the appeal, if any, that is the direct appeal, shall lie to the Federal Court. The word “direct” is used because s. 208 makes provision for an appeal in such a case on certain conditions from a decision of the Federal Court to His Majesty in Council; but nothing turns on this for the present purpose.

The means adopted in the section to carry out the above object are these :

(1) The appeal is stated to lie to the Federal Court if the High Court certifies that the specified question of law is involved and is a substantial question. (2) A duty is imposed on the High Court of its own motion to give or to withhold a certificate that the specified question of law, being a substantial question, is involved. This part of sub-s. (1) contains some other important words which will be considered later. (3) Where such a certificate is given, any party in the case may appeal to the Federal Court on defined grounds [sub-s. (2)]. (4) Where such a certificate is given, no (direct) appeal shall lie to His Majesty in Council even with special leave [sub-s. (2)].

It is clear that the section does not provide for a case where no such certificate is given, however plain it may be that it ought to have been given. There is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal in such case, and *a fortiori* there is nothing taking away the right of direct appeal to His Majesty in

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Council in a case where no substantial question of law of the specified character could by any reasonable possibility arise.

What then is the position if it becomes manifest to the Board that, by some mischance or inadvertence or forgetfulness, the High Court has neglected its duty under the latter part of sub-s. (1) to give a certificate in a case where the specified question of law is or may reasonably be involved?

It is plain that it is for the High Court, not this Board, to determine whether the question is involved and if so whether it is substantial. In such an event although the jurisdiction of His Majesty in Council has not been affected, since there has been no certificate, nevertheless there has been a dereliction of duty by the High Court, and the Board, in accordance with the principles on which it is accustomed to act in tendering advice to His Majesty, would not think it right to hear the appeal until a proper certificate has been obtained or it is on record that a certificate has been withheld.

The precise event in fact happened in the recent case of *Errol Mackay v. Oswald Forbes*.<sup>1</sup> It seemed to the Board that a question of interpretation arose under an Order in Council made by virtue of s. 293 of the Government of India Act, 1935. There was no certificate by the High Court. It was suggested by counsel for the appellants that the Court might have considered s. 205 and might have decided to withhold a certificate, though that decision was not expressed. Their Lordships expressed the view that this was unlikely in that case, and in the absence of a certificate they thought that the appeal should be dismissed with costs. They added, however, that if the High Court should thereafter make an order withholding a certificate under s. 205, the appellants were to be at liberty to apply to His Majesty in Council to have the appeal restored.

Their Lordships are of opinion that this order was perfectly correct, not because s. 205 took away the jurisdiction in a strict sense of His Majesty in Council, but for the more general reason indicated above. They will add that the course taken of dismissing the appeal was no doubt to some extent due to the circumstance that the Board entertained little doubt that the certificate would be given. If the case had been one in which there was a real doubt whether the certificate would be given or withheld, a more lenient course might have been taken, and the appeal might have been directed to stand over until the High Court had either given a certificate or decided to withhold it.

It remains to consider what the position is and what course should be taken by the Board when the appeal is from the High Court and no such specified question of law can with any reasonable probability be thought to be involved, and where, not unnaturally, the High Court have neither granted a certificate nor recorded that a certificate is withheld. The first question here is whether in such a case s. 205 applies at all, and; at this point it is necessary to examine the language in the latter part of sub-s. (1) in order to determine the nature of the duty imposed upon the High Court. The language is of a very comprehensive kind. The duty is to be that of "every High Court in British India." It is to consider "in every case" whether or not the specified question is involved. And finally the Court is "of its own

<sup>1</sup> (1940) L. R. 67 I. A. 64, s. c. 42 Bom. L. R. 315.

motion" to give or to withhold a certificate accordingly. Their Lordships, however, are of opinion that this part of sub-s. (1) is directory in the sense in which that word is used in the wellknown distinction between enactments or phrases in them which are mandatory or absolute and those which are merely directory. There are several reasons for this conclusion: first, the object of s. 205 is as above stated, secondly, the circumstances that the duty is imposed on the Judges of the High Court, persons occupying positions of great importance and dignity to whom mandatory clauses would not be addressed without strong reason, thirdly, that, in fact, there is no provision whatever for imposing any penalty or deprivation of right on a litigant, if the High Court should neglect to comply with its judicial duty as laid down in the section. In other words, the duty is imposed on the Judges for the purpose of ensuring that, if the case involves the specified question of law, the High Court will carry out the intention of the section by giving a certificate which will ensure that the appeal, if any, shall be to the Federal Court; but there is no condition precedent imposed on an appeal to His Majesty in Council in the absence of a certificate. The responsible persons—in this case the Judges of the High Court—may be "blameable"—as Lord Blackburn observed in the instructive case of *Justices of Middlesex v. The Queen*<sup>1</sup>—but third parties have nothing to do with that.

If the sentence imposing the duty is only directory, as their Lordships think is clear for the reasons stated, an important consequence follows. It is a well settled general rule that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially" [*Woodward v. Sarsons*<sup>2</sup>; see also *Earl of Mountcashell v. Viscount O'Neill*<sup>3</sup>]. It is sufficient if the plain object of the directory provision is carried out [*Walter v. Rumbal*<sup>4</sup> and *Jarvis v. Hemmings*<sup>5</sup>]. If these principles are applied in the present case, it will be apparent that the following alternative view arises: either s. 205 in imposing on the High Court the duty of giving or withholding a certificate is doing so only in cases where there is a reasonable possibility that the specified question arises or may arise, or, alternatively, the duty is one which need only be complied with in such a case. It is plain that in the vast majority of cases no such question can arise. It seems to their Lordships most difficult to believe that the legislature was intending to lay on the Judges of every High Court an obligation as part of their judicial duties to record their intention to "withhold" a certificate in such cases as an ordinary judgment on a criminal trial or in a libel action or a decree or judgment in an every-day case for the recovery of a trifling sum of money, for example, in a normal action for a debt. Their first duty is "to consider"; but only it would seem when there is in fact something to consider. Their Lordships have come to the conclusion that the duty imposed on the Judges by words of a directory character is one which arises only in a case where there is some reasonable ground for thinking that the specified question may be involved.

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1 (1884) 9 App. Cas. 757, 778.

4 (1695) 1 Ld. Raym. 53.

2 (1875) L. R. 10 C. P. 733, 746.

5 [1912] 1 Ch. 462.

3 (1856) 5 H. L. C. 937, 955.

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The conclusions on this matter of the construction of s. 205 are accordingly these : First, no question of the jurisdiction of His Majesty in Council can arise unless there is a certificate, in which case the direct appeal lies to the Federal Court. Secondly, if in the absence of a certificate it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court and that they ought to have given or to have withheld a certificate, the Board ought to decline to hear the appeal until the High Court have had an opportunity of doing one or the other. Thirdly, the section on its true construction is dealing only with cases where there is a reasonable possibility that the specified question may arise, and the duty is imposed on the Judges of the High Court only in those cases.

Their Lordships desire to add that the case of *Errol Mackay v. Oswald Forbes*<sup>1</sup> related to a case within the second of these propositions. The remarks of the Board as regards the duties of the Judges of the High Court must be read as confined to cases of the nature which arose in that case ; and in that connexion reference may be made to the remarks of Lord Halsbury in *Quinn v. Leathem*<sup>2</sup> that every judgment must be read as applicable to "the particular facts proved or assumed to be proved since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found." It may be well to add that their Lordships do not differ from the opinion expressed in that case as to the duty of the Judges of the High Court in a case to which the section is applicable to record a determination to withhold a certificate if they think that is the right course. Preferably that should be done by the Judges who have heard the case ; but it is not essential in every case and may sometimes be impossible, for example, when there are two Judges and they differ on the question whether the certificate should be given or withheld. It may be noted that in the *Errol Mackay* case<sup>1</sup> their Lordships provided for the event of the High Court making an order at some later date withholding the certificate in question, and that order doubtless could be made by Judges other than those who delivered the original judgment.

It follows from the above observations that the preliminary objection fails, since in the present case there is no possible ground for thinking that any question, still less a substantial one, as to the interpretation of the Government of India Act, 1935, can be involved.

Two other matters were argued on the preliminary objection, first, whether a decision on a reference under s. 66(2) of the Indian Income-tax Act is "a judgment, decree, or final order" within the meaning of those words in s. 205 ; secondly, whether the certificate given as above mentioned on June 17, 1935, under s. 66A of the Indian Income-tax Act is not a sufficient proof that the certificate under s. 205 of the Government of India Act (if the section was applicable) had been withheld. On these two questions their Lordships do not think it necessary to express any opinion.

Coming now to the appeal by the bank, it may be observed that the

1 (1940) L. R. 67 I. A. 64,  
s. c. 42 Bom. L. R. 315.

2 [1901] A. C. 495, 506.



High Court rightly appreciated that the question was ultimately one of fact to be decided on the findings of the Commissioner under s. 66(2) of the Indian Income-tax Act, and that the appellant bank had to establish either that the Commissioner had misdirected himself on some question of law or that there was no sufficient evidence to justify his findings. Their Lordships note that the High Court, in deciding that neither of these points had been made good, examined and considered a number of cases most of which related to insurance companies and banks. Their Lordships do not propose to attempt to reconcile all these decisions and the various dicta which are to be found in the reports of them, which might indeed prove to be an impossible task; and they will add that the cases relating to insurance companies largely turn on the nature of the insurance business actually carried on and the way in which reserve funds have been set aside and dealt with.

In the present case it appears that on December 31, 1934, the value of the investments of the bank amounted to Rs. 50,88,550, mainly held in Indian Government securities which, being readily saleable, could if necessary be promptly realised in order to pay claims. During the year 1935 some ten lacs of these Government securities and some shares were sold, and the profit made taking the differences between the cost price of the investments and the prices at which they were sold was Rs. 1,42,588. The grounds on which the bank contends that the profit of Rs. 1,42,588 made on the sale of some of its securities in the year 1935 does not form part of the profits of its business of banking are succinctly stated thus, in the statement of the case: That the bank had treated the investments in shares and securities as a reserve for emergencies and had resorted to their sale in the accounting period 1935 because they had in that year to meet heavy withdrawals of deposits and to deposit Rs. 2,66,000 with the Reserve Bank of India under the provisions of s. 42(1) of the Reserve Bank of India Act, 1934 (No. 11 of 1934). The bank claimed also that it did not "deal in shares and securities" and that therefore the profit made by the sale of shares and securities was not taxable.

In the statement the Commissioner finds that up to 1933 there was no sale of securities. The first sale took place on November 30, 1934. On the other hand, he declines to accept the contention that the bank had to sell the securities in order to meet heavy withdrawals of deposits and to make the compulsory deposit with the Reserve Bank of India. He states from an examination of the books that it is clear that the profits realized by selling shares and securities were utilized in increasing the reserves. A general view of the financial position since 1932 as on December 31 of each year can be gathered from a table contained in the statement which is as follows:—

| Accounting year. | Assessment year. | Deposits in Thousands. | Investments in Thousands. | Total reserve in Thousands. |
|------------------|------------------|------------------------|---------------------------|-----------------------------|
| 1932 ... ..      | 1933-4 ... ..    | Ra.<br>11,543          | Ra.<br>4,584              | Ra.<br>997                  |
| 1933 ... ..      | 1934-5 ... ..    | 12,361                 | 4,931                     | 1,041                       |
| 1934 ... ..      | 1935-6 ... ..    | 11,882                 | 5,088                     | 1,043                       |
| 1935 ... ..      | 1936-7 ... ..    | 11,310                 | 3,859                     | 1,234                       |

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It is apparent that the decrease of deposits in the year 1935 as compared with the previous year is roughly five per cent. while the decrease in investments as between the two years is more than twenty per cent. So far from there being a finding that the sales of shares and securities were due to any special emergency, the Commissioner says that it is apparent that the bank had been selling the shares and securities in order to take full advantage of the high prices prevailing in 1935. He was of opinion that the bank had been "carrying on business in shares and securities since the closing months of 1934." This may well be the correct view and a sufficient ground for dismissing this appeal; but their Lordships do not wish to give any support to the contention that in order to render taxable profits realised on sales of investments in such a case as that before them it is necessary to establish that the tax-payer has been carrying on what may be called a separate business either of buying or selling investments or of merely realising them.

The principle to be applied in such a case is now well settled. It was admirably stated in a Scottish case, *Californian Copper Syndicate (Limited and Reduced) v. Harris*<sup>1</sup> and the statement has been more than once approved both in the House of Lords and in the Judicial Committee. [See for example *Commissioner of Taxes v. Melbourne Trust, Limited*.<sup>2</sup>] Some dicta which appear to support the view that it is necessary to prove that the tax-payer has carried on a separate or severable business of buying and selling investments with a view to profit in order to establish that profits made on the sale of investments are taxable, for example, the dicta in the case of *The Commissioners of Inland Revenue v. The Scottish Automobile and General Insurance Co., Ltd.*<sup>3</sup> cannot now be relied on. It is well established to cite the exact words used in the *Californian Copper* case<sup>4</sup> (p. 166):—

"...that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business."

In the ordinary case of a bank, the business consists in its essence of dealing with money and credit. Numerous depositors place their money with the bank often receiving a small rate of interest on it. A number of borrowers receive loans of a large part of these deposited funds at somewhat higher rates of interest. But the banker has always to keep enough cash or easily realisable securities to meet any probable demand by the depositors. No doubt there will generally be loans to persons of undoubted solvency which can quickly be called in, but it may be very undesirable to use this second line of defence. If as in the present case some of the securities of the bank are realised in order to meet withdrawals by depositors, it seems to their Lordships to be quite clear that this is a normal step in carrying on the banking business, or, in other words, that it is an act done in "what is truly the carrying on" of the banking business.

This, it appears to their Lordships, is the more appropriate and satisfac-

1 [1904] 6 F. 894, 5 Tax Cases  
159. .  
2 [1914] A. C. 1001, 1010.  
3 (1931) 16 Tax Cases 381, 388,

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4 (1904) 6 F. 894.  
s. c. 5 Tax Cases 159.

tory ground for dealing with the question arising in the present case. It accords exactly with one of the findings in the statement of the Commissioner agreeing with the views both of the Income-tax Officer who first dealt with the case and the Assistant Commissioner. He observed

"that the purchase and sale of shares and securities are so much linked with the deposits and withdrawals of clients that with the existing articles of Association the purchase and sale of shares and securities are as much part of the assessee's business as receiving deposits from clients and paying them off are, and therefore, the profits which arise from the former transactions are as much business profits as the profits arising from the latter transactions are."

There can be no doubt that there is ample evidence to justify this view, and in their Lordships' opinion, as in that of the High Court, it is sufficient to dispose of this appeal.

Their Lordships will accordingly humbly advise His Majesty that the appeal must be dismissed with costs.

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*Appeal dismissed.*

Solicitors for appellant : *Douglas Grant & Dold.*

Solicitor for respondent : Solicitor, India Office.

[*On appeal from the High Court of Judicature at Patna.*]

*Present :*

VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT,  
SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

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*Civil Procedure Code (Act V of 1908), Sec. 11, Sch. II, para. 20—Court declining jurisdiction—Reason for such decision whether binding as res judicata—Indian Registration Act (XVI of 1908), Sec. 17(1)(b)—Award—"Ownership", interpretation of—Compulsory registration of award.*

A Court which declines jurisdiction cannot bind the parties by its reasons for declining jurisdiction : such reasons are not decisions, and are certainly not decisions by a Court of competent jurisdiction. On a dispute as to the jurisdiction of a Court to try an issue, the Court, by its reasons for holding that it had no jurisdiction, cannot, upon the principle of *res judicata*, decide and bind the parties upon the very issue which it was incompetent to try.

Hence, a decision by the High Court that no Court in the province had jurisdiction over the subject-matter of the award within the meaning of para. 20 of sch. II of the Civil Procedure Code of 1908, which applies the test whether it would have had jurisdiction to try the suit in which the relief claimed was the relief granted by the award, and in so doing construes the award, such construction is not *res judicata* between the parties on the question of the true construction of the award.

The respondent advanced in 1912 a sum of Rs. 50,000 to the appellant for the purpose of partially clearing of incumbrances on a village upon the term

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that he should have the option to acquire a half share in the village in lieu of the repayment of his loan. The option was exercised in 1914 and the respondent thenceforward enjoyed a half-share of the profits of the village, but no conveyance was executed. Differences having arisen between the parties, a reference was made to arbitrators, who awarded payment of Rs. 61,400 by the appellant to the respondent, and directed: "The ownership of the second party [i.e. respondent] in one-half of...[the] property shall not cease till after the above sum...be fully paid up." A question having arisen whether the award was compulsorily registrable under s. 17 (1) (b) of the Indian Registration Act, 1908:—

*Held*, (1) that the aforesaid provision was not framed as one which purported to create or confer an interest in immovable property; but it was framed on the assumption that an interest was already in existence and provided that that existence should not cease until a specified event had happened;

(2) that the mere use of the word "ownership" could not outweigh the consideration that the whole wording of the sentence pointed to the continuance of the *status quo*, and not to the creation of a new condition of affairs:

(3) that the award did not purport or operate to create, declare or assign any right, title or interest in the village, and therefore did not require registration under s. 17 (1) (b) of the Indian Registration Act, 1908.

THIS was an appeal from the judgment and order of the High Court of Judicature at Patna, dated September 28, 1936, which reversed the judgment and order of the Additional Subordinate Judge of Patna, dated February 12, 1935, and directed that a private award be filed and made a decree of the Court.

Het Lal and others (respondents Nos. 1-3) were the sons and respondent No. 4 the grandson of one Ishwari Prasad who died in October, 1924.

In 1908 Upendra Nath Bose (appellant) purchased in execution sale the proprietary right in village Raitar in the Patna district subject to incumbrances. In 1912 Ishwari Prasad advanced Rs. 50,000 to the appellant, who was a close friend, to be applied in clearing the incumbrances, with the option to him to become the appellant's co-sharer in the village to the extent of one half share. In 1914 Ishwari Prasad decided to exercise the option, and, though no conveyance was executed, from then until his death he enjoyed a half share of the profits of the village and took part in its management.

After Ishwari's death in 1924, the appellant at the respondents' request made a written declaration dated April 26, 1925, of his position in relation to Raitar village, stating that as between himself and Ishwari Prasad the village had been provisionally valued at Rs. 1,34,000 and expressing his willingness, once the accounts had been made up, to "execute such proper instrument as you may unanimously wish or in case of difference of opinion among you as a person you refer (to?) may reasonably require" and undertaking in the meantime to administer the village and divide the profits in accordance with rules which had been drawn up by himself and Ishwari Prasad.

In October, 1925, the respondents referred to private arbitration matters arising in the administration of Ishwari Prasad's estate. In their award dated February 13, 1926, the arbitrators gave effect to an agreement reached between the respondents that the village in question should be held jointly by, all but managed by one of the respondents under the appellant's direction and

that, should such arrangement prove impracticable, the appellant "will have the first refusal of the lease or purchase of the property."

On the application of respondent No. 4, the said award was on August 6, 1927, followed by a decree of Court in accordance with it.

On April 3, 1928, the appellant of the first part and the respondents of the second part referred to the private arbitration of two named arbitrators differences which had arisen between them "regarding the accounts and transfer of Raitar property." As regards the transfer questions had been raised as to the form which the transfer should take, whether it should be a transfer in favour of the respondents jointly or in favour of each of the respondents severally in respect of the share to which each was entitled, on what terms the transfer should be made or whether the respondents should relinquish their moiety in favour of the appellant and if so for what consideration. There was also a question outstanding whether, in view of a will executed by Ishwari Prasad, which had not however been admitted to probate, the transfer should be in favour of the executors or in favour of the respondents as Ishwari Prasad's heirs.

On August 1, 1930, the arbitrators made their award as follows :—

(1) That the amounts specified in the statement of accounts passed by us attached hereto and marked as Exhibit B should be paid with interest at eight annas per cent. per month within three months of to-day after which period the rate of interest shall be 10 annas per cent. per month on any balance unpaid till the amounts are fully paid up.

(2) That Babu Upendra Nath Basu requested us that instead of transferring the above said Raitar property to the second party he may be allowed to pay any sum fixed by us in lieu thereof so as to save the property from being ruined and we were asked by the parties to fix the sum so to be paid by the first party to the second party. We accordingly direct that the said Babu Upendra Nath Basu do pay rupees fifteen thousand, three hundred and fifty to each of the four gentlemen of the second party, that is to say, a total sum of rupees sixty-one thousand and four hundred as the equivalent of the share of the second party in the said property, with interest at 6 per cent. per annum accruing from the first of October, 1930. If the said amount is not paid by the first of October, 1931, the rate of interest thereafter shall be seven and a half per cent. per annum on the whole or any balance left unpaid.

The ownership of the second party in one half of Raitar property shall not cease till after the above sum of rupees sixty-one thousand and four hundred as well as the amounts mentioned in the statement Exhibit B together with interest specified in respect of both be fully paid up.

The registration of the award was effected on August 14, 1930, before the Sub-registrar of Benares in the United Provinces. It was registered in Book 4, the "miscellaneous register," instead of in Book 1, which is the register of non-testamentary documents relating to immoveable property. The registration failed to comply with the statute in respect also that whereas the award fell to be registered under s. 28 "in the office of the sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situated," the office of the sub-registrar of Benares did not satisfy this requirement in relation to village Raitar.

On January 10, 1931, respondent No. 1 applied under para. 20 of sch. II. of the Code of Civil Procedure before the Subordinate Judge of Benares that the award be filed in Court, making the appellant and respondents Nos. 2-4

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defendants in "the suit."

On January 9, 1932, the Subordinate Judge, treating the award as one for the payment of money by the appellant to the respondents and conceiving himself to be entitled to treat as a nullity that part of which defined the rights of the parties in Raitar, ordered the award to be filed.

The appellant appealed to the High Court of Allahabad.

King and Niamatullah JJ. heard the appeal and on March 2, 1933, reversed the order of the Subordinate Judge. They directed therefore that the application for filing the award be returned to respondent No. 1.

On March 10, 1933, respondent No. 1 made an application in the form of a plaint before the Second Subordinate Judge of Patna, making the appellant and respondents Nos. 2-4, who had refused to join him in the application, defendants.

The trial Judge held that the effect of the second sub-para. of para. 2 of the award was to declare the legal ownership of the respondents in one moiety of Raitar and that the registration of that part of the award was compulsory; that its registration in Benares was no registration in the eye of the law; and that the consequences of non-registration were those enjoined by s. 49 of the Indian Registration Act, namely, that the award could not be received as evidence of any transaction affecting Raitar.

Respondent No. 1 appealed to the High Court at Patna. A bench of the High Court, consisting of Khwaja Mahamad Noor and Madan JJ., heard the appeal, and on September 28, 1936, Madan J. delivered the judgment of the Court allowing it. The order of the Additional Subordinate Judge was set aside, the appeal was allowed and the award was ordered to be filed and made a decree of Court.

There was an appeal to His Majesty in Council.

*J. M. Pringle*, for the appellant.

*W. Wallace*, for the respondent.

LORD RUSSELL OF KILLOWEN. This is an appeal from a decree of the High Court of Judicature at Patna by which it was ordered that the award hereinafter mentioned should be filed and made a decree of the Court.

The relevant facts leading up to this litigation are as follows :—

The appellant, one Upendra Nath Bose, had in the year 1908 purchased in execution sale the proprietary right in the village Raitar in the Patna district subject to incumbrances. In the year 1912 his friend, Ishwari Prasad, advanced to him a sum of Rs. 50,000 for the purpose of partially clearing off the incumbrances and upon the terms that he should have an option to acquire a half share in the village in lieu of the repayment of his loan. This option he exercised in or about the year 1914. No conveyance was executed; the matter continued to rest on contract, but thenceforward he enjoyed a half share of the profits of the village.

This state of affairs continued until the death of Ishwari which occurred in the year 1924. He left him surviving three sons, viz., the respondents Het Lall, Debi Prasad, and Shyam Lall, and a grandson the respondent Prabhakar Prakash.

On April 26, 1925, the appellant executed a document addressed to the

respondents in which he set out the facts relating to Ishwari's loan, and his half interest in the village. The appellant also stated his willingness to account, and that he claimed no personal interest in more than half the estate. Clause 6 of this document ran thus :—

" I also hereby agree that as soon as accounts are made up and settled I shall execute such proper instrument as you may unanimously wish, or in case of difference of opinion among you, as the person you refer may reasonably require."

Ultimately the parties referred to two arbitrators differences which had arisen, as stated in the agreement of reference, " regarding the accounts and transfer of Raitar property." In the course of the arbitration it was suggested and agreed between the parties that a sum should be fixed upon the payment of which the respondents should have no claim to share in the village. This course was adopted by the arbitrators, who made their award on August 1, 1930. By paragraph 1 thereof they dealt with the accounts between the parties, finding the amounts due and directing payment with interest. By paragraph 2 they dealt with " the transfer of Raitar property," in the following terms :—

" (2) That Babu Upendra Nath Basu requested us that instead of transferring the above said Raitar property to the second party he may be allowed to pay any sum fixed by us in lieu thereof so as to save the property from being ruined and we were asked by the parties to fix the sum to be so paid by the first party to the second party. We accordingly direct that the said Babu Upendra Nath Basu do pay rupees fifteen thousand, three hundred and fifty to each of the four gentlemen of the second party, that is to say a total sum of rupees sixty-one thousand and four hundred as the equivalent of the share of the second party in the said property, with interest at six per cent. per annum accruing from the first of October 1930. If the said amount is not paid by the first of October 1931, the rate of interest thereafter shall be seven and a half per cent. per annum on whole or any balance left unpaid.

" The ownership of the second party in one-half of Raitar property shall not cease till after the above sum of rupees sixty-one thousand and four hundred as well as the amounts mentioned in the statement exhibit B together with interest specified in respect of both be fully paid up."

The award was registered before the sub-registrar of Benares, and in Book 4. It is conceded that this registration was made before the official of the wrong district and entered in the wrong book, with the result (which is common ground) that the award has never been registered at all.

In January, 1931, the respondent Het Lall applied, under paragraph 20 of schedule II of the Code of Civil Procedure, to the Subordinate Judge of Benares that the award be filed in Court, making the appellant and the other respondents parties as defendants to that application. Under paragraph 20 the application must be made to " any Court having jurisdiction over the subject matter of the award." The Subordinate Judge made the order ; but on appeal to the High Court at Allahabad this order was reversed, as being made " without jurisdiction " on the ground that proceedings for filing the award could be instituted only in a Court within the local limits of whose jurisdiction the Raitar village was situated.

The respondent Het Lall then, on March 10, 1933, initiated the present proceedings in the form of a plaint before the Second Subordinate Judge of Patna, to which the appellant and the other respondents were joined as defend-

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P. C. ants, and by which he asked that the award be made a rule of Court and a  
1940 decree passed on the basis of the award.

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The Subordinate Judge dismissed the application; but on an appeal by the respondent Het Lall to the High Court at Patna, the order of the Subordinate Judge was set aside, and the award was ordered to be filed and made a decree of Court.

The point at issue on the appeal by the appellant to His Majesty in Council can now be stated.

It was contended by the appellant that upon its true construction the award was, within the meaning of s. 17 (1) (b) of the Indian Registration Act, 1908, a non-testamentary instrument which purported or operated to create, declare assign limit or extinguish a right title or interest of the value of one hundred rupees or upwards to or in immoveable property; and that since it had not been registered, then by s. 49 of the same Act it was incapable of affecting the immoveable property in question or of being received in evidence of any transaction affecting that property, with the consequence that the award was incapable of being filed in Court and of having judgment pronounced and decree passed according to it.

The point, it will be noted, is whether upon its true construction that part of the award which deals with the village Raitar falls within the description of non-testamentary instruments contained in s. 17 (1) (b) of the Indian Registration Act. Sections 17 (1) (b) and 49 of that Act are framed thus :—

“17. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely :—

\* \* \* \* \*

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property ;

\* \* \* \* \*

49. No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—

(a) affect any immoveable property comprised therein, or  
(b) confer any power to adopt, or  
(c) be received as evidence of any transaction affecting such property, or conferring such power, unless it has been registered :”

The question resolves itself into this :—whether by the last sentence of paragraph 2 of the award the arbitrators purport to confer upon “ the second party ” a right title or interest to or in one-half of the village, which commences with the award and comes to an end when the sum of Rs. 61,400 with interest has been paid, or whether they intend merely to provide that the *status quo* (i.e., the contractual interest which arose from the exercise of the option) should remain unaltered until the Rs. 61,400 and interest had been paid.

In their Lordships’ opinion the latter is the true view. The sentence is not framed as one which purports to create or confer an interest. It is



framed on the assumption that an interest is already in existence, and provides that that existence shall not cease until a specified event has happened. It is true that the interest is called "ownership," while the existing interest of the second party was merely contractual, but the arbitrators were not lawyers but laymen, to whom the rights in respect of the village which were being exchanged or released for cash, might well appear to be not inaccurately described as an ownership which has not to cease until the cash was paid. However that may be, the mere use of the word "ownership" cannot in their Lordships' opinion outweigh the consideration that the whole wording of the sentence points to the continuance of a *status quo*, and not to the creation of a new condition of affairs.

The award did not purport or operate to create, declare or assign any right, title or interest in the village, and therefore did not require registration under the Act.

A further contention, however, was raised by the appellant, of this nature. Assuming, it was argued, that upon its true construction the award did not purport or operate to create, declare or assign a right title or interest in the village, nevertheless as between the appellant and respondents it must be taken that it did, because the matter of the true construction of the award was *res judicata* between them.

The foundation for this argument is the decision before referred to of the Allahabad High Court, that the Courts of that Province had no jurisdiction over the subject matter of the award within the meaning of paragraph 20 of sch. II of the Code of Civil Procedure. Undoubtedly in order to test whether the Benares Court had jurisdiction to order the filing of the award, the Judges applied the test whether it would have had jurisdiction to try a suit in which the relief claimed was the relief granted by the award. For the purpose of this test, they construed the award as an award which "did determine that the heirs of Ishwari Prasad had a legal title to half share in the Raitar property which they were entitled to retain until the receipt of specified sums of money"; and they held that just as the Benares Court would have had no jurisdiction to try a suit claiming that relief, since the village was outside the local limits of its jurisdiction, so it had no jurisdiction to order the filing of the award.

It must, however, be borne in mind that the construction of the award was not an issue in the proceedings; it was merely a ground upon which the Court based their decision upon the question which was the issue between the parties, viz., whether the Benares Court had jurisdiction to order that the award be filed and be made an order of Court.

No case for holding that the matter of the construction of the award is *res judicata* between the appellant and respondents can be based upon s. 11 of the Code of Civil Procedure. Indeed this was conceded by counsel for the appellant, who based his case in this regard upon what he termed the general principles of *res judicata*. But it is difficult to see how those general principles can be applicable to the facts of the present case. The *res judicata* here was the lack of jurisdiction of the Subordinate Judge of Benares, and of the High Court at Allahabad on appeal therefrom—not the reason for that decision. A Court which declines jurisdiction cannot bind the parties

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P. C. by its reasons for declining jurisdiction ; such reasons are not decisions, and  
 1940 are certainly not decisions by a Court of competent jurisdiction. It would  
 — indeed be strange if on a dispute as to the jurisdiction of a Court to try an  
 UPENDRA issue, that Court by its reasons for holding that it had no jurisdiction, could,  
 NATH BOSE v. upon the principle of *res judicata*, decide and bind the parties upon the very  
 LALL issue which it was incompetent to try.  
 — For the reasons indicated their Lordships are of opinion that this appeal  
 Lord Russell fails and should be dismissed. They will humbly so advise His Majesty.  
 of Killowen The appellant will pay the costs of the appeal. •

*Appeal dismissed.*

Solicitors for appellant : *Hy. S. L. Polak & Co.*

Solicitors for respondents : *T. L. Wilson & Co.*

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[*On appeal from the High Court of Judicature at Bombay.*]

*Present :*

VISCOUNT MAUGHAM, LORD WRIGHT AND SIR GEORGE RANKIN.

MAHOMEDALLY TYEBALLY

*v.*

SAFIABAI.

1940

July 8.

*Indian Limitation Act (IX of 1908), Arts. 106, 120, 123, and 144—Administration suit—Suit by Mahomedan heir against his co-heirs—Limitation—Immoveable property governed by Art. 144—Moveable property governed by Art. 120—Civil Procedure Code (Act V of 1908) O. I, r. 10—Discretion of Court to add party—Death of defendant having some interest as plaintiff—His heir not brought on record within time—Whether administration suit abates.*

Article 106 or art. 123 of the Indian Limitation Act, 1908, does not apply to a suit for administration brought against Mahomedan co-heirs by a person entitled to part of the interest of an heir. Such a suit is governed as regards immoveable property by art. 144 and as regards moveables by art. 120 of the Indian Limitation Act, 1908, because the heirs of a Mahomedan succeed to his estate in specific shares as tenants-in-common.

Under O. I, r. 10, Civil Procedure Code, 1908, the Court has discretion to add as a party to a suit the representative of a person against whom the suit has abated for the purpose of giving effect to the rights of the parties. Where a Mahomedan brings a suit against his co-heirs for administering the property that has come to their hands, and one of the defendants, who has the same interest and is in the same position as that of the plaintiff, dies, but no application is made by the plaintiff to bring his heir on record, the suit does not come to an end by reason of abatement as against the deceased defendant.

In a suit for administration a particular interest may not be represented before decree, but such interest is either provided for by the decree, or is asserted at a later stage under the decree, or is given effect by a party being permitted to attend certain accounts and enquiries so as to be bound by the result.

THIS was an appeal from the judgment and decree of the High Court of Judicature at Bombay (Beaumont C. J. and Rangnekar J.) dated September 8, 1936, reversing the judgment and decree passed by Barlee J., dated February 17, 1936.

One Esmailji died leaving his widow Jelumboo, and two sons, Ebrahimji and Sarafally, and two daughters, Sakinaboo and Amtoolaboo.

Ebrahimji and Sarafally were jointly carrying on business in Bombay. The two brothers were living together and owned some properties at Kapadvanj in the Kaira District. Out of the profits of their business they had purchased one property in Samuel Street, Bombay. In 1904 Ebrahimji died leaving his widow Fatmabai, a son who was born after his death, and two daughters, Khatizabai and Safiabai. After the death of Ebrahimji one more property was purchased in Abdul Rehman Street, Bombay, out of the profits of the business.

In 1912 Jelumboo, the widow of Esmailji, died.

In 1920 Amtoolaboo, the younger daughter of Esmailji, died leaving two daughters Safiabai (plaintiff) and Asmabai (defendant No. 8).

The plaintiff, Safiabai, filed this suit to assert her rights in the estate of Ebrahimji alleging that Jelumboo had a one-sixth share in the estate of her son Ebrahimji and that she was one of the heirs of Jelumboo.

Defendants Nos. 1 to 5 were the representatives of Ebrahimji and they resisted the claim of the plaintiff on the grounds, that the suit was barred by limitation, that it abated under O. XXII, r. 4, of the Civil Procedure Code, as the heirs of Sakinaboo, another daughter of Jelumboo (defendant No. 7) who died in 1932, were not brought on record within the time limited by law, and that the plaintiff was estopped as her predecessors-in-title had not put forward their claim in another suit based on a partition deed.

Defendant No. 6 was the daughter of Ebrahimji.

Defendants Nos. 9 to 16 were Sarafally's heirs.

Defendants Nos. 6 to 16 supported the plaintiff's claim.

Barlee J. dismissed the suit on February 17, 1936, holding that the plaintiff's claim was barred by limitation. The following is his Lordship's judgment.—

BARLEE J. Two brothers, Ebrahimji Esmailji Bhagat and Sarafally Emailji Bhagat, were joint owners of some immoveable property at Kapadvanj, and partners in a shop in Bombay. Ebrahimji died in 1904 leaving heirs, his mother, widow and children. His estate consisted of an undivided share of the immoveables, including a house which the brothers had bought in Samuel Street, Bombay, and a share in the business (net) assets.

Sarafally remained in sole possession of the shop—with which only I have to deal. It prospered. His mother Jelumboo lived with him till she died in 1912. Her heirs were her son Sarafally and two daughters. Sarafally died in 1924.

A few months before he died he made an arrangement with three of the surviving heirs of Ebrahimji (Ebrahimji's widow, son and daughter) regarding the business. The document (exhibit B) is called a partition deed. In fact it is a declaration of the shares of the parties to it in the property

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P. C. including the business and the immoveable property at Kapadvanj and Bombay. They declared :—

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 ———  
 "that the moveable and immoveable properties which appertain to the firm which is being carried on in the name of Ebrahimji Esmailji Bhagat and which are joint and in the possession and belong to us the two parties and in which No. 1 out of us has a share consisting of ten annas in the rupee and No. 2 has a share consisting of six annas in the rupee" etc.

Barles J.  
 ———  
 Sarafally died in 1924 and his nine heirs entered into an agreement with Kikabhai, his mother and sister, by which the latter party agreed to buy the house in Abdul Rehman Street, and the heirs of Sarafally bought the business and other property.

Effect was given to this agreement by a consent decree in C. S. No. 4352 of 1924.

Another suit followed in 1926 between Kikabhai son of Ebrahimji and his sisters—their mother being dead. The result was that his sister Safiabai took Rs. 51,500 and gave up all her claims to the property which had come to them in 1924.

The plaintiff now claims as heir of Jelumboo a share of the property which came to Kikabhai, his mother and sister in 1924. She is a daughter of Amtoolaboo, second daughter of Jelumboo. She joined as defendants, Kikabhai, son of Ebrahimji, and the other surviving heirs of Ebrahimji (defendants Nos. 1 to 6), the heirs of Sarafally (defendants Nos. 9 to 16), and the only surviving heir of Jelumboo (defendant No. 7). Defendant No. 8 is plaintiff's sister.

The most important issue in the case is that of limitation. To decide it I must discover the legal position of the plaintiff and of her mother Jelumboo. On the death of Ebrahimji, Jelumboo became entitled as an heir to one-sixth of his estate, including the shop. She was not a partner in his business but a creditor of Sarafally the sole surviving partner. She was entitled to a one-sixth share of the moveable and immoveable property of the deceased and to a one-sixth share of his share in the assets of the firm. I am not now concerned with anything except the claim to a share in the firm. Her right may have included a right to a share of the profits of the firm after Ebrahimji's death, but this is immaterial for by art. 106 of the Indian Limitation Act her claim was time-barred after three years, and by s. 28 her right was extinguished.

Mr. Somjee, however, has pleaded that this is immaterial since the estate of Ebrahimji was subsequently partitioned and his client is claiming her share of the estate of Ebrahimji in the hands of his other heirs, and is entitled to claim it as a tenant-in-common with them, now that it has been ascertained. He contends that Sarafally held the property up to his death as a co-owner, and that his possession was not adverse to the heirs of Ebrahimji, who were tenants-in-common with him since no act of ouster has been proved. In the same way, he pleads, defendants Nos. 1 to 5 are holding Ebrahimji's estate as tenants-in-common for and on behalf of themselves and the other heirs of Ebrahimji.

This argument would be unimpeachable were the plaintiff claiming the

real estate in which Ebrahimji had a share. But his share in the business was personalty and there are no 'estates' in personalty. His right was a share of the net assets on dissolution and his heirs had no higher right. There was no equitable conversion, and the actual conversion which occurred in or about 1917 did not benefit the plaintiff, firstly, because it did not alter the nature of her right—she could not have been forced to take a share of the house property in lieu of her money claim, and, secondly, because Jelumboo's right had already been extinguished. Again each heir had an individual right to a share of the assets of the firm and not a joint right. What defendants Nos. 1 to 5 got, therefore, was in lieu of their own share and not on behalf of other heirs.

Mr. Somjee has relied on certain passages in the agreements B and C and the proceedings in the suits of 1924 and 1926. I can find no admission of plaintiff's claim which can help her. Even if the agreements had contained acknowledgments, the bar of limitation would not have been removed since the period of limitation had expired long before 1923; and as she was not a party to any of the proceedings, she cannot plead a contract valid under s. 25 of the Indian Limitation Act.

My finding then is that the plaintiff's claim is barred by time.

My finding on issue No. 1 is in the negative. This has already been decided in my previous order.

My finding on issue No. 3 is that the plaintiff is not estopped by conduct, but that the defendants who are heirs of Sarafally are estopped from claiming any share in the estate of Ebrahimji. Mr. Munshi relied on estoppel under s. 115, but the estoppel in my view is by record. The heirs of Sarafally had an opportunity of claiming as heirs of Jelumboo in the suit filed by them against Kikabhai and others. They failed to take advantage of that opportunity and cannot do so now. Mr. Somjee argues that they cannot rely on this ground since they have not pleaded estoppel by record. But this plea arises out of the evidence which they themselves have led and therefore is available to the other side.

My findings on issues 5 and 6 are in the negative for the reasons I have already given.

The suit is dismissed with costs.

Mr. Desai argues that I should make an order that the heirs of Sarafally should be liable along with the plaintiff for their costs, and he refers me to an authority mentioned at p. 146 of Sir Dinshah Mulla's Civil Procedure Code, 10th edn. I have no doubt that in a suitable case one defendant may be ordered to pay the costs of another defendant, but in this particular case I do not think such an order is justified, since the defendants, the heirs of Sarafally, have done nothing except to ask that there be a division and their share be given to them. This request therefore must be rejected.

The plaintiff must pay the costs of defendants Nos. 1 to 5, the other defendants should pay their own costs.

On appeal, the Appeal Court (Beaumont C. J. and Rangnekar J.) reversed the decree of the lower Court (September 8, 1936). The following judgment was delivered by Rangnekar J.—

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RANGNEKAR J. This is an appeal from a judgment of Mr. Justice Barlee whereby the learned Judge dismissed the plaintiff's action. The material facts may be stated shortly as follows. One Esmailji died leaving his widow Jelumboo, and two sons Ebrahimji and Sarafally, and two daughters Sakina-boo and Amtoolaboo. After the death of Esmailji, Ebrahimji and Sarafally were carrying on business jointly in Bombay. Ebrahimji died in 1904 leaving his widow Fatmabai, a son, who was born after his death, and two daughters, Khatizabai and Safiabai. Jelumboo died in 1912. The two daughters of Esmailji were married. One of them, Amtoolaboo, died in 1920, leaving Safiabai, who is the plaintiff, and Asmabai, who is defendant No. 8 in the suit. It is common ground that the two brothers were living together, and that they owned some properties situate at Kapadvanj, and they had also purchased one property in Samuel Street out of the profits of their business. After Ebrahimji's death one property at Abdul Rehman Street was purchased, admittedly out of the profits of the business. It is not disputed that Jelumboo was an heir of Ebrahimji and that she had a one-sixth share in his estate, nor is it disputed that her heirs would be Sarafally and her two daughters. This suit was instituted by Safiabai, the daughter of Amtoolaboo, to assert her rights in the estate of Ebrahimji, and her claim was that in that estate Ebrahimji's mother Jelumboo had a one-sixth share, and that she was one of the heirs of Jelumboo. Of the defendants, defendants Nos. 1 to 5 are the representatives of Ebrahimji. Defendant No. 7 is the other daughter of Jelumboo, and defendant No. 8 is another daughter of Amtoolaboo. Defendants Nos. 9 to 16 are Sarafally's heirs. All defendants except defendants Nos. 1 to 5 supported the claim of the plaintiff. Defendants Nos. 1 to 5 resisted it on various grounds, and accordingly, at the trial, several issues were raised, one of them being that the suit was barred by the law of limitation. The learned Judge, as appears from his judgment, seems to have considered that to be the principal question in the case. He held that the suit was barred under art. 106 of the Indian Limitation Act. But he went on to record, and has recorded, findings on some of the issues, which will be adverted to presently. The question then is whether the suit is barred by limitation. That, I think, must plainly depend upon the nature of the claim as set up in the plaint. In the plaint, after setting out the relationship between the parties to the suit, and referring to certain transactions to which I shall presently refer, the plaintiff alleged that all the parties were living jointly and as members of a joint family until at any rate 1926, and that at no time was any exclusion set up by the contending defendants against them. The plaintiff further complained that defendant No. 1 deliberately avoided filing a suit for administration of the estate of Ebrahimji, well knowing that in that event he will have to make the plaintiff and all other heirs of Jelumboo parties thereto, and to pay them their respective shares, and submitted that in those circumstances the suit was not barred by the law of limitation. The first prayer is for a declaration that Jelumboo was entitled to a one-sixth share in the estate left by Ebrahimji as his mother, and that after her death her own heirs became entitled to the same, and the second for a further declaration that the plaintiff, defendants Nos. 7 and 8, and the heirs of Sarafally would be entitled to a one-sixth share in the estate

of Ebrahimji. The next prayer is for partition of the properties between the parties entitled thereto, and the ascertainment of their shares, and for separate possession. Then there is a prayer for a complete discovery against defendant No. 1, and for all accounts being taken, inquiries made, and necessary directions given, and proper orders being passed for these purposes. It is true that there is no specific prayer for administration, but we are clearly of opinion, having regard to the plaint as a whole, that the suit was substantially for administration of the estate of Ebrahimji, and for the ascertainment of the rights of the heirs of Jelumboo, who herself was an heir in that estate. If then the suit is for administration, then, as the parties are Mahomedans, time will not run unless there was an exclusion or an ouster. It is well established that Mahomedan heirs succeed to the estate as tenants-in-common with specific shares, and unless a case of exclusion or ouster is made out against any of the heirs, the mere fact that one or some of the heirs are in possession of the whole estate will not deprive the other heirs of their rights as heirs in such estate. It is not necessary for me to refer to the authorities on this point, as it does not appear to me to be open to dispute. The way in which, however, the case was put before the learned Judge was this. It was contended that the suit in substance was one for taking partnership accounts of a partnership between Sarafally and Ebrahimji, and for recovery of the latter's share in the partnership and in the properties purchased out of the profits of the partnership. It appears that after the death of Ebrahimji the business was continued by Sarafally, and the respondents' contention was that in that business Sarafally and they, as heirs of Ebrahimji, were the only partners. This was met by the plaintiff by the contention that after the death of Ebrahimji the share of Ebrahimji was continued in the business by Sarafally with the consent of the then heirs for the benefit of the estate of Ebrahimji, and until at least 1923 the business was carried on by Sarafally for and on behalf of himself and the estate of Ebrahimji. The learned Judge has recorded no finding on this issue, but he has distinctly found that the estate of Ebrahimji was not held and enjoyed by his widow and children to the exclusion and adversely to Jelumboo and her heirs. If it had been necessary on the facts to determine the question as to whether the business was continued by Sarafally only for himself and the widow and children of Ebrahimji and not, as the plaintiff contends, for the benefit of Ebrahimji's estate, we would have remanded the case for a finding on the issue. But, in view of the facts, we do not think it is necessary. As stated above, the learned Judge had found there was no exclusion or ouster against Jelumboo and her heirs. The fact remains that the business was continued admittedly with the help of Ebrahimji's share therein, and the evidence shows that all the property, both moveable and immoveable, including the business, was treated by common consent of the family as joint, in which not only Sarafally but the estate of Ebrahimji was interested. This is clear from certain subsequent events, to which it will now be convenient to refer. As stated above, the Abdul Rehman Street property was admittedly purchased out of the profits of the business, and the rest of the immoveable property was admittedly joint property of Ebrahimji and Sarafally.

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 1940 fell ill in 1923. On July 13, 1923, he called together all the heirs of Ebra-  
 — himji except Khatizabai, and the heirs of Jelumboo, Jelumboo herself being  
 MAHOMED- already dead then. They then entered into an agreement, the effect of which  
 ALLY was to distribute all the properties between Sarafally and respondents Nos. 1  
 TYEBALLY to 5 and Safiabai, the daughter of Ebrahimji. Khatizabai, who, as I have  
 v. said, was admittedly an heir, was not a party to this agreement, nor were  
 SAFIABAI heirs of Jelumboo parties. The agreement in one place is called a partner-  
 — ship deed and in another a partition deed. The properties are described as  
*Rangnekar J.* joint and in the possession of the parties to the agreement. But the fact  
 remains that all of them with the exception of the Abdul Rehman Street  
 property admittedly belonged jointly to Sarafally and Ebrahimji. Then the  
 properties are described as belonging to the firm "which is being carried on  
 in the name of Ebrahim". The business assets are described as belonging  
 to this firm. It is clear that the agreement was made by Sarafally and  
 some of the heirs of Ebrahimji. How can it then be contended that the  
 agreement shows that the business and the joint property of Ebrahimji and  
 Sarafally belonged exclusively only to the parties to the agreement, and in  
 any event how can it bind the heirs of Jelumboo who were not parties to it?  
 Some only of the heirs of Ebrahimji and Sarafally cannot by agreement  
 between them change the nature of the property, which, the agreement shows,  
 was treated as belonging to the heirs of Ebrahimji and Sarafally, behind the  
 back of the other heirs of Ebrahimji. At the most it may be evidence of  
 exclusion, if the other heirs of Ebrahimji were aware of the agreement, but  
 there is no evidence of that, and the learned Judge's finding, which, in our  
 opinion, is correct, is to the contrary. But even if the agreement be treated  
 as evidence of exclusion, the suit is within twelve years of it. Then shortly  
 after the agreement, that is on August 5, 1923, Sarafally died, and there-  
 after another agreement was entered into on September 23, 1924. By this  
 the heirs of Sarafally and respondents Nos. 1 to 5 agreed to wind up the  
 estate and divide it among themselves in a particular manner again behind  
 the back of the heirs of Jelumboo. This agreement was made to carry out  
 the earlier agreement of July 13, 1923. This was followed by a suit brought  
 by respondent No. 1, Khatizabai, who is now represented by defendants  
 Nos. 2 to 5, and the widow of Ebrahimji against the heirs of Sarafally and  
 Safiabai. The plaint incidentally shows that, even according to the res-  
 pondents, Ebrahimji and Sarafally were tenants-in-common. By consent the  
 suit was referred to arbitration. An award was made and decree taken in  
 terms of it. The result of it was to divide the whole estate belonging to  
 Ebrahimji and Sarafally among the parties to the suit. To these proceed-  
 ings, as well as to a subsequent suit between respondent No. 1 and his sisters  
 Jelumboo's heirs were not parties. It is significant to note, however, that  
 in the latter suit Safiabai did raise the question that Jelumboo's heirs were  
 necessary parties. The position, then, is that these facts show that the  
 whole property, including the business, was treated as joint property of Ebra-  
 himji and Sarafally in which they were tenants-in-common, and after the  
 death of the former his heirs were tenants-in-common with Sarafally, and  
 after his death with his heirs. Therefore, in my opinion, the learned Judge



was right in holding that there was no exclusion or adverse possession against the heirs of Jelumboo. Merely because some only of the heirs of Ebrahimji enter into an agreement with the other joint owner, and, after the latter's death, with his heirs, to divide the common estate among themselves, cannot affect the rights of the other heirs of Ebrahimji. The position, then, is that the suit is for administration of the estate of Ebrahimji brought by an heir of one of the heirs of Ebrahimji against the other heirs of Ebrahimji and the heirs of Sarafally. According to her, the estate is now *in the hands of* the contending defendants, and she wants her share in it. The suit is not, therefore, a partnership suit, or a suit to wind up the partnership business and to recover her share therein, as an heir of a deceased partner. According to her, that has been done, and the deceased partner's share is now held and in the possession of the contending defendants. In my opinion, art. 106 clearly cannot apply to such a suit. Mr. Munshi referred to certain Privy Council cases, which, in my opinion, have no bearing on the question which arises on the facts of this case. He relied on *Gopala Chetty v. Vijayaragavachariar*<sup>1</sup> in which the judgment of the House of Lords in *Knox v. Gye*<sup>2</sup> was explained by Lord Phillimore. But the judgment shows that even in the case of two partners, where the partnership has been dissolved, accounts made up, and assets distributed, if subsequently an asset, which belonged to the partnership, came into the hands of one of the partners, it will have to be divided between him and the other partner. The facts in the present case seem to me to be much stronger than the facts in that case. I think, therefore, the view taken by the learned Judge in the trial Court on the question of limitation is clearly unsustainable.

The next point, which is raised on behalf of the respondents, is that the whole suit abated under O. XXII, r. 4, of the Civil Procedure Code, as the heirs of Sakinaboo, who was the original defendant No. 7, were not brought on record within the time limited by law. It appears that the lady died in March, 1932, and the present defendant No. 7 applied to the learned Judge for being brought on record as her heir, and for her rights being ascertained and given effect to, about two years after the death of Sakinaboo. The learned Judge accepted the application, and made an order that she should be brought on record. Accordingly that was done. The learned Judge clearly had jurisdiction to excuse the delay on the part of the heirs in making the application for being brought on record. The learned Judge exercised the jurisdiction, and no sufficient ground is shown why we should interfere with it. Apart from that, it seems to me that there is no clear authority for the view, which is pressed by Mr. Munshi, that in a suit like the present, when one of the defendants, who himself was joined as an heir, dies, and his heirs are not brought on record within ninety days, the whole suit must abate. The wording of O. XXII, r. 4, is clearly against such a contention, and at the most it may be that the suit may abate against the heir of the deceased party. If it is to the interest of the other parties that all questions should be determined at one time in one proceeding, then clearly it is their duty to bring the heir of a deceased party on the record. If they do not do

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<sup>1</sup> (1922) L. R. 49 I. A. 181,

s. c. I. L. R. 45 Mad. 378,

24 Bom. L. R. 1197.

<sup>2</sup> (1871-72) L. R. 5 H. L. 656.

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it, they take the risk of the heir turning up subsequently and contending that he was not bound by any decree made in the litigation. The case on which Mr. Munshi relies is a case of Hindu joint tenants, and there is a clear distinction between the position of heirs of a deceased Mahomedan under the Mahomedan law and the position of an heir of a joint tenant. But all that was said in that case was that to a suit for partition all the coparceners were necessary parties, and if any of the coparceners is not joined, the suit is not well constituted. I respectfully agree with the decision, but it is difficult to see how it can apply to the facts of this case. I think, therefore, that this contention must be rejected.

The third point taken by Mr. Munshi is one about estoppel, which is based on the agreement of 1923 and the subsequent events which are set forth above. Now the contention is that in these transactions the heirs of Sarafally, now represented by defendants Nos. 9 to 16, did not assert that Jelumboo or rather Jelumboo's heirs were also heirs to the estate of Ebrahimji, and therefore they are now estopped from contending, as they undoubtedly do, that Jelumboo and her heirs are entitled to their shares in the estate of Ebrahimji. The learned Judge accepted this contention not as regards defendant No. 7, but as regards the heirs of Sarafally, represented by defendants Nos. 9 to 16. But he held that this was an estoppel by record. Mr. Munshi does not support this conclusion. But he argues that these facts clearly raise an estoppel by conduct. To establish an estoppel of that character it is necessary to show, first, that there was a representation made by the party against whom the estoppel is raised, secondly, that the representation was made to the party with intent that it should be acted upon, and, thirdly, that the other party acted upon it and changed his position or acted to his prejudice. In my opinion, there is no evidence to establish these points. In the first place, there was no assertion made by one of the defendants that Jelumboo was not an heir to Ebrahimji's estate. They only came forward as heirs of Sarafally, who was a party to the agreement, and in order to carry out the agreement. The question of Jelumboo's rights did not arise in the matter at all. The facts are that the estate was agreed to be divided between Sarafally and some of the heirs of Ebrahimji, and after Sarafally's death the method of distribution was agreed upon in the second agreement between the heirs of Sarafally and the defendants, who were some of the heirs of Ebrahimji. The second agreement was made to carry out the first agreement. Both the parties having proceeded by consent on the footing that Jelumboo had no interest in the estate, it is difficult to see how the contending respondents' position was prejudiced. It is difficult to hold on these facts that there is any case of estoppel made out against these heirs. I think, therefore, that contention must also be rejected. Mr. Munshi referred to a Privy Council decision in *Muhammad Wali Khan v. Muhammad Mohi-ud-din Khan*.<sup>1</sup> The facts, in my opinion, of that case are clearly distinguishable.

It is now necessary to consider the order which should be made in this appeal. It seems to me that the parties did not appreciate the proper posi-

tion which arose upon the pleadings. There is no doubt that the plaintiffs are entitled to the declarations claimed in prayers (a) and (b), and that being so, I do not think it is necessary to remand the case for a finding on some of the issues on which no express finding has been recorded by the Judge. The principal question agitated by the parties before the learned Judge was that the suit was barred by limitation, as there was exclusion and ouster against the plaintiff and the other heirs of Jelumboo, and that was the case with which they came to Court by their written statement. That issue was found by the learned Judge against them. The position then is that the plaintiffs have *prima facie* established their cause of action, and are entitled to a preliminary decree for administration. But having regard to the facts and the difficulties in the case, we propose that the decree should be for declarations claimed by prayers (a) and (b), and for an order that the suit be referred to the Commissioner for taking accounts to take an account of the estate of Ebrahimji and of the properties, if any, forming part of the estate, come to the hands of defendants Nos. 1 to 5, and that the property be applied in due course of administration. Mr. Munshi has asked us to give special directions to the Commissioner as regards his contention that some of the properties do not belong to the estate, and did not form part of the estate of Ebrahimji. Having regard to the decree which we are making, I do not think it necessary to do so. Two questions arise. One would be, what is the estate of Ebrahimji, and, secondly, what part of that estate is in the hands of the defendants? And it will be perfectly open to the parties to raise all proper contentions allowed by law on this decree before the Commissioner. In my opinion, no such specific directions are required. The appeal, therefore, will be allowed. Respondents Nos. 1 to 5 to pay the costs of the appeal. Costs in the suit and further directions will be reserved.

BEAUMONT C. J. I agree and have nothing to add.

Defendants Nos. 1 to 5 appealed to His Majesty in Council.

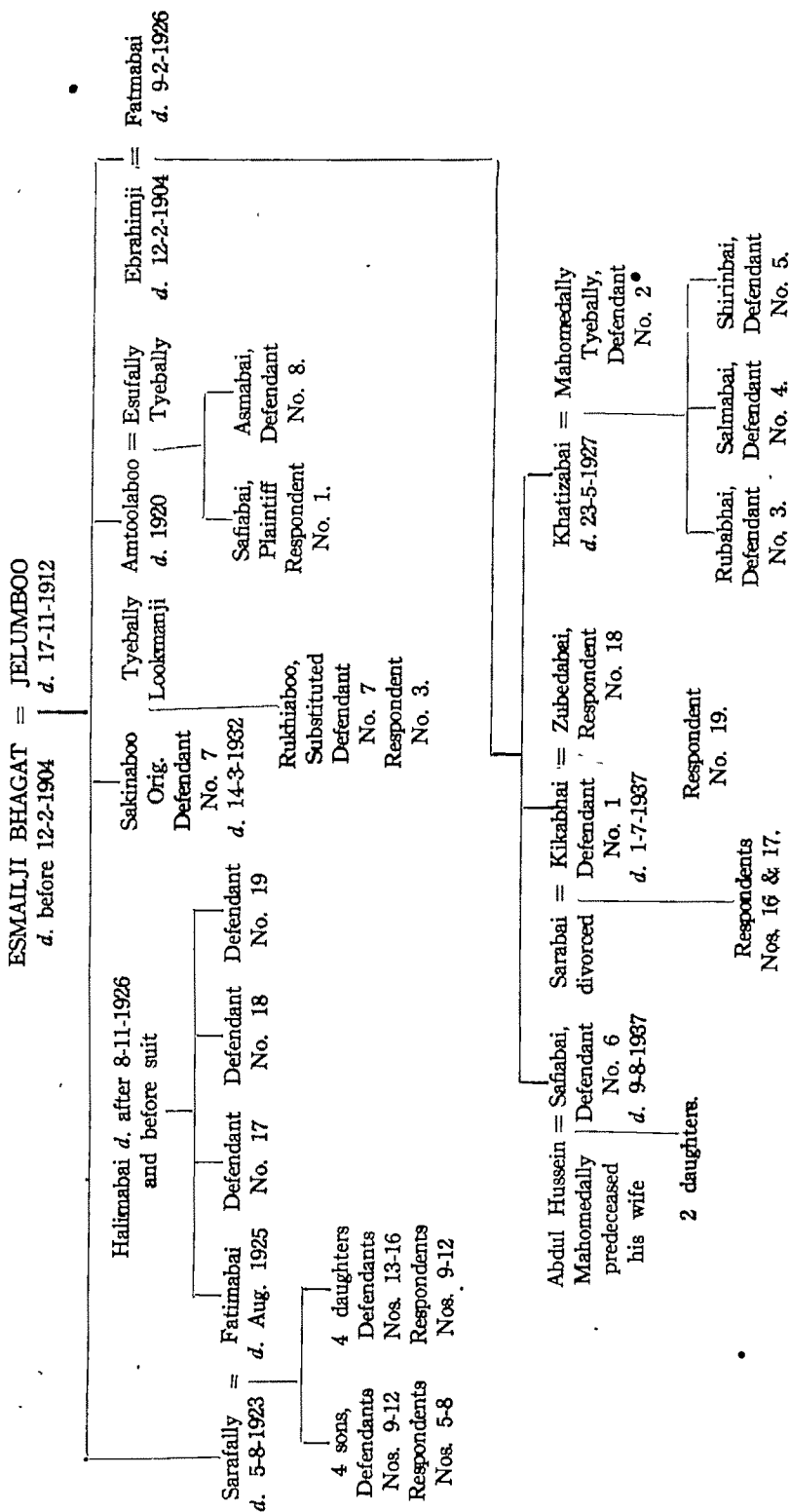
*Sir Thomas Strangman* K. C. and *A. G. P. Pullan*, for the appellants.  
*J. M. Parikh*, for the respondents.

SIR GEORGE RANKIN. This case concerns the administration of the estate left by one Ebrahimji who died in 1904. He was a Dawoodi Borah governed by the Shia School of Mahomedan law and had carried on business in Bombay with his brother Sarafally as merchants and commission agents. A pedigree table of the family is given hereunder. They belonged to Kapadvanj in the Kaira District of the Bombay Presidency, and the brothers were co-owners of certain immovable properties there in addition to their interests in their ancestral home. Their Bombay business was a profitable one and a house in Samuel Street in Bombay had been acquired out of the profits.

The heirs of Ebrahimji, according to the Shia system of "sharers" and "residuarys" were (1) his mother Jelumboo entitled to a sixth share, (2) his widow Fatmabai entitled to an eighth share, (3) his son Kikabhai, and his two daughters by different wives (4) Safiabai and (5) Khatizabai. These children took shares in the residue left after deduction of the mother's and

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widow's shares, the son taking twice as much as a daughter. His brother Sarafally and his two sisters Sakinaboo and Amtoolaboo were not heirs. The business was continued by Sarafally, the share of Ebrahimji being left in the business. Jelumboo lived with her son Sarafally until her death in 1912. Another Bombay house—in Abdul Rehman Street—was acquired out of the profits in or about 1917. Amtoolaboo died in 1920 leaving as her heirs two daughters the plaintiff Safiabai and Asmabai (defendant No. 8).

In 1923 Sarafally was ill : he died in August of that year. On July 13 before his death he entered into an agreement in writing intended to regulate and define the respective interests of himself and Ebrahimji's estate in the business and in the various properties at Bombay and Kapadvanj. The other parties to this agreement were Ebrahimji's son Kikabhaj, his daughter Safiabai and his widow Fatmabai. Provision was made for the other daughter Khatizabai joining therein, which she afterwards did. The agreement treated the widow, son and daughters of Ebrahimji as his only heirs, ignoring the facts that his mother Jelumboo had inherited from him a sixth share of his estate, and that of her interest only a half had devolved on Sarafally, the other half belonging to his sister Sakinaboo and the two daughters of his deceased sister Amtoolaboo—namely, the plaintiff and Asmabai.

On this footing the agreement provided that the respective shares of Sarafally and Ebrahimji's estate should as to two plots of land in Kapadvanj be equal, but as to the business and the houses in Abdul Rehman Street and Samuel Street should be as follows : ten annas to Sarafally and six annas to Ebrahimji's estate. The ancestral house at Kapadvanj had already been partitioned by metes and bounds.

On Sarafally's death (August 5, 1923), his estate devolved on his widow, his four sons and his four daughters. On September 24, 1924, an agreement in writing was made between them as Sarafally's heirs of the one part and the widow and three children of Ebrahimji as representing Ebrahimji's estate of the other part. No notice was taken in this agreement of Jelumboo or her heirs as having any interest in the estate of Ebrahimji. The agreement of July 13, 1923, was approved. The house at Abdul Rehman Street and its contents and two immovable properties at Kapadvanj were to be taken by Ebrahimji's heirs, and Sarafally's heirs were to get the Samuel Street house and the business. These assets were to be taken at certain valuations : the figure for the business to be fixed by one Metaji Chaturbhuj Motichand who was to make up the final account. Some properties at Kapadvanj were not included in this arrangement but it was recited that these had already been divided.

On December 11, 1924, the widow and son of Ebrahimji together with one daughter (Khatizabai) sued for partition in accordance with the agreement of September 24, 1924. The other daughter (Safiabai) was made a defendant but the suit was brought against Sarafally's eight children and widow as representing his estate : a preliminary decree for partition and accounts was obtained on May 5, 1925, and a final decree on June 11, 1926. The widow of Ebrahimji died meanwhile in 1925 and her interest passed to her children. The widow of Sarafally died in 1926 : this produced certain changes in the representation of Sarafally's estate which will be taken account of in due course.

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On July 17, 1926, Ebrahimji's son Kikabhai sued his sister Khatizabai and his half-sister Safiabai for sale and division of the property which had come to them under the decree in the previous suit. Safiabai by her written statement filed on November 8, 1926, set up that Jelumboo, her father's mother, was one of his heirs, and that the present plaintiff together with her sister Asmabai and her aunt Sakinaboo and other persons should be brought before the Court as necessary parties. Khatizabai having died in 1926, her husband and children were substituted in her stead. On February 21, 1929, a decree was passed by consent directing that Safiabai should take a sum of Rs. 51,500 with certain interest in full satisfaction of her share in her father Ebrahimji's estate. This was paid to her and a release was executed by her on January 31, 1930. Their Lordships do not stop to consider the propriety of these proceedings having regard to the facts brought to notice by the lady's own written statement as already mentioned.

On July 23, 1930, the present suit was filed. At some date before that but after 1926 the death of Halimabai occurred. She was the mother of Sarafally's wife and had been one of her heirs. The result of Halimabai's death was that the persons entitled to the estate of Sarafally were now his four sons, his four daughters and three sisters of his wife. These eleven persons may be described as the second set of defendants to the present suit—namely defendants Nos. 9-19 inclusive. The plaintiff was Safiabai, one of the two daughters of Amtoolaboo, sister to Ebrahimji. The first set of defendants (so to call them) were Kikabhai, and Khatizabai's representatives; these were defendants Nos. 1-5. Among other defendants was Kikabhai's half-sister Safiabai (defendant No. 6) who has been paid out as already mentioned. The plaintiff's sister, Asmabai, was defendant No. 8 and the plaintiff's aunt, Sakinaboo, was defendant No. 7. These two ladies were in the same position as the plaintiff, being persons entitled along with the plaintiff to a half of the one-sixth interest which Jelumboo had in her son Ebrahimji's estate. The other half of that one-sixth interest belonged at the date of the suit to Sarafally's representatives—that is defendants Nos. 9-19—unless by the agreements of 1923 and 1924 they had lost their interest.

It is necessary to direct attention to the frame and scope of the suit. It was brought on the Original Side of the High Court at Bombay. The plaint set forth the various relationships of the parties and the devolution of interests in the respective estates of Ebrahimji and Sarafally. It recited the agreements of July 13, 1923, and September 23, 1924, and the two previous suits brought thereupon; it stated that the plaintiff had had no knowledge thereof and had not consented thereto; but it did not claim that the plaintiff's interest in the estate of Ebrahimji should be ascertained as between herself and the estate of Sarafally as though these agreements had never been made. In effect, as their Lordships read the plaint, it merely asked that Jelumboo's one-sixth share in what Ebrahimji's widow and children had received as representing his estate should be given to the persons entitled thereto. Defendants Nos. 9-19, Sarafally's representatives, supported the plaintiff: the contesting defendants were the defendants Nos. 1-5.

The suit having been filed on July 23, 1930, Sakinaboo (sister of Ebrahimji), who was defendant No. 7, died on March 14, 1932, leaving her

daughter Rukhiaboo as her heir. No application to make the daughter a party to the suit having been made within ninety days the suit abated as against Sakinaboo under O. XXII, r. 4, cl. 3, of the Civil Procedure Code. No application was made within sixty days thereafter to set aside the abatement under r. 9 of the same Order. But on May 10, 1936, Rukhiaboo herself applied to be brought on the record in her mother's stead and claimed to share in the relief asked by the plaint. Acting under r. 10 of O. I of the Code, Barlee J., on January 22, 1936, added her as defendant No. 7 to the suit. At the trial the learned Judge on February 17, 1936, dismissed the suit, holding that the plaintiff's claim was within art. 106 of the Indian Limitation Act, 1908, which prescribes a period of three years from the date of dissolution for a suit for an account and a share of the profits of a dissolved partnership. On appeal this decree was set aside by a division bench (Beaumont C. J. and Rangnekar J.) who directed an account to be taken of the estate of Ebrahimji come to the hands of Kikabhai and the heirs of Khatizabai and ordered that the estate of Ebrahimji be applied in due course of administration. This decree was dated September 8, 1936, and is the decree from which the present appeal is brought by the heirs of Khatizabai.

It is not contended that the plaintiff's claim is for anything more than her prima facie rights in Ebrahimji's estate, but three points are taken for the appellants. It is said (1) that the suit had come to an end by reason that it had abated as against Sakinaboo, (2) that it is barred by limitation, and (3) that defendants Nos. 9-19 can make no claim against the appellants in respect of Sarafally's interest in Jelumboo's estate as this would be contrary to the agreements of July 13, 1923, and September 23, 1924, and to the decree of the Court made (June 11, 1926) in the suit of 1924 which gave effect to these agreements.

On the first point their Lordships are of opinion that it is impossible to hold that the suit for administration of Ebrahimji's estate came to an end by reason of abatement as against Sakinaboo. Sakinaboo and her daughter Rukhiaboo are persons having the same interest as the plaintiff, and though the plaintiff by reason of laches may be supposed in certain circumstances to lose her rights as against them, it is paradoxical to suppose that the plaintiff's laches have deprived them of rights. There is nothing in O. XXII to take away their interest in the estate of Ebrahimji and they could (so far as that Order is concerned) have brought an administration suit of their own, notwithstanding any abatement of the plaintiff's suit. The presence of someone to represent Sakinaboo's interest was very proper and highly desirable in the interest of every other party, but it is putting it too high to say that the suit could not possibly go on without her. It not uncommonly happens, in a suit for administration, that for one reason or another a particular interest is not represented before decree, but is either provided for by the decree, or is asserted at a later stage under the decree, or is given effect by a party being permitted to attend certain accounts and enquiries so as to be bound by the result. Still, it would have been very bad practice if in the present case Rukhiaboo had not been joined as a party and this was properly done by Barlee J. on her own application under O. I, r. 10. Their Lordships are of opinion that it is open to the Judge in his discretion under O. I, r. 10, to

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add as a party to the suit the representative of a person against whom the suit has abated for the purpose of giving effect to the rights of the parties. The contention that the plaintiff's suit had abated as a whole is fundamentally mistaken. It involves that the plaintiff was claiming relief against Sakinaboo, that because Sakinaboo's heirs were entitled to resist the grant of this relief in the present suit by reason of the plaintiff's laches, the plaintiff could not be given relief against the present appellants. No step in this reasoning can be justified.

It was not contended before the Board that the plaintiff's suit is of the character mentioned in art. 106 of the Indian Limitation Act. It is a suit against certain Mahomedan co-heirs by a person entitled to part of the interest of an heir, and the High Court on appeal rightly held that to such a suit neither art. 106 nor art. 123 is applicable. The heirs of a Mahomedan succeed to his estate in specific shares as tenants-in-common and the plaintiff's suit against the son and daughters of Ebrahimji for due administration of what came to their hands as property left by their father is governed as regards immovable property by art. 144 and as regards movables by art. 120 (*Mahomed Riasat Ali v. Mussumat Hasin Banu*<sup>1</sup> and *Ghulam Mohammad v. Ghulam Husain*.<sup>2</sup>) Upon the proper application of art. 120 as between tenants-in-common it will be sufficient to refer to *Bolo v. Kokhar*<sup>3</sup> and *Yerukola v. Yerukola*.<sup>4</sup> It does not appear that the widow, son or daughters of Ebrahimji received what was to come to them under the agreement of September 24, 1924, until the suit of 1924 had been decreed in 1926 which is well within six years of the filing of the present suit on July 23, 1930. But their Lordships think it right to add that on the evidence they find no reason for holding that there had been an ouster or exclusion of the plaintiff prior to July 23, 1924: indeed there are concurrent findings of the Courts in India which are inconsistent with any such contention.

The third point taken by the appellants is in their Lordships' opinion good against those claiming under Sarafally an interest in Jelumboo's one-sixth share of Ebrahimji's estate. As the suit of 1924 resulted in a decree there is an element of estoppel by record, but the matter may be put sufficiently as resting on agreements made in 1923 and 1924 between Sarafally and Sarafally's heirs on the one part and the widow and the children of Ebrahimji on the other. Defendants Nos. 9-19 cannot claim to make the present appellants liable on the footing that Sarafally was entitled to more than these agreements gave him, though it be true enough that since 1912 he had been entitled to a half of his mother's one-sixth share. If the plaintiff by her suit had challenged the rights of Sarafally's heir under the agreements of 1923 and 1924, it may well be that she could have required Sarafally's heirs to account upon a footing which would have made it impossible to give any effect to these agreements: even as between the parties to them. But the plaintiff by her suit has not sought relief upon any such basis and the agreements have their effect between Sarafally (and his representatives) and the children of his brother.

1 (1893) L. R. 20 I. A. 155.  
2 (1931) L. R. 59 I. A. 74,  
s.c. 34 Bom. L. R. 510,  
s.c. I. L. R. 54 All. 93.

3 (1930) L. R. 57 I. A. 325,  
s.c. 32 Bom. L. R. 1596.  
4 (1922) I. L. R. 45 Mad. 648, F.B.



Their Lordships are of opinion that on this point the appeal succeeds but only as against defendants Nos. 9-19 (respondents Nos. 5-15). The decree of the High Court dated September 8, 1936, should be varied (a) by limiting the second of the declarations therein made to a declaration that the plaintiff and defendants Nos. 7 and 8 are entitled to a one-twelfth share in the estate of Ebrahimji Esmailji Bhagat, the plaintiff and defendant No. 8 being each entitled to one-quarter of the said one-twelfth share and defendant No. 7 being entitled to the remaining half thereof; (b) by adding to the order for administration the words "so far as regards the one-twelfth share to which the plaintiff and defendants Nos. 7 and 8 are entitled as aforesaid."

Their Lordships will humbly advise His Majesty accordingly. They see no need to disturb the High Court's order as to costs. As regards the costs of this appeal the appellants must pay one-half of one set of costs to the contesting respondents—that is, respondents Nos. 1, 3 and 5-12 who have joined in resisting the appeal.

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*Decree varied.*

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Lattey & Dawe.*

[*On appeal from the High Court of Judicature at Bombay.*]

*Present :*

LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON, AND  
MR. M. R. JAYAKAR.

THE RANEEGUNJ COAL ASSOCIATION LTD.

*v.*

THE TATA IRON AND STEEL CO. LTD.

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—  
June 18.  
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*Contract—Construction—Literal and grammatical construction of two provisions lead to inconsistencies—One provision susceptible of possible construction different from its literal meaning—Possible construction removes inconsistency—Adoption of such construction—Court not to speculate as to reasons why particular language was used in contract.*

Where in a document there is an apparent inconsistency according to the literal construction of the words used, if by any other reasonably possible construction the apparent inconsistencies can be reconciled, that construction should be adopted.

It is not for a Court to speculate as to the reasons which may have dictated the employment of the language used in a contract.

A clause in an agreement contained two provisions which, if construed according to their literal and grammatical meaning, were inconsistent with each other. But of the two inconsistent provisions one was susceptible of a possible construction different from its literal meaning, while the other was not; and if the possible construction was applied all inconsistency disappeared :—

P. C. *Held*, on the true construction of the clause, that the possible construction  
1940 should be adopted.

RANEEGUNJ APPEAL from a judgment and decree of the High Court of Judicature at  
COAL Bombay (Beaumont C. J. and Blackwell J.), dated September 20, 1937, con-  
ASSOCIATION, firming, with a slight variation, the judgment and decree of that Court  
LTD. (Engineer J.), dated May 24, 1937.

v.  
TATA IRON The defendants, the Raneegunj Coal Association Ltd., entered into an agree-  
& STEEL CO., ment in writing, on January 16, 1919, with the plaintiffs, the Tata Iron and  
LTD. Steel Corporation Ltd., to sell to the plaintiffs their output of coal from  
certain seams in their mines. The contract was for twenty-five years and  
was to operate from April 1, 1920.

Dispute arose between the plaintiffs and the defendants as to the inter-  
pretation of cl. (4) in the contract. [The clause is reproduced in the judg-  
ment of their Lordships.]

In pursuance of the agreement the defendants supplied to the plaintiffs  
4,96,539, tons and 3 cwts. of coal for the contract year from April 1, 1932,  
to March 31, 1933. The price to be paid by the plaintiffs was not settled  
in January, 1932, as provided by cl. (4).

On April 19, 1932, the defendants wrote to the plaintiffs that on constru-  
ing the contract on the basis of the various rates of purchases made by the  
Railway Board the price for the coal during the year 1932-33 would come  
to Rs. 4-4-11 per ton and inquired whether the plaintiffs were agreeable to  
settle and adjust the price at that figure.

On April 27, 1932, the plaintiffs replied that there was no contract entered  
into by the Railway Board for the purchase of first class Jharriah coal during  
the period between July 1, 1931, and January 31, 1932, and that the price  
payable by the plaintiffs for the coal could not therefore be based on the  
rates of the contracts of the Railway Board, and that the plaintiffs were  
prepared to pay the minimum price of Rs. 3-12-0 as stated in cl. (4).

On March 29, 1933, the defendants wrote to the plaintiffs that they had  
decided to refer the dispute between them to arbitration under cl. (13) of the  
agreement, and that accordingly they were submitting their case to the Bengal  
Chamber of Commerce Tribunal of Arbitration.

On April 1, 1933, the Bengal Chamber of Commerce informed the plaintiffs  
that the defendants had applied for arbitration and that the plaintiffs should  
submit their case.

The plaintiffs filed the present suit in the High Court stating that dis-  
putes as to the price payable for the coal supplied by the defendants had  
arisen between the parties from time to time by reason of the difficulty of  
construing cl. (4) of the agreement, that it was necessary in the interest of  
the parties that cl. (4) should be properly construed once for all by a Court  
of law so that the basis on which the price of the coal to be supplied by  
the defendants to the plaintiffs might be fixed, that the price of Rs. 3-12-0 per  
ton paid by the plaintiffs to the defendants for the coal supplied for the  
year 1932-33 was the proper price thereof and the defendants were not entitled  
to recover from them anything more, that the plaintiffs were ready and willing  
to pay to the defendants at the rate of Rs. 3-12-0 per ton for the coal to be

supplied during the year 1933-34, and that the plaintiffs were prepared to pay such price as might be fixed by the Court on the true construction of cl. (4) for both the years 1932-33 and 1933-34. The plaintiffs also submitted the construction which they sought to be placed on cl. (4).

The plaintiffs prayed for the construction of cl. (4). This prayer was subsequently amended and the following question was submitted for the decision of the Court :—

“Whether on the true construction of clause 4 of the Agreement of January 16, 1919, and on the basis of there being no contract for the purchase of 1st class Jharriah coal made by the Railway Board or any similar authority between July 1 and January 31 following, the plaintiffs are entitled to have the price of the coal supplied by the defendants under the agreement in the year commencing from the following April 1 calculated on the footing of the latest purchaser's contract in the Calcutta market entered into during the said period i.e. between July 1 and January 31 following ; or on what other basis such price should be calculated.”

The plaintiffs also prayed for an order and injunction restraining the defendants from proceeding with the arbitration pending before the Bengal Chamber of Commerce.

The defendants in their written statement contended *inter alia* that the plaint disclosed no cause of action, that no suit for the relief claimed could be maintained except with the consent of the parties and on agreed facts, that the plaintiffs had filed the suit after they had submitted to the Tribunal of Arbitration, that if there was any dispute regarding the construction of cl. (4) it could be disposed of by the Tribunal of Arbitration and that the construction sought to be placed on cl. (4) by the plaintiffs was not correct. The defendants also submitted the construction which they put on cl. (4).

Engineer J., who heard the suit, held that the plaint disclosed a cause of action, that the suit as framed was maintainable, and that on the true construction of cl. (4) and on the basis of there being no contract for the purchase of first class Jharriah coal made by the Railway Board or any similar authority between July 1 and January 31 following, the plaintiffs were entitled to have the price of the coal in the year commencing from April 1 calculated on the footing of the latest purchaser's contract in the Calcutta market entered into during the period between July 1 and January 31 following.

His Lordship delivered the following judgment on May 24, 1937 :—

ENGINEER J. This suit arises out of an agreement between the plaintiffs and the defendants made on January 16, 1919, by which the defendants agreed to sell their output of coal from certain seams in their mines to the plaintiffs.

The contract is for twenty-five years and commenced to operate from April 1, 1920. Thus when the suit was filed in 1933 there were still twelve years to run before the contract would come to an end.

The dispute that has arisen between the parties is as regards the construction of cl. (4) of the contract which lays down the basis on which the price of coal supplied by the defendants to the plaintiffs is to be fixed. The prayers in the suit originally were as follows :—

(a) For construction of cl. (4) of the said agreement.

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- P. C. (b) That the price payable by the plaintiffs for the coal supplied by  
 1940 the defendants during the contract year 1932-33 may be fixed by this Hon'ble  
 — Court, and the amount payable by the plaintiffs to the defendants for the  
 RANEEGUNJ quantity of coal supplied may be ascertained and declared.  
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 ASSOCIATION, (c) That the price payable by the plaintiffs to the defendants for the  
 LTD. coal supplied and to be supplied during the contract year 1933-34 may be  
 v. fixed.  
 TATA IRON (d) All accounts may be taken, inquiries made and directions given for  
 & STEEL CO., the aforesaid purposes.  
 LTD.  
 — (e) That the defendants may be restrained by an order and injunction  
 Engineer J. from proceeding with the arbitration pending before the Bengal Chamber  
 — of Commerce mentioned in cl. (5) of the plaint.

(f) For the costs of the suit and such further and other relief as this Hon'ble Court shall think fit.

On January 29, 1933, the defendants took out a chamber summons for stay of the suit on the ground that the disputes between the parties should be left to be decided by arbitration as provided by the contract. For one reason or another the summons was not decided until December 14, 1936, on which date it was dismissed by Mr. Justice Rangnekar. The defendants appealed (Appeal No. 7 of 1937) against the order dismissing the summons. The Appeal Court (Beaumont C. J. and Blackwell J.) dismissed the appeal on March 10, 1937. What happened in the Appeal Court will appear from the following extract from the judgment of the Appeal Court :—

"But there is this criticism to be made on the plaintiffs' suit, namely, that the reliefs asked for involved partly matters of fact, and the question of construction which arises is raised in much too general terms. What the plaintiffs have asked for in cl. (a) of their prayers is for construction of cl. (4) of the agreement. It is obvious that the Court cannot be asked merely to construe an agreement, a course which would involve the Court in giving a lecture as to the true meaning and effect of the agreement in various hypothetical events which might arise. No Court can be asked to do that. What the Court can be asked to do under High Court Rule 237 is to determine a question of construction arising on a document, and declare the rights of the persons interested. It is, I think, possible from the plaint to ascertain what the real question of construction which the plaintiffs desired to raise was. That I think appears from paragraphs 9 and 10, but the point should be raised specifically. Mr. Munshi on behalf of the plaintiffs has agreed to strike out altogether prayers (b) and (c) of the plaint, which involve matters which might be more suitably dealt with by arbitrators, and in place of the present prayer (a), he claims by way of amendment to raise the following question, namely, whether on the true construction of cl. (4) of the agreement of January 16, 1919, and on the basis of there being no contract for the purchase of first class Jharriah coal made by the Railway Board or any similar authority between July 1 and January 31 following,—the plaintiffs are entitled to have the price of the coal supplied by the defendants under the agreement in the year commencing from the following April 1 calculated on the footing of the latest purchasers' contract in the Calcutta Market entered into during the said period between July 1 and January 31 following, or on what other basis such price should be calculated. It seems to me that that question will raise the point of construction which arises under cl. (4), and which it is in the interests of both parties to get determined. Otherwise, I am satisfied that the parties will go on disputing as to the basis of calculation of the price during the remaining years for which this contract is to run. If that question is raised, then it seems to me that it can

be determined without any evidence; and in view of the unfortunate fact that the determination of this chamber summons seems to have involved a delay of three and a half years, I propose to give directions to have that question placed before the Court, so that it will be determined before the rising of the Court in April next. On the plaintiffs agreeing to amend their prayer in the manner indicated, I think that the suit ought not to be stayed, and the appeal will therefore be dismissed."

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The plaint was accordingly amended as stated in the judgment of the Appeal Court, and the suit is now before the Court with the amended prayers.

Among the issues which the defendants sought to raise at the hearing were the following two issues:—

"3. Whether prior to the year in dispute whenever there was absence of purchase by the Railway Board prior to January 31 prices were fixed by the parties under cl. (4) of the agreement on the rates of purchases made by the Railway Board during the next two months?

"4. Whether the plaintiffs raised before the Tribunal of Arbitration of the Bengal Chamber of Commerce in 1928 the same contention with regard to the construction of cl. (4) of the said agreement as they have raised in this suit, namely, that as in the month of January, 1927, there were no Railway Board contracts, the Steel Company (plaintiffs) were chargeable only with the market rate plus eight annas and their counsel abandoned the same and agreed to the construction adopted by the parties in the previous years?"

Obviously these are not issues proper to be raised and I gave my ruling as follows:—

"Issues 3 and 4 (namely the issues in question) are not issues in the suit. The defendants may, if they are so advised, tender evidence to prove the allegations comprised in issues 3 and 4, contending that such evidence is relevant on the question of construction. The admissibility or otherwise of such evidence will be considered when it is tendered. Issues 3 and 4 will be struck out."

The first and the second issues raised by the defendants are as follows:—

- (1) Whether the plaint discloses a cause of action?
- (2) Whether the suit as framed is maintainable?

Counsel for the defendants asked me to decide these issues as preliminary issues, contending that in the event of my deciding these issues in favour of the defendants I ought not to try the other issues at all. In view of the course which the suit has taken up to now I did not think it desirable to try issues 1 and 2 as preliminary issues, and I decided to try the whole suit.

I will first consider the issues whether the plaint discloses a cause of action, and whether the suit as framed is maintainable. But before I do so, I should notice two contentions raised by counsel for the plaintiffs. He contended that according to the order of the Appeal Court only the question of the construction of the contract was before me and that the defendants were not entitled to raise the said issues. This contention is based on the sentence in the judgment of the Appeal Court extracted above which runs as follows:—

"I propose to give directions to have that question placed before the Court, so that it will be determined before the rising of the Court in April next."

I cannot accept the plaintiffs' contention. The only question before the Appeal Court was whether, in view of the arbitration clause which existed in the contract, the suit should be stayed. In fact the defendants had not

P. C. even filed their written statement at that time, as they could not take any  
 1940 step in the proceedings so long as the question of stay was pending. In my  
 opinion, all that the Appeal Court meant was that the original prayers (b)  
 RANNEGUNJ and (c) of the plaint having been deleted by the amendment, the only sub-  
 COAL stantial question which remained to be decided in the suit was that of the  
 ASSOCIATION, construction of cl. (4). But this does not mean that the defendants are  
 LTD. precluded from taking such defences as are open to them including the  
 v. question as to the maintainability of the suit.  
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The next contention urged on behalf of the plaintiffs was that the issues as regards the plaint not disclosing a cause of action and as regards the suit not being maintainable, are *res judicata*. This contention is based on the fact that in support of the defendants' application for stay, it was urged both in the Court of first instance and in the Court of Appeal, that the suit was not properly framed. Reliance was placed on behalf of the plaintiffs on the following portion in the judgment of Mr. Justice Rangnekar who dismissed the summons (December 14, 1936) :—

"It is next said that there is no cause of action. That is a question which would more appropriately be raised at the trial of the action and is not material or relevant on the present summons. But I am unable to accept that contention. It is open to parties under our rules by an originating summons to raise a question of construction of a contract or a clause therein, and what can be done on an originating summons can certainly be done by a plaint if the suit is of a civil nature. It is not disputed that the suit is of a civil nature. Apart from that, there is support for this view in the decision to which I have referred. The case brought before Mr. Justice Lawrence was brought by an originating summons, and there was no question raised that the action was incompetent."

Reliance was also placed on grounds 11 and 12 of the memorandum of appeal which are as follows :—

(11) That the learned Judge should have held that the frame of the suit was bad and that the suit was not maintainable.

(12) That having regard to the frame of the suit the learned Judge should have ordered it to be stayed.

In my opinion, it is elementary that the matter cannot be said to be *res judicata*. As observed by Mr. Justice Rangnekar in his judgment, the question was not material or relevant on the chamber summons. I hold that it is open to the defendants to raise the two issues and that the question involved in these issues is not *res judicata*, and I proceed to consider whether there is any substance in the objections embodied in those issues.

I summarise the defendants' contentions and arguments on this point as follows :—

Only a person who has a right and not a person under liability can be a plaintiff either in a suit or in an originating summons. The right to have a contract construed is not a right at all. There is no cause of action in the abstract to have a contract construed. The suit is not an originating summons and, therefore, r. 237 of the High Court Rules has no application. In any event the rules as regards an originating summons are merely matters of procedure; they cannot create a cause of action. The suit does not fall under s. 42 of the Specific Relief Act as there is no question of legal character or a right as to any property. Section 42 is exhaustive of declaratory decrees and

as according to the defendants the suit does not fall under s. 42, the High Court Rules relating to originating summonses for the construction of an instrument cannot support the present action, and unless the parties agree to bring the matter before the Court in the form of a special case under O. XXXVI of the Civil Procedure Code, no suit will lie and no originating summons can be maintained. Lastly, the defendants contend that in substance the plaintiffs want the Court to declare what their liabilities are under the contract, and that the Court has no jurisdiction to make such a declaration.

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The objections raised by the defendants can be dealt with conveniently by considering the provisions of the law in India applicable to the case, and considering in what respects, if any, they differ from the corresponding provisions of law in England. Section 42 of the Specific Relief Act is as follows :—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief :

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

Rule 237 of the High Court Rules provides as follows :—

"Any person claiming to be interested under a deed, will, or other written instrument, may apply in Chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested."

The provision of law in England corresponding to s. 42 of the Specific Relief Act is to be found in O. 25, r. 5, of the Rules of the Supreme Court, which is as follows :—

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

It is contended on behalf of the defendants that this provision is wider than that contained in s. 42 of the Specific Relief Act, and that s. 42 does not apply to cases where it is not possible to ask for consequential relief. But in my opinion this contention is not sound. The argument on which this distinction is sought to be raised loses sight of the proviso to s. 42 which says that no Court will make such a declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so. These words show that the section does contemplate a person instituting a suit for a declaration, although not able to seek any further relief than a mere declaration. The only requirement of the section is that if the plaintiff is able to seek further relief he must do so.

The provision in the Rules of the Supreme Court corresponding to r. 237 of our High Court Rules is to be found in O. 54A, r. 1, which is as follows :—

"In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for

P. C. the determination of any question of construction arising under the instrument;  
1940 and for a declaration of the rights of the persons interested."

It is contended that O. 54A, r. 1, is wider because it speaks (in the plural) of the rights of the persons interested. It is contended that under r. 237 a declaration can be asked for only as regards the right of the person interested who takes out the originating summons, i.e. the plaintiff in the originating summons. I, however, fail to see any such distinction. But even if there is such a distinction, I think the plaintiff in this suit does ask for a declaration of his right, viz. the right under the contract to be supplied by the defendants with coal at a rate fixed in a particular manner.

*Engineer J.* In my opinion, the suit as framed is maintainable! The case clearly falls under r. 237 of the High Court Rules, the contract being a written instrument, a question of construction having clearly arisen and a declaration being asked of the rights of the person interested.

The defendants contend that what the plaintiffs seek to obtain here is not a declaration of their right but a declaration that their obligations are not what the defendants allege and that the cause of action is not in the plaintiffs but in the defendants. But I see no reason why, as stated above, the suit should not be regarded as one asking for a declaration that the plaintiffs are entitled to be supplied with coal by the defendants at the lesser rate which they contend for and not at the higher rate which the defendants contend for. If the plaintiffs can by an originating summons ask for the construction of the contract and ask for a declaration that they have a right under the contract to be supplied with coal at a rate fixed in a particular manner, there is no reason why they cannot get the same relief by a suit instead of by an originating summons.

As observed by Mr. Justice Rangnekar in his judgment on the chamber summons for stay, what can be done on an originating summons can certainly be done by a suit if the suit is of a civil nature. In my opinion, no authority is necessary for that proposition, but if one is necessary, it is to be found in *Guaranty Trust Company of New York v. Hannay & Company*<sup>1</sup> where Lord Justice Bankes makes the following remarks (p. 573) :—

"Order LIV-A, r. 1, deals in terms with a case where anticipatory relief depending upon the construction of a document is claimed. This rule gives the applicant a right to proceed by originating summons, but this is for convenience merely. I cannot doubt that if the applicant preferred to proceed by action the Court would have jurisdiction to deal with his claim under Order XXV, r. 5."

In any event if necessary I am prepared to deal with the suit as if it was an originating summons.

The defendants' contention that the Court has no jurisdiction to make such a declaration is, in my opinion, erroneous and is due to the confusion of two different senses in which the word "jurisdiction" is used, as pointed out in *Guaranty Trust Company of New York* case<sup>2</sup> (p. 563) :—

"The first and... the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the Court

1 [1915] 2 K. B. 536.

2 [1915] 2 K. B. 536, 563.



has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

Once it is conceded that the declaration could be made if asked for by some one who wanted it for the purpose of getting consequential relief, it follows that what r. 237 has done is to remove the restriction imposed upon the making of such a declaration by the practice of the Court.

If we take the suit to be one asking for a declaratory decree, in my opinion, it falls within s. 42 of the Specific Relief Act. I do not see any reason why a limited meaning should be given to the word "property" in s. 42. It should be noted that the words are not "right to any property" but "right as to any property". I do not see why the benefit which a party is entitled to get out of a contract cannot be said to be his right as to property. The contention that s. 42 is not applicable where the plaintiff seeks a declaration as regards his liability is also, in my opinion, not correct. The best answer to that contention is to be found in ill. (c) to s. 42 which contemplates a suit to obtain a declaration by a person who has entered into a covenant to settle after-acquired property that the covenant is void for uncertainty even before any such property accrues, or any persons entitled under the trusts are ascertained.

The defendants' contention that even under the rules relating to originating summonses only a person who is entitled to a right can take out an originating summons and not a person who is under a liability, is also not maintainable. To give effect to that contention would be tantamount to saying that only one party to an instrument can ask for its construction. If the defendants' contention were correct, a vendor of immoveable property would not be entitled to take out an originating summons to have it determined that he is not bound to answer a general requisition as to encumbrances not noticed in the abstract, but a purchaser would be able to take out an originating summons to have it determined that the vendor is so bound. According to the defendants' contention a purchaser cannot take out an originating summons to have it determined that he is not liable to pay interest, while a vendor would be entitled to take out an originating summons to have it determined that he is entitled to interest. Similarly as regards compensation for deficiency in area, according to the defendants' contention, a purchaser can take out an originating summons for a declaration that he is entitled to compensation but a vendor cannot take out an originating summons to have it declared that the purchaser is not entitled to compensation. In rejecting this contention of the defendants I need only add that I would not have dealt with it at this length but for the emphasis with which the point was urged before me.

As regards the issue whether the plaint discloses a cause of action, if by the words "cause of action" the defendants mean a right to some relief in addition to a mere declaration, it may be said that there is no cause of action disclosed in the plaint as it stands. But I do not see why averments establishing a right to obtain a declaration from a Court of law without asking for further relief in cases where such declarations are allowed to be asked for do not constitute a good cause of action. There is no inherent want of jurisdiction in a Court to make a declaration without granting con-

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sequential relief. It was only because it was the settled practice of Courts not to make such declarations that actions for mere declarations were not allowed to be maintained. Once that disability is removed by a rule made by the Court there is no bar to such a suit, and the plaintiff who establishes facts which entitle him to obtain a declaration from the Court can be said to have a cause of action.

On behalf of the defendants reliance was placed on the case of *Guaranty Trust Company of New York v. Hannay & Company*.<sup>1</sup> It seems to me that the defendants sought to rely more on the dissenting judgment of Lord Justice Buckley than on the propositions of law laid down in that case. Lord Justice Pickford in that case said that O. 25, r. 5, cannot be confined to cases where there is a cause of action apart from the rule, and that its effect was to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration. Lord Justice Bankes held that the rule applies where a person seeks relief, or in whom a right to relief is alleged to exist, and his application for a declaration is not refused merely because he cannot establish a legal cause of action, and that relief is not confined to relief in respect of a cause of action. Even Lord Justice Buckley who gave the dissenting judgment distinguished the case from those where declarations were asked for as to the construction of a document. At p. 554 he states as follows :—

"There are several cases...in which declarations have been made as to the construction of a document at the instance of some one of the parties to the document against the others. Those cases, in my opinion, throw no light upon the question which arises in the present case. There is a cause of action as between parties who by personal contract or statutory obligation are bound towards each other, and it arises from their mutual obligation."

In *Clay*, In re : *Clay v. Booth*,<sup>2</sup> certain beneficiaries asked for the construction of a deed of indemnity and for a declaration that the defendant who claimed to be indemnified under such indemnity was not entitled to repayment of the costs ordered to be paid by him. In that case the authority of *Guaranty Trust Company of New York v. Hannay & Company* was recognised, but it was held that the Vice-Chancellor had no jurisdiction to make a declaratory order against the defendant as he had never made a claim that he was entitled to recover or to be repaid the costs, but he merely stated that he reserved his rights under the deed. *Guaranty Trust Company of New York v. Hannay & Company*<sup>3</sup> was again followed by Earl of Reading C. J. in *Barwick v. S. E. & C. R. Cos.*<sup>4</sup> At pp. 196 and 197 he says as follows :—

"The law relating to the making of declarations under the Rules of the Supreme Court Order XXV, r. 5, was very elaborately discussed by the Court of Appeal in *Guaranty Trust Company of New York v. Hannay & Company*, and no useful purpose would be served by again reviewing it. The Master of the Rolls, then Pickford L. J., said (p. 562) :—

'...the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who

1 [1915] 2 K. B. 536.

3 [1915] 2 K. B. 536.

2. [1919] 1 Ch. 66.

4 [1921] 1 K. B. 187.

is interested in the subject matter of the declaration.' I think the plaintiffs were interested in the subject matter, as were also the defendants. I find no authority which would preclude the Court from making the declaration. Indeed, in both decisions relied upon, I find support for the proposition that in an exceptional case where it is reasonably necessary for the purpose of doing justice, and where the declaration is sought by a party who is interested in the subject matter of the litigation, the Court could and should make the order."

The House of Lords by a majority judgment again affirmed the same principle in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, Ltd.*<sup>1</sup> Lord Sumner at p. 452 said as follows :—

"For many years it had been accepted practice in cases in the Commercial List to hear and determine claims for a declaration of right, when a real and not a fictitious or academic question is involved and is in being between two parties, in order that they may know what business course to take without having to run the risk of acting and finding themselves liable in damages, when at last the matter is brought before the Court. I believe this practice, as hitherto applied, to be warranted by the rules, and that the decision of the Court of Appeal to that effect in the *Guaranty Trust Case* was correct."

Cases are not wanting in the English Courts where declarations have been made in respect of a liability instead of a right. In *Societe Maritime Et Commerciale v. Venus Steam Shipping Co.*,<sup>2</sup> where a contract "if it had been binding" would have continued in force for a year and a half and the breach of it would have involved the plaintiffs in heavy damages, the Court in an action brought by them claiming a declaration that they were not bound to perform the contract, granted the declaration as prayed. In *Dyson v. Attorney-General*<sup>3</sup> the plaintiff claimed a declaration that he was under no obligation to comply with a particular notice issued by the Commissioners of Inland Revenue or to furnish certain particulars to the person named in the notice. A summons to strike out the statement of claim as disclosing no reasonable cause of action was dismissed, and ultimately when the case was argued on the merits, the declaration as asked for was given as in *Dyson v. Attorney-General*.<sup>4</sup>

The plaintiffs contend that s. 42 is not exhaustive of declaratory suits which can be entertained by Courts. So far as I am concerned, I am bound by the decision of the Appeal Court in *Bai Shri Vaktuba v. Thakore Agar-singhji Raisinghji*,<sup>5</sup> where at p. 680 Scott C. J. says as follows :—

"It has long been established that the general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature excepting suits of which cognizance is barred by any enactment for the time being in force, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute."

Two decisions of the Privy Council may, however, be noticed. In *Fischer v. Secretary of State for India in Council : Fisher v. Orr*,<sup>6</sup> the suit was in substance to have the true construction of a statute declared and to have an act done in contravention of the statute rightly understood pronounced

1 [1921] 2 A. C. 438.

2 (1904) 9 Com. Cases 289.

3 [1911] 1 K. B. 410.

4 [1912] 1 Ch. 158.

5 (1910) I. L. R. 34 Bom. 676,  
s. c. 12 Bom. L. R. 697.

6 (1898) L. R. 26 I. A. 16.

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P.C. void and of no effect. In dealing with the matter their Lordships of the  
1940 Privy Council said (p. 28) :—

RANEBGUNJ “... the present suit is one to which no objection could have been taken before  
COAL the Act of 1852... That is not the sort of declaratory decree which the framers  
ASSOCIATION, of the Act had in their mind.”

LTD. In *Sheoparson Singh v. Ramnandan Singh*,<sup>1</sup> Sir Lawrence Jenkins in deliver-  
ing the judgment of the Privy Council said (p. 97) :—

TATA IRON “A plaintiff coming under this section [s. 42] must therefore be entitled to  
& STEEL CO., a legal character or to a right as to property,”  
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— and the Privy Council held that the plaintiffs were not clothed with a legal  
Engineer J. character or title which would authorise them to ask for a declaratory decree  
— sought.

It might be open to the plaintiffs to contend, if necessary, that they need not even ask for a declaration, and that in fact no declaration is sought, and the decree in the suit if granted is not a declaratory decree. It might be open to them to contend that under r. 237 they are entitled to ask for the construction of the instrument without asking for a declaration of rights of the person interested. In fact prayer (a) as it stands at present does nothing more than ask for the construction of cl. (4) of the contract. It is not necessary for me to pursue this point further.

I am aware of the decision of Mr. Justice Mirza in *Sripadnao v. Shankarrao*,<sup>2</sup> where he held that a declaratory suit cannot lie in respect of rights arising out of a contract, following the decision in *Ramkrishna v. Narayana*.<sup>3</sup> In that suit, after referring to the judgment of the Appeal Court in *Bai Shri Vaktuba v. Thakore Agarasinghji Raisinghji*<sup>4</sup> and the decision in *Ramkrishna v. Narayana*, Mr. Justice Mirza said (p. 209) :—

“The present case is in respect of alleged rights arising out of a contract and such rights, in my opinion, cannot form the subject-matter of a declaratory suit.”

No English decisions on the question are referred to.

Earlier in my judgment I have referred to several cases where declarations were made in respect of contracts and I need not do more than only refer to the observations in the judgment of Lord Justice Buckley at p. 555 in *Guaranty Trust Company of New York v. Hannay & Company*,<sup>5</sup> where he says as follows :—

“There is a cause of action as between parties who by personal contract or statutory obligation are bound towards each other, and it arises from their mutual obligations.”

Even *Ramkrishna v. Narayana*,<sup>6</sup> which is followed by Mr. Justice Mirza, says (p. 83) :—

“... we do not think that there are exceptional circumstances in this case to take it out of the ordinary rule.”

It is contended that this decision of Mr. Justice Mirza is binding on me. But I am of opinion that it is merely *obiter*. Mr. Justice Mirza actually

1 (1916) L. R. 43 I. A. 91.  
s. c. 18 Bom. L. R. 397.

2 (1929) 32 Bom. L. R. 207.

3 (1914) I. L. R. 39 Mad. 80.

4 (1910) I. L. R. 34 Bom. 676,  
s. c. 12 Bom. L. R. 697.

5 [1915] 2 K. B. 536.

6 (1914) I. L. R. 39 Mad. 80.

passed a decree in favour of the plaintiff for the amount which the plaintiff had since the institution of the suit paid in full satisfaction of his liability to the creditor. There was, therefore, no declaration left to be made. In any event I think that that decision is clearly distinguishable. In the first place there was no question of construction in the suit before Mr. Justice Mirza. The declaration asked for was nothing but the enunciation of a truism. Secondly, consequential relief was in fact asked for. Mr. Justice Mirza answered the issue, whether the plaint disclosed any cause of action, in the affirmative, and as regards the issue whether the suit was maintainable, he held that it was not maintainable in respect of declaratory prayer (a), but was maintainable in respect of prayer (b). I need not say more than that with all respect I doubt whether the proposition in the wide form in which it is laid down, namely, that a declaratory suit cannot lie in respect of rights arising out of a contract, is correct. It is, however, for the Appeal Court to deal with the matter if and when necessary.

Before I leave this part of the case, I ought to mention an argument advanced on behalf of the plaintiffs that s. 42 of the Specific Relief Act is not exhaustive of declaratory decrees so far at any rate as the Original Side of the High Court is concerned. The argument is put in the following manner :—

Supreme Courts were established in India in 1823. In 1852 for the first time Courts in England were given a right to make certain declaratory decrees by Statute 15 & 16 Vic. c. 86, known as the Chancery Procedure Act. A similar provision was enacted in India by Act VI of 1854, s. 29 of which was word for word the same as s. 50 of the Chancery Procedure Act of 1852. Act VI of 1854 applied only to Courts established by Royal Charter. Then followed Act VIII of 1859 which applied to Courts not established by Royal Charter. Section 15 of it was word for word the same as s. 29 of Act VI of 1854. Supreme Courts were abolished in India, and High Courts were established by the Charter of 1861. Both by this Charter and the amended Charter of 1863, the existing provisions applicable to Supreme Courts were declared applicable to High Courts. It is contended for the plaintiffs that Act VI of 1854 was never repealed, and that therefore under s. 29 of the Act, the Original Side of the High Court is entitled to make declaratory decrees. But this argument overlooks the fact that by cl. 37 of the Charter, Act VI of 1854 ceased to be applicable. At any rate that is how cl. 37 has always been construed. Apart from this, even if s. 29 of Act VI of 1854 were still in force, it has been held by the Privy Council that on a proper construction of that section Courts were entitled to make declarations only where further relief could be claimed but was not claimed. The decision I refer to is that in *Kathama Natchiar v. Dorasinga Tever*<sup>1</sup>. At p. 179 *et seq.* Sir James Colville discusses the question, and ultimately holds that on a proper construction of the section a declaratory decree cannot be made by the Court unless there be a right to consequential relief capable of being had in the same Court or in certain cases in some other Court. In that case it is stated that when the Supreme Court of

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<sup>1</sup> (1875) L. R. 2 I. A. 169.

P. C. Calcutta ceased to exist, and the High Court was created, the Charter of  
 1940 the new Court required that Court to be guided in its original jurisdiction  
 by the principles which had governed the Supreme Court. The judgment  
 RANEEGUNJ then proceeds to state as follows (p. 187) :—  
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 ASSOCIATION, “Unless, therefore, the limited construction put upon the clause by the Supreme  
 LTD. Court is to prevail generally in all the Courts of *India*, we must come to the  
 v. absurd conclusion that the same words are to be interpreted by the High Court  
 TATA IRON in one sense when it is exercising its original jurisdiction or sitting on an appeal  
 & STEEL CO., from a decree made under that jurisdiction, and in a different sense when it is  
 LTD. sitting on an appeal from a Mofussil Court; and further that the Legislation has  
 by the same form of words intended to make one law for the Mofussil Courts  
 Engineer J. and another for those of the Presidency towns.”

Holding, as I do, that the Court has jurisdiction to make the decree asked for, and that the suit as framed is maintainable, I have no hesitation in saying that if it is a question of discretion, this is eminently a case where discretion should be exercised in favour of making a declaration. The wisdom of making such a declaration in a contract which has still some years to run, and under which situations like those in the two years mentioned in the plaint are likely to arise again and again, has been sufficiently indicated in the judgment of the Appeal Court when the matter was before it on the summons for stay.

I will now proceed to consider the question of the construction of cl. (4) of the contract. The agreement has already figured before the Privy Council in order to have another portion of it construed, and their Lordships of the Privy Council described the document as one whose drafting precision was imperfect thereby making greater liberty of interpretation permissible.

A year for the purpose of the contract is by cl. (4) stated to be a period of twelve calendar months commencing from April 1 and ending on March 31. Disregarding words which are not relevant in the present case cl. (4) of the contract stands as follows :—

“In the month of January immediately preceding the commencement of a year the price payable by the Buyers for the coal to be delivered during such year shall be settled and adjusted at annas eight per ton above the price payable under or in respect of the then latest contract for the purchase of first class Jharriah coal entered into by the Railway Board or if no purchase shall have been made by such Board for 9 months prior to the commencement of such year then by purchasers in the Calcutta Market Provided nevertheless that the price so to be settled and adjusted as aforesaid shall in no case be less than rupees three and annas twelve per ton.”

It is clear from the clause that the price is to be settled and adjusted in the month of January immediately preceding the commencement of a year. It is also clear that the price is to be settled and adjusted at annas eight per ton above the price payable under or in respect of the then latest contract entered into by the Railway Board, that is, the latest contract up to January 31 immediately preceding the commencement of a year. It is also clear that the words “in the month of January etc.” at the commencement of cl. (4), as well as the words “the then latest contract” apply also to the words “by purchasers in the Calcutta Market”. Except for the difficulty created by the words “for nine months prior to the commencement

of such year," it is clear that what the clause contemplates is that if there is no contract made by the Railway Board up to January 31 the price is to be settled and adjusted at annas eight per ton above the price payable under or in respect of the then latest contract entered into by purchasers in the Calcutta market. The whole difficulty in construing the clause arises from the fact that in respect of the second alternative, namely, the one which contemplates the rates of contracts by private purchasers being made the basis of fixing the contract rate, the words used are "for nine months prior to the commencement of such year". It is common ground that there was no contract by the Railway Board or other similar authority up to January 31, but that there were contracts entered into by the Railway Board after January 31 and before April 1. The defendants contend that on the proper construction of cl. (4) the price is to be fixed at annas eight per ton above the price payable under or in respect of the latest contract between February 1 and March 31 immediately preceding the commencement of the year. The plaintiffs deny this construction. They say that to give effect to it would be to ignore and in fact to contradict two clear provisions in the contract, viz., (a) that the price is to be settled and adjusted in the month of January, and (b) that the contract of purchasers in the Calcutta Market, which is to form the basis of fixing the contract rate must also be the latest contract up to January 31.

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It is clear that the earlier part of the clause which mentions the month of January defines the end of the period in which contracts entered into either by the Railway Board or by purchasers in the Calcutta market are to be taken into consideration. If nothing more was said, there would be no indication of the commencement of that period. If the commencement of the period is not defined, it would be open to the parties to contend that the basis of fixing the contract rate should be the rate of a contract entered into by the Railway Board at any time, no matter how long before January 31. It was for this reason that the words ("for nine months prior to the commencement of such year" seem to have been put in.

I will first consider whether it is possible to read cl. (4) in the manner suggested by the defendants. The defendants want the clause to be read as containing a provision that in the event of there being no contract by the Railway Board between July 1 and January 31, the rates of contracts entered into by the Railway Board in the months of February and March following, should form the basis for fixing the contract rate. It is contended for the defendants that the intention of the parties was to take as far as possible the rates of the Railway Board, but only preference was to be given in the first instance to contracts made up to January. They cannot support this construction unless they ask the Court, which they do, to delete the words "in the month of January immediately preceding the commencement of the year" which occur in the commencement of the clause, and which clearly apply to both the alternatives, viz., to the taking of the rates of contracts of Railway Board, as well as to the taking of the rates of contracts of private purchasers. They also ask the Court, in order to support their construction, to delete the words "the then latest." In my opinion it is impossible to read into the clause a provision by which the rates of contracts

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 1940 31 are to form the basis of fixing the contract rate. Even if the words "for  
 RANERGUNJ nine months prior to the commencement of such year" are read strictly in  
 COAL their literal sense, all that can be urged is that the contingency on which the  
 ASSOCIATION, rates of contracts entered into by private purchasers are to be taken into  
 LTD. consideration, has not occurred. I asked counsel for the defendants to put  
 v. down in writing the clause, as he wanted the Court to read it, and to state  
 TATA IRON how the defendants asked the Court to read cl. (4) in that way. The diffi-  
 & STEEL CO., culty of asking the Court to read the clause in the manner suggested by the  
 LTD. defendants became obvious when this was attempted. Ultimately counsel  
 Engineer J. for the defendants suggested two alternatives of reading cl. (4), so as to  
 bring out the sense which he suggested. The first rendering suggested was  
 as follows :—

"In the month of January immediately preceding the commencement of a year (which term shall for the purpose of this agreement be deemed to mean a period of twelve calendar months commencing on April 1 and ending on March 31), the price payable by the buyers for the coal to be delivered during such year shall be settled and adjusted at annas eight per ton above the price payable under or in respect of the then latest contract for the purchase of first class Jharriah coal loaded into waggons at Colliery Siding entered into by the Railway Board or if that Board shall have been abolished then by such authority as shall be constituted or established in its place (or if there be no such contract the price payable shall be settled and adjusted at eight annas per ton above the price payable under contracts made by such Board or authority during the next two months) or if no such authority shall be established or if no purchase shall have been made by such Board or authority for nine months prior to the commencement of such year then by purchasers in the Calcutta Market provided nevertheless that the price so to be settled and adjusted as aforesaid shall in no case be less than Rupees three and annas twelve per ton."

The second rendering suggested was as follows :—

"The price payable by the buyers for the coal to be delivered during any year shall be settled and adjusted at annas eight above the price payable under or in respect of the latest contract for the purchase of first class Jharriah coal loaded into waggons at Colliery Siding entered into by the Railway Board or if that Board shall have been abolished then by such authority as shall be constituted or established in its place (in the month of January immediately preceding the commencement of a year which term shall for the purpose of this agreement be deemed to mean a period of twelve calendar months commencing on April 1 and ending on March 31), or if there be no such contract then under purchasers by such Railway Board or authority during the next two months, or if no such authority shall be established or if no purchase shall have been made by such Board or authority for nine months prior to the commencement of such year then by purchasers in the Calcutta market provided nevertheless that the price so to be settled and adjusted as aforesaid shall in no case be less than Rs. 3 and annas 12 per ton."

According to the first rendering, the defendants want the Court to add into the clause the words "or if there be no such contract, the price payable shall be settled and adjusted at annas eight per ton above the price payable under contracts made by such Board or authority during the next two months." Besides this addition, the rendering suggested by the defendants involves the alteration that the rate to be taken in respect of contracts made by purchasers in the Calcutta market is not to be the rate of the latest contract up to January 31 but the rates of contracts entered into for nine months



prior to the commencement of the year. The rendering suggested by the defendants also involves the deletion of the provision that in all cases the rates are to be fixed in January.

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The second rendering suggested involves even more radical alterations. The words in the commencement of the clause "in the month of January immediately preceding the commencement of a year" are taken away, and the word "then" before "the latest" is also deleted, and the words "in the month of January immediately preceding the commencement of a year" are put after the words "or established in its place." The effect of this alteration is to take away from the clause the meaning which is plain as the clause now stands that the price is to be fixed in January, and instead of that the words "in the month of January" are made to qualify the words "the latest contract." As this is not enough to bring out the sense for which the defendants contend, they have to add the words "or if there is no such contract then under purchases by such Railway Board or authority during the next two months." The effect of the alteration so made includes the effect of the purchasers' contract being not the latest contract up to January but up to March.

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I confess I do not see how the Court in construing the clause is entitled to make such radical alterations as are suggested by the defendants, and which are necessary in order to bring out the sense which the defendants contend for.

The intention of the parties is to be gathered from the instrument as it stands, aided by facts showing in what manner the language of the document is related to existing facts. On the language of cl. (4) as it stands, there can be no doubt that the intention of the parties was that the price was to be fixed in January and that the basis of such price was to be the then latest contract either of the Railway Board or failing that of purchasers in the Calcutta market. It is true that the words "if no purchase shall have been made by such Board or authority for nine months prior to the commencement of such year" do not harmonize with the words "then by the purchasers in the Calcutta market" governed as these words are by the phrase "the then latest contract entered into." But the utmost that can be contended on behalf of the defendants is that if the words "if no such purchase shall have been made by such Board or authority for nine months prior to the commencement of such year" are read in their strict literal sense, then in the circumstances which have happened, viz., that there is no contract by the Railway Board up to January 31 but there are contracts subsequent to January 31 and before April 1, the alternative by which the price payable under contracts by purchasers in the Calcutta market is to form the basis does not come into operation at all. There are, therefore, two alternatives before the Court construing the clause, (1) that the contract makes no provision for the price being fixed in the event of there being no contract of the Railway Board up to January 31, but there being contracts after January 31 and before April 1—a situation which could hardly have been intended by the parties—and (2) that the words "for nine months prior to the commencement of such year" should be so construed as to always bring into operation when necessary the second alternative, namely "the price payable under contracts

P. C. entered into by purchasers in the Calcutta market" as the basis of fixing the  
 1940 contract rate. In view of the fact that in both the alternatives the clause  
 — contemplates the fixing of the rates in January, I am of opinion that in con-  
 RANNEGUNJ COAL ASSOCIATION, LTD. struing the document the strict meaning of the words "for nine months"  
 " should not be adopted. If once it is clear that the clause does not contem-  
 plate taking into consideration the rates of contracts entered into by the  
 TATA IRON & STEEL CO., LTD. Railway Board subsequent to January 31, the contingency of there being no  
 — contract by the Railway Board in February or March is irrelevant for the  
 purposes of the contract. In my opinion, the words "for nine months prior  
 Engineer J. to the commencement of such year" were used only in order to fix the start-  
 — ing point of the period in which contracts either of the Railway Board or by  
 private purchasers were to be the basis of fixing the contract rate, the termi-  
 nus having already been clearly fixed as January 31. I, therefore, hold that  
 the words "for nine months prior to the commencement of such year" should  
 be read as "for a period commencing from nine months prior to the com-  
 mencement of such year." The construction which I adopt has, I think,  
 the merit of making cl. (4) exhaustive and of not doing violence to any of  
 the unequivocal provisions of the clause.

It is contended that even in the clause as it stands, the fixing of the rates  
 in January is not possible, if either of the parties chooses to wait up to the  
 last day of the month for the latest contract in January. That argument,  
 however, does not appeal to me. On January 31 the parties are entitled  
 under the clause to sit together to fix the rates and the price of the then latest  
 contract made by the Railway Board would be the basis of fixing the price.

If, however, I am wrong in the construction which I put on the words "for  
 nine months prior to the commencement of such year," and if the words are  
 to be read according to their strict literal meaning, the only result would be  
 that the parties have made no provision by their contract for the price being  
 fixed in the event of there being no Railway contract up to January 31, but  
 there being Railway contracts in February or March and in that event the  
 purchasers would be bound to pay and the sellers would be entitled to recover  
 price for the coal supplied at a reasonable price. It is conceded by both  
 sides that the proviso at the end of the clause fixing the minimum rate of  
 Rs. 3 and annas 12 only applies if the rate is fixed in either of the ways  
 mentioned in the clause.

The defendants wanted to lead extrinsic evidence to support their con-  
 struction of the clause. They wanted to put in certain letters in order to  
 prove (a) that as a matter of fact the parties never fixed the rates in Janu-  
 ary and (b) that when there were no contracts of the Railway Board up  
 to the end of January the parties settled the rates on contracts of the Railway  
 Board in February or March. The letters which the defendants tendered  
 were marked Y-1. The plaintiffs contended that the evidence tendered was  
 inadmissible, that if the evidence was admitted, the whole correspondence  
 should be admitted and the letters which they submitted would in that  
 event be relevant were marked X-1. The defendants also wanted to prove  
 that in the years 1930-1931 and 1931-32, the plaintiffs paid to the defend-  
 ants at a rate of annas eight above that of the Railway Board contracts  
 later than January in the preceding year. The object of proving the said

allegations was to show that in fact the agreement between the parties was not to fix a price in January, and to show that they did agree to take the rates of contracts by the Railway Board subsequent to January 31. But I held that evidence to be inadmissible. If the clause clearly states, as I hold it does, that the price is to be fixed in January, in my opinion, no evidence can be led to contradict it. If the clause contains no provision that the rates of contracts either of the Railway Board or of private purchasers entered into subsequent to January 31 are to be taken into account, in my opinion, no evidence can be led to add to the terms of the clause by putting in the provision which the defendants seek to do in either of the renderings which they suggested of cl. (4).

The question of the admissibility of this evidence was argued at great length before me. Some ancient and modern authorities were cited by counsel for the defendants in support of their contention that the evidence was admissible. The latest English authority cited on the point was *Watcham v. East Africa Protectorate*,<sup>1</sup> where it was held that—

“The principle that when an instrument contains an ambiguity evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent.”

In my opinion, English authorities on the point are entirely out of place. In *Balkishen Das v. Legge*,<sup>2</sup> decided in 1899, the Privy Council in the judgment delivered by Lord Davey observed as follows (p. 65) :—

“Evidence of the respondent and of a person named Mani was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By s. 92 of the Indian Evidence Act ... no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, or adding to or subtracting from its terms subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to shew in what manner the language of the document is related to existing facts.”

Even after this decision, there was a conflict of decisions in India as to whether notwithstanding the provisions of the Indian Evidence Act, equitable principles applied by Courts in England in order to give relief were applicable in India. So far as our High Court is concerned, Sir Lawrence Jenkins in *Dattoo v. Ramchandra*<sup>3</sup> observed as follows (p. 670) :—

“But it has been pointed out by the Privy Council in *Balkishen Das v. W. F. Legge* that in questions of this kind the Courts in India must be guided by s. 92 of the Evidence Act; and that we cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which *Alderson*

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1 [1919] A. C. 533.

2 (1899) L. R. 27 I. A. 58.

s. c. 2 Bom. L. R. 523.

3 (1905) 7 Bom. L. R. 669.

P.C. v. *White*,<sup>1</sup> or *Lincoln v. Wright*<sup>2</sup> furnish us with examples. We think that the  
 1940 contention urged by the appellant obviously comes within the ruling of the Privy  
 Council, and if we were to give effect to it, then we should not observe the limi-  
 — tation which their Lordships declare to be binding on us.”

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 ASSOCIATION, LTD. In my opinion it makes no difference whether the extrinsic evidence is  
 v. tendered as of oral statements or of conduct. It will be noticed that part  
 TATA IRON & STEEL CO., LTD. of the evidence tendered in *Dattoo v. Ramchandra* was of conduct, viz. that,  
 notwithstanding the execution of the deed, the plaintiff's father remained in  
 — possession until his death, and that after his death his widow remained in  
 possession for three years, and that there was no transfer of the land into the  
*Engineer J.* khata of the transferee. The conflict of decisions in India was ultimately  
 — set at rest by another decision of the Privy Council in *Maung Kym v. Ma Shwe La*.<sup>3</sup> At p. 242, Lord Shaw of Dunfermline says as follows :—

“Founding upon this section, the respondents maintain that the whole of the evidence led must be rejected. On the contrary, the appellants maintain that, notwithstanding the terms of the section, they are entitled to set up and prove the acts and conduct of the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, the cases cited being *Baksu Lakshman v. Govinda Kanji*,<sup>4</sup> *Hem Chunder Soor v. Kally Churn Das*,<sup>5</sup> *Rakken v. Alagappudayan*,<sup>6</sup> *Preonath Shaha v. Madhu Sudan Bhuiya*,<sup>7</sup> *Khankar Abdur Rahman v. Ali Hafez*<sup>8</sup> and *Mahomed Ali Hossein v. Nazar Ali*.<sup>9</sup> The judgment of Melville J. in the first of these cases is repeatedly founded upon in the course of the series, in which that learned Judge expressly followed the English equity doctrine as expressed in *Lincoln v. Wright*<sup>10</sup> by Turner L. J. thus :— ‘The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the plaintiff and Wright the transaction should be a mortgage transaction, it is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud.’

“In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey in the case of *Balkishen Das v. Legge*.<sup>11</sup> It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents. Lord Davey cites s. 92 of the Indian Evidence Act and adds : “The cases in the English Court of Chancery which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to shew in what manner the language of the document is related to existing facts.”

“Notwithstanding the decision of this Board, however, a certain conflict of authority on the subject still remains in India. But the respondents rightly refer to *Achutaramaraju v. Subbaraju*,<sup>12</sup> *Maung Bin v. Ma Hlaing*,<sup>13</sup> and *Dattoo v. Ramchandra*,<sup>14</sup> and in particular to the judgment of Jenkins C. J. in the last case. In

1 (1858) 2 De G. & J. 97.

2 (1859) 4 De G. & J. 16.

3 (1917) L. R. 44 I. A. 236,  
 s.c. 20 Bom. L. R. 278.

4 (1880) I. L. R. 4 Bom. 594.

5 (1883) I. L. R. 9 Cal. 528.

6 (1892) I. L. R. 16 Mad. 80.

7 (1898) I. L. R. 25 Cal. 603, F.B.

8 (1900) I. L. R. 28 Cal. 256.

9 (1901) I. L. R. 28 Cal. 289.

10 (1859) 4 De G. & J. 16, 22.

11 (1899) L. R. 27 I. A. 58, 65.

12 (1901) I. L. R. 25 Mad. 7.

13 (1905) 3 L. B. R. 100.

14 (1905) I. L. R. 30 Bom. 119.

s.c. 7 Bom. L. R. 669.

these the judgment of the Board, as pronounced by Lord Davey, has been rightly followed and applied."

It is conceded that the admissibility of the evidence cannot be supported by any section in chapter VI of the Indian Evidence Act. All that is contended is that the conduct of the parties is relevant under s. 8 of the Indian Evidence Act. The relevant words of that section on which reliance is placed are as follows :—

"The conduct of any party, to any suit or proceeding in reference to any fact in issue therein is relevant if such conduct influences or is influenced by any fact in issue or relevant fact and whether it was previous or subsequent thereto."

In my opinion, s. 8 is not applicable to this case at all.

As a matter of fact, if we examine English decisions we find that in many cases the evidence admitted in England would also be admissible under the provisions of the Indian Evidence Act, as for instance, the evidence admitted in *Watcham v. East Africa Protectorate*<sup>1</sup> would equally be admissible under s. 97 of the Indian Evidence Act.

For the defendants, reliance was also placed on the Privy Council decision in *Ma Thaung v. Ma Than*,<sup>2</sup> where we find the following observation in the judgment of the Privy Council delivered by Mr. Ameer Ali (p. 8) :—

"The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings. The mode, therefore, in which the sons and daughters of U. Nyein dealt with their shares is material : it helps to strengthen the conclusion that exhibit L was more a record of a division of rights and interest rather than a deed of partnership."

But that case does not, in my opinion, help the defendants. In the first place, the evidence tendered in the present case can hardly be said to be tendered to explain or elucidate the contract. On the contrary, in my opinion, the evidence is meant to contradict, and add to, the written terms of the contract. Secondly, the case of *Ma Thaung v. Ma Than* is clearly distinguishable. There the matter was not as between the parties to the instrument. The wife of the deceased who said that the instrument was a partition deed was not a party to the instrument. Section 92 of the Indian Evidence Act clearly applied only as between the parties to any such instrument or their representatives in interest, and s. 99 provides that persons who are not parties to a document, or their representatives in interest may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document. Moreover, the conduct referred to in *Ma Thaung v. Ma Than* was an admission of the father and sons that it was a partition and not a partnership deed.

In *Vassanji Khimji v. Shapurji Burjorji*,<sup>3</sup> a case decided by the Privy Council, we find in the judgment of Lord Macnaghten the following observation (p. 395) :—

"Everybody is now agreed that what took place after the execution of that document can have no bearing on the construction of it."

In the same report at p. 639, there is another case of *Raghoji Rao Saheb v.*

1 [1919] A. C. 533.

2 (1923) L. R. 51 I. A. 1.

3 (1912) I. L. R. 36 Bom. 387,

S.C. 14 Bom. L. R. 493. P.C.

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P. C. *Lakshmanrao Saheb*<sup>1</sup> where we find at p. 656 the following observation :—

1940 " *Contemporanea expositio* as a guide to the interpretation of documents is often accompanied with danger, and great care must be taken in its application. But in the present case their Lordships do not feel themselves able to reject the assistance which it affords."

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But that case does not say that the evidence was admitted irrespective of the provisions of the Indian Evidence Act, or on the strength of principles of English law. The question there was whether the land comprised in a sanad granted by Government and described as "lands attached to Deur" meant the lands limited to the village of Deur itself, or whether the lands extended to the possessions in the Satara District, or whether they covered the possessions as a whole which lay within the Presidency of Bombay. Neither party to the case maintained that the grant should be confined to the lands in the village of Deur alone; and it was conceded by the respondent that other lands in the Satara District must be held to be included. I do not think that the decision in *Raghoji Rao Saheb v. Lakshmanrao Saheb* helps the defendants in any way.

[After recording findings on the issues, the judgment concluded :]

There will be a declaration in terms of the answer to issue No. 3.

As regards the costs of the suit, if the contest had been confined merely to the construction of the contract, I might have made no order as to costs. But a considerable part of the hearing before me was taken up by issues 1 and 2, viz. whether the plaint discloses a cause of action, and whether the suit is maintainable. On the whole I see no reason why I should not direct the defendants to pay to the plaintiffs the costs of the suit and I order accordingly.

On appeal, the Appeal Court (Beaumont C. J. and Blackwell J.) dismissed the appeal on September 20, 1937, but by consent of the parties varied the decree by providing that the price of the coal should be calculated, not on the footing of the latest purchaser's contract, but at eight annas per ton over that rate.

The following judgments were delivered by their Lordships :—

BEAUMONT C. J. This is an appeal from a judgment of Mr. Justice-Engineer. In the Court below four issues were raised, but in this Court the findings of the learned Judge on issues 1 and 2, and his decision that evidence of user under the agreement was not admissible, have not been challenged, and the only question argued in appeal has been as to the construction of the agreement in suit.

That agreement is dated January 16, 1919, and is made between the Ranee-gunje Coal Association, Ltd., of the one part, and the Tata Iron and Steel Co., Ltd., of the other part, and it provides for the supply of coal by the Coal Company to the Tata Company. Clause 4 deals with the method of fixing the price of the coal. The agreement has already been before the Privy Council in connection with the construction of other clauses, and their Lordships pointed out that the agreement is drafted in terms which are by no means precise, and that therefore greater liberty of interpretation is permissible.

in the construction of the agreement than would be the case if the Court were construing a statute. Clause 4, so far as relevant, provides as follows :—

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“In the month of January immediately preceding the commencement of a year” (and a year is defined for the purposes of the agreement as meaning a period of twelve months commencing on April 1 and ending on March 31) “the price payable by the buyers of the coal to be delivered during such year shall be settled and adjusted at eight annas per ton above the price payable under or in respect of the then latest contract for the purchase of first class Jharriah coal by the Railway Board or if no purchase shall have been made by such Board for nine months prior to the commencement of such year, then by purchasers in the Calcutta market.”

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It is agreed that in respect of the year in suit, which is the year commencing April 1, 1932, there were no contracts by the Railway Board for the purchase of first class Jharriah coal between July 1, 1931, and January 31, 1932, but there were such contracts entered into in February or March, 1932. The question to be determined is how, on those facts, the price of coal for the year commencing April 1, 1932, is to be fixed under cl. (4) ?

Four alternative constructions of cl. (4) have been suggested. The first is that there is a hiatus and in the events which have happened, the parties have not fixed the price at all, for the year in question, since there being no contract by the Railway Board for the period, July 1 to January 31, the price could not be fixed on any such contract in January, and there having been a purchase by the Board in the nine months prior to April 1, 1932, the condition on which recourse was to be had to purchase in the Calcutta market did not arise. Therefore, it is suggested, the parties have not agreed on the method of fixing the price, and the price must be a reasonable price, which, I suppose, in practice would mean that, unless the parties came to an agreement, the matter would have to be referred to arbitration. I agree with the learned Judge in the Court below in thinking that cl. (4) was intended to be comprehensive, and that we ought not to hold that in the events which have happened the method of fixing the price is not specified, if there is any other reasonable construction of the clause open.

The construction for which Mr. Coltman on behalf of the appellants contends is this. He says that the object of cl. (4) was to fix the method of ascertaining the price, rather than the date at which the price was to be ascertained, that the governing consideration was to be the purchase by the Railway Board of Jharriah coal, that that price was to be fixed in the month of January but only if and so far as practicable. He admits that the *terminus a quo* for contracts to be taken into consideration in fixing the price was to be nine months before the expiration of the year, i.e. July 1, extracting that provision from the condition on which recourse was to be had to purchase in the Calcutta market. He says that contracts having been entered into in February and March by the Board, such contracts should be taken into account, because they come within the period of nine months before the expiration of the year, and he says that as this price obviously cannot be taken into account in January, the provision fixing the price in January must give way to the paramount intention of basing the price on contracts made by the Railway Board. The drawback to that construction is that it undoubtedly involves a considerable amount of alter-

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ation in the language of the clause, as was shown by the alternative clauses written out by the plaintiffs' counsel in the Court below designed to carry out his construction, and further such construction does undoubtedly give the go-bye to the provisions of cl. (4) as to fixing the price in January. The construction contended for by the respondents which found favour in the Court below is that the price is to be fixed in January, and that the reference to no purchases having been made by the Board for nine months prior to the commencement of the year was intended really to fix the *terminus a quo* for the start of the period in which the contracts to be taken into account must have been entered into, and in this appeal it has been common ground between the parties that cl. (4) does fix the *terminus a quo* as at July 1, 1931. The learned Judge pointed out that in adopting the construction which he favoured he was making a very small verbal alteration in the terms of cl. (4) of the contract. For the words, "for nine months prior to the commencement of such year" he reads the words, "for a period commencing from nine months prior to the commencement of such year." No doubt that is a small verbal alteration, and Courts of construction are always justified in altering the language which the parties have used if the Court is satisfied that it is necessary to do so in order to give effect to the intention of the parties to be ascertained from the contract as a whole. But I cannot help observing that the alteration, though small in form, very materially affects the meaning of cl. (4). It converts what is in terms a condition precedent for having recourse to purchases in the Calcutta market into a provision fixing the period in which contracts either by the Railway Board or in the Calcutta market, to be taken into account in fixing prices must have come into existence, and it involves having recourse to the Calcutta market otherwise than on the condition specified. On the other hand it seems tolerably clear that cl. (4) was based on the hypothesis that the Railway Board would enter into contracts by January, and I think there is certainly force in the learned Judge's view that the reference to nine months before the commencement of the year was intended to introduce a period behind which the parties could not go in relation to contracts relied on for fixing the price, and both parties agreed that this is so.

It appears to me that there is a fourth construction open which is based on a literal reading of cl. (4) and that is this. The parties meet in January to fix the price. They first of all fix a price on the then latest contract entered into by the Railway Board, whatever the date of that contract may be, and even if it was entered into before the commencement of the year in question. I will call that price, Price A. Then, if there has been no such contract since July 1, and as the condition for having recourse to purchasers in the Calcutta market, may or may not come into operation, they fix an alternative price based on the then latest contract entered into in the Calcutta market. I will call that Price B. They then have to wait until the expiration of the year, that is, March 31, in order to find out which of these two prices is to operate. If there has in fact been no contract for purchase by the Railway Board during the nine months previous to the expiration of the year, that is, since July 1, then Price B operates. If, on the other hand, there has been a purchase, as there was in this case,



in February or March, then Price A operates, that price being based on the latest contract in January, and not on the February or March contracts. That construction, which has not been put forward by either of the parties, seems to me to have the advantage of doing no violence to the language of cl. (4), but, on the other hand, it has, I think, the disadvantage of reaching a conclusion which probably neither of the parties intended or contemplated. It is very unlikely that they intended to base the price for the current year on a contract which might have been entered into before the current year commenced. It seems moreover capricious to make recourse to purchasers in the Calcutta market dependent on the non-existence of February or March contracts by the Board, when such contracts were in any event irrelevant for fixing the price for the current year. I confess to feeling very considerable doubt as to what the true construction of this clause is. My learned brother Blackwell is of opinion that the judgment of the Court below is correct, and I realise that there is a great deal to be said in favour of that view. I myself doubt whether the Court is justified on normal canons of construction in turning a condition precedent into something quite different when it is possible to give literal effect to the clause as drafted. However, I am reluctant to deliver a differing judgment, particularly as the case is one which will probably go to the Privy Council, and a hearing before a third Judge would therefore involve the parties in unnecessary expense. Though I feel a certain amount of doubt as to the correctness of the judgment appealed from, my doubt is not so strong as to induce me to differ from my learned brother. I agree, therefore, though with hesitation, that the appeal should be dismissed.

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BLACKWELL J. Mr. Coltman has argued that it is impossible, reading cl. (4) as a whole, that the parties should have intended that the price payable by the buyers for the coal to be delivered during the year, which is defined in the clause, should be fixed in the month of January, having regard to the fact that, as he contends, a period of nine months must elapse from July 1, 1931, before it can be ascertained whether resort can be had to purchases made in the Calcutta market. His argument is that the words "then latest contract" do not refer to the month of January, but refer to what turns out to be the then latest contract at the time of settlement and adjustment, which, he says, can in no circumstances take place until after March 31, 1932, that being the expiration of nine months from the preceding July 1. In my opinion that construction does great violence to the natural meaning of the words used in the earlier part of the clause. Those words, in my view, clearly contemplate that the price payable by the purchasers is to be settled and adjusted at eight annas per ton above the price payable in respect of the then latest contract for the purchase of the coal in question, and it seems to me that the then latest contract can only mean the latest contract by January 31, which is the date upon which the price, in the words of the clause itself, shall be settled and adjusted. I think that such violence would be done to the words of the clause by adopting Mr. Coltman's suggested construction, involving as it does the alterations to which the learned trial Judge refers in his judgment, that that construction is one

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which the Court should not adopt, if there is any other possible or reasonable construction.

The learned Chief Justice in the course of his judgment has suggested a construction which has not been put forward by either of the parties to this appeal. It is at first sight, no doubt, an attractive construction, because it does not involve reading into the clause any words which are not there. But speaking for myself, I feel it is impossible to suppose that commercial people would sit down in January to fix in the manner which he suggests hypothetical prices, which they might thereafter be compelled to alter, having regard to subsequent events. I do not think that commercial people would be likely to adopt such a course, and I feel that that cannot have been what they had in mind when this very unsatisfactory clause was drafted.

I have come to the conclusion that the construction placed by the learned trial Judge on this clause, and his finding on issue 3, which is the only issue before us, was right. Reading the clause as a whole, it seems to me that it makes it incumbent upon the parties to the agreement not later than January 31 to fix the price payable in accordance with the then latest contract entered into by the Railway Board or the then latest contract entered into by purchasers in the Calcutta market, if by January 31 there was no such latest contract entered into by the Railway Board from the preceding July 1. It is quite true that the words which give rise to difficulty are, "or if no purchase shall have been made by such Board or authority for nine months prior to the commencement of such year then by purchasers in the Calcutta market." But the words "by purchasers in the Calcutta market" are, in my opinion, plainly governed by the words "in the month of January the price payable shall be settled at eight annas per ton above the price payable in respect of the then latest contract". It seems to me that the parties meeting in January had to look back to a commencing period which would begin at nine months prior to the commencement of the year with which they had to deal, namely the next April 1. That would take them back to July 1, 1931. It is quite true that they would not be able in January to look at contracts entered into for the full period of nine months from the preceding July 1, and that, no doubt, is a difficulty in giving full effect to the words used. But, in my opinion, less violence is done to the contract as a whole by adopting this construction than by adopting the alternative construction contended for by Mr. Coltman. I, therefore, agree that the learned Judge was right, and that this appeal fails.

PER CURIAM. By consent decree will be varied by providing that the price will be calculated, not as the decree said, on the footing of the latest purchaser's contract, but at eight annas per ton over that rate. Subject to that variation the appeal is dismissed with costs.

The defendants appealed to His Majesty in Council.

*H. V. Willink, S. Hyam, and L. M. Jopling*, for the appellants.  
*A. T. Miller and J. M. Parikh*, for the respondents.

LORD RUSSELL OF KILLOWEN. The point for decision on this appeal is the true construction of one clause in an agreement dated January 16, 1919,

and made between the appellants and the respondents. By the agreement the appellants (called therein "the sellers") sell to the respondents (called therein "the buyers") the output of coal from certain seams in their collieries, for a period which commenced on April 1, 1921, and which has still a few years to run.

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The clause in question is the 4th clause, which runs as follows :—

"In the month of January immediately preceding the commencement of a year (which term shall for the purpose of this agreement be deemed to mean a period of twelve calendar months commencing on the first day of April and ending on the thirty-first day of March) the price payable by the buyers for the coal to be delivered during such year shall be settled and adjusted at eight annas per ton above the price payable under or in respect of the then latest contract for the purchase of first class Jharriah coal loaded into wagons at colliery siding entered into by the Railway Board or if that Board shall have been abolished then by such authority as shall be constituted or established in its place or if no such authority shall be established or if no purchase shall have been made by such Board or authority for nine months prior to the commencement of such year then purchasers in the Calcutta Market provided nevertheless that the price so to be settled and adjusted as aforesaid shall in no case be less than Rupees three and annas twelve per ton."

A consideration of the clause reveals the fact that it contains two features or provisions, which, if construed according to their literal and grammatical meaning, are inconsistent with each other—viz. (1) The first part, ending with the words "Railway Board", is a provision that the price for each contract year shall be settled and adjusted in the preceding month of January on the basis of the then latest contract of the Railway Board; whereas (2) the substituted provision for that settlement and adjustment in the month of January being made on the basis of Calcutta market contracts, is brought into operation in an event, the happening or non-happening of which cannot be ascertained until two months later than the end of January.

The difficulty which may arise is obvious; and it did in fact arise in connection with the contract year commencing on April 1, 1932. The Railway Board made no contracts of the kind specified in the clause (which may conveniently be called relevant contracts) at any time between July 1, 1931, and January 31, 1932; but the Railway Board did enter into relevant contracts after January 31, 1932, and before April 1, 1932.

A difference thereupon arose between the parties, and it became necessary to have the clause authoritatively construed; and for that purpose the respondents instituted the present suit in which, as ultimately settled by the Court, the relief sought took the following form :—

"(a) Whether on the true construction of Clause 4 of the agreement of January 16, 1919, and on the basis of there being no contract for the purchase of first class Jharriah coal made by the Railway Board or any similar authority between July 1 and January 31 following the plaintiffs are entitled to have the price of the coal supplied by the defendant under the agreement in the year commencing from the following April 1 calculated on the footing of the latest purchaser's contract in the Calcutta market entered into during the said period i.e. between July 1 and January 31 following; or on what other basis such price should be calculated."

It will be observed that what is sought is to have the clause construed without reference to the events of any particular year, but upon a specified basis.

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The plaintiffs contended that by the clause the price for the subsequent contract year has to be settled and adjusted by the end of January by reference to the then latest Railway Board relevant contract, but that if no such contract had been entered into between the preceding July 1 and January 31, the price must be settled and adjusted by reference to the then latest contract entered into by purchasers in the Calcutta market during the same period.

On the other hand the defendants contended that the price for each contractual year must be settled and adjusted primarily by reference to the price of the latest relevant contract of the Railway Board made in the period from the preceding July 1 to March 31, and that recourse could only be had to market contracts if no such contract had been made by the Railway Board during that period.

Engineer J. decided in favour of the plaintiffs' view, and made a declaration in terms of the relief prayed. An appeal from that decree was dismissed, but a declaration (amended in a small detail) was substituted for that contained in the original decree. Beaumont C. J. while not, it would seem, favouring the contention of the defendants, felt some doubt about the correctness of the plaintiffs' construction. His doubt, however, was not strong enough to induce him to dissent. He seems to have preferred a construction suggested by himself, for which neither party contended, and which seems to their Lordships open to the objection that it provides for the settlement and adjustment of two alternatives and contingent prices in January, a proceeding which none of the language used would appear to justify. Blackwell J. agreed with Engineer J. thinking that less violence was done to the language used by adopting the declared construction than by adopting the construction contended for by the defendants.

After consideration of close and careful arguments before the Board, their Lordships find themselves in agreement with the Courts in Bombay.

That there exists an apparent inconsistency according to the literal construction of the words used is clear; and in such a case if by any other reasonably possible construction the apparent inconsistencies can be reconciled, that construction should be adopted.

Turning to the clause in question it is to be observed that the whole clause, from beginning to end, hinges on and is governed by the mandatory provision that the price for each contract year shall be settled and adjusted in the preceding January. In each of the three cases of "then latest" contracts which are specified (*viz.* Railway Board contracts, substituted-authority contracts, and market contracts) they must, according to the clause, be under consideration at the settlement and adjustment in the month of January; and in every case the word "then" must, and can only, refer to the only point of time mentioned in the clause, *viz.*, the month of January. No other meaning is capable of being assigned to the language used. The same, however, is not true of the words which create the apparent inconsistency, *viz.*

"or if no purchase shall have been made by such Board or authority for nine months prior to the commencement of such year, etc."

The point of time when the necessary enquiry or investigation as to the existence of contracts of the Board or authority has to be made, is unchanged.

It is still the time of the settlement and adjustment in January. The words accordingly may well mean "if no purchase shall, at the time of the settlement and adjustment in January, have been made by such Board or authority for nine months prior to the commencement of such year." In such a context it does but little violence to the last ten words to construe them as referring to a period which commences nine months before April 1 and ends at the time of the settlement and adjustment. The position accordingly is this : that of the two portions of the clause which disclose the inconsistency, one is susceptible of a possible construction different from its literal meaning, while the other is not : and if the possible construction is applied all inconsistency disappears. That construction must therefore be adopted.

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This alternative construction of the clause is not, their Lordships think, open to the objection which seems to have pressed upon the Chief Justice. It does not convert a condition precedent into anything other than a condition precedent ; nor does it involve having recourse to the Calcutta market otherwise than on the condition specified, except of course according to the literal meaning of the words used. What the Courts in Bombay have done is, in order to reconcile two apparent inconsistencies, to attribute to the words used a meaning which the words used are capable of bearing, though different from their literal meaning. The condition precedent so construed remains as a condition precedent, and the condition specified by the agreement is the condition as so construed.

It was suggested that the reason why the month of January was mentioned in the clause was, or might be, because at the date of the agreement the Railway Board was wont to make its coal contracts during the period between July and January. It is not for a Court to speculate as to the reasons which may have dictated the employment of the language used in a contract ; indeed if any such speculation were allowable, it could equally be suggested, as a commercial reason, that the month of January was selected in order to afford the buyers sufficient time in which to make their other commercial arrangements, with a knowledge of the price which they would then be paying for their coal.

For the reasons indicated their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants will pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for appellants : *Cassavetti Constat & Co.*

Solicitors for respondents : *Stanley Johnson & Allen.*

[On appeal from the High Court of Judicature at Lahore.]

Present :

VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT,  
SIR GEORGE RANKIN AND MR. M. R. JAYAKAR:

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August 17.

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v.

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*Custom—Mahomedans—Succession—Customary law applicable to Tulla clan in the Punjab—Non-ancestral estate—Married daughters whether take precedence over collaterals of tenth degree—Antiquity of custom—Proof of.*

Under the customary law applicable to the Mahomedan Tulla clan resident in the Shahpur district in the Punjab, collaterals of the tenth degree of a deceased landowner do not take precedence over his married daughters in succession to his non-ancestral estate.

The English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" does not apply to conditions in India. A custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.

THIS was an appeal from the judgment and decree of the High Court of Judicature at Lahore.

The facts appear fully in the judgment.

*Sir Hari Singh Gour* and *S. P. Khambatta*, for the appellants.

Respondents did not appear.

MR. M. R. JAYAKAR. The question in this appeal is whether, under the customary law applicable to the members of the Tulla clan resident at mauza Mahamad Tulla in the tahsil and district of Shahpur in the Punjab, collaterals of the tenth degree of a deceased landowner can take precedence over his married daughters in succession to his non-ancestral estate. The question arose as follows :—

One Sahlion, a Mahomedan landowner of the Tulla clan, resident as stated above, died, leaving him surviving a widow and two married daughters (appellants before the Board) and some immoveable property. The widow subsequently gave the property to the daughters by a registered deed of gift dated September 8, 1934. The respondents, claiming to be his collaterals, instituted a suit against the widow (defendant No. 1) and the daughters (defendants Nos. 2 and 3) asserting that Sahlion's property was ancestral as regards the plaintiffs and that the widow had no right to

make the gift, which should be declared void and ineffectual as against the plaintiff's rights and invalid after the death or re-marriage of the widow. The widow and daughters denied the claim on the ground that the property was not ancestral and that the plaintiffs had no *locus standi* to sue, because daughters succeeded to the non-ancestral property as against collaterals, "especially when the plaintiffs are collaterals of the tenth degree."

The Subordinate Judge who tried the suit dismissed it, holding that the plaintiffs were Sahlion's collaterals of the tenth degree, that the lands in the suit were not ancestral and that, according to the general rule of custom prevailing among the Mahomedan tribes of the district of Shahpur which applied to the parties, the daughters were not ousted by the plaintiffs with regard to succession to the non-ancestral property of their father. In arriving at his decision, the learned Judge relied on the oral and documentary evidence adduced by the parties and upon certain rulings of the Punjab Courts.

The plaintiffs appealed to the High Court at Lahore and that Court, in a judgment remarkable for its brevity, allowed the appeal. The material part of the High Court judgment begins with the statement "that it is common ground that under the customary law which governs all the Musalman tribes of the Shahpur district, married daughters do not inherit their father's estate in any circumstances." Their Lordships have a difficulty in understanding this statement, because the question stated by the High Court as the "common ground" was precisely the issue in controversy in the case. The judgment bears, in several places, indications that the High Court, instead of examining the disputed question on the facts and the evidence in the case carefully considered in the Subordinate Judge's judgment, proceeded entirely on the authority of the questions and answers contained in a Manual compiled by Mr. (afterwards Sir) James Wilson, called a "General Code of the Tribal Customs in the Shahpur District of the Punjab," published in 1896. (It may be convenient to refer hereafter to this publication as Wilson's Manual.) Basing their views on certain questions and answers in Wilson's Manual the learned Judges of the High Court held that there was a presumption against inheritance by the daughters and that this presumption had not been rebutted. They therefore allowed the appeal. The judgment contains no detailed criticism of the oral and documentary evidence of custom adduced by the parties, all of which was ignored with the brief observation that in a full bench decision of the Lahore High Court (*Bahadur v. Mst. Nihal Kaur*<sup>a</sup>) it had been stated that: "recent judicial decisions are not sufficient to abrogate the custom so clearly laid down in Wilson's Manual of Customary Law." Their Lordships have consequently derived less assistance than they would have expected from the High Court judgment in elucidating the important question in controversy in this appeal.

Before examining the value to be attached to the statements in Wilson's Manual, and the effect of the full bench decision, it will be useful to state what the true legal position of the parties was as it emerged from the plead-

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ings. The basis of the plaintiff's claim was that the property in suit was ancestral so far as their rights were concerned. This was denied by the defendants. The onus was therefore on the plaintiffs to prove that the property was ancestral. The Subordinate Judge held that the onus had not been discharged. The learned Judges of the High Court did not consider this question, as the statements in Wilson's Manual on which they relied made no distinction between ancestral and non-ancestral property, and stated generally that married daughters "in no case" inherited their father's estate or "any share in it." Before this Board, the respondents did not appear in support of the High Court judgment. Their Lordships have therefore to decide the question on the evidence which is available in this case, and, on reviewing it, they agree with the finding of the Subordinate Judge that the land was not proved to be ancestral. In more than one decision of the Lahore High Court (see, for instance, *Chanda Singh v. Mst. Banto*<sup>1</sup> and *Rahmat Ali Khan v. Mst. Sadiq-ul-Nisa*<sup>2</sup>) it has been laid down that to establish the ancestral character of land it is not sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the revenue pedigree. It should also be proved that the descendants of that common ancestor held the land in ancestral shares and that the land occupied, at the time of the dispute, by the proprietors thereof had devolved upon them by inheritance. It is now settled law in the Punjab that the mere mention of the name of a person in the pedigree table as the common ancestor is no proof of the fact that every piece of land held by his descendants (howsoever low) was originally held by and descended from him in succession from generation to generation. As is explained by Tek Chand J. in *Chanda Singh v. Mst. Banto*,<sup>3</sup> "a genealogical tree of this kind is prepared merely to indicate the relationship of the proprietors in a particular village and is in no sense intended to be a record of the acquisition of every bit of land held by all persons whose names appear in it. It is no doubt presumptive proof of their kinship, but not of the nature of the property owned by them. For that purpose one has to look to the history of the acquisition of the village." The extracts from the settlement records relating to the land in dispute, which are a part of the evidence in this case, justify the finding of the Subordinate Judge.

Before examining the questions and answers in Wilson's Manual, it will be useful to ascertain the customary rights of daughters against collaterals with reference to ancestral and non-ancestral land as they are stated in Sir W. H. Rattigan's Digest (of Civil law for the Punjab, chiefly based on customary law, 1935 edition), a book of unquestioned authority in the Punjab. In paragraph 23 (p. 79) it is stated that (1) a daughter only succeeds to the ancestral landed property of her father, if an agriculturist, in default (a) of heirs mentioned in the preceding paragraph (viz., male lineal descendants, a widow or mother), or (b) of near male collaterals, provided that a married daughter sometimes excludes near male relatives, especially amongst Mahomedan tribes, under circumstances specified in the

1 (1927) I. L. R. 8 Lah. 584, 406.  
 589-90.

3 (1927) I. L. R. 8 Lah. 584, 589.

2 (1931) I. L. R. 13 Lah. 404,



paragraph (not material to the present issue); (2) but in regard to the acquired property of her father the daughter is preferred to collaterals. It is further stated (p. 92) "that the *general* custom of the province (the Punjab) is that a daughter excludes collaterals in succession to self-acquired property of her father," and "the *initial* onus therefore is on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a *special* custom excluding the daughters." This being the legal position of the parties, the question arises whether, the property being non-ancestral, the plaintiffs have discharged the onus by proving the existence of a special custom excluding daughters. They endeavoured to do this in two ways, (1) by relying on the authority of Wilson's Manual, and (2) by producing oral evidence at the trial.

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As the questions and answers in Wilson's Manual formed the main basis of the High Court judgment, it is necessary to examine in detail their value and effect. [After examining the questions and answers the judgment proceeded:]

On a careful examination of the relevant questions and answers in Wilson's Manual, a few considerations arise *in limine* which cannot be ignored:—

(1) That some of the answers are in conflict with the customs recorded in Rattigan's Digest, notably what is stated in that Digest as the general custom of the province that daughters exclude collaterals with respect to self-acquired property of their father.

(2) It cannot be disputed that, in his lifetime, a Mahomedan proprietor (as, for instance, an Awan in the Shahpur district) possesses unlimited power to give away his property to his daughters and their issue. This is clear from Wilson's Manual, p. 71, where it is recorded: "a father having no son or son's son, has full power to give the whole of his immovable property to his daughter, daughter's son, sister, sister's son, or son-in-law, or to one of his agnate heirs, without the consent of the other agnates. No distinction is made between ancestral and acquired property." Again, at p. 73, it is stated as regards Awans and miscellaneous Musalmans (Tullas are included in this category): "a proprietor having no son or son's son, can, without the consent of the agnate heirs, make a gift of immovable property, ancestral or acquired, divided or not, to a person not related to him," and an explanatory note is added that "among the Awans there is a general feeling that a sonless man is absolute owner of all his property, including his land, and can do with it as he likes, as his agnate heirs are generally his enemies!" If this is the rule, it is difficult to understand why, on the death of such an absolute owner, his married daughters, whom he could have made the objects of his bounty at his will during his lifetime, should be superseded, even with regard to his self-acquired property, by collaterals, irrespective of the degree of remoteness in which they stood. Though Punjab Act II of 1920 ("an Act to restrict the power of descendants and collaterals to contest an alienation of immovable property... on the ground that such alienation... is contrary to custom") does not apply to alienations made by a female (as in the present case), s. 7 thereof throws light on the absolute right of the proprietor to give away his non-ancestral property. The section applies to the

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whole of the Punjab, and provides that "no person shall contest any alienation of non-ancestral immovable property...on the ground that such alienation...is contrary to custom."

(3) In answer 17 in Wilson's Manual no distinction is made between ancestral and non-ancestral or between movable and immovable property, and the rule is stated as a wide generalisation (in answer 16) with reference to "all Musalmans" that a married daughter "in no case" inherits her father's estate or "any share in it." This answer is in conflict with numerous decisions of the Punjab Courts (some of them are noticed in a subsequent part of this judgment) which have laid down in clear terms that, in the earlier records of customs throughout the Punjab, rules stated in such wide and general terms must be taken to govern ancestral property only.

(4) In the province as a whole, numerous decisions of the Punjab Courts show that daughters generally succeed to the self-acquired property of their father, even to the exclusion of the nearest agnatic relations (as, e.g., uncles or nephews), and, even as regards ancestral property, it is now well settled that, more usually, the fifth degree is found to be the remotest customary limit. (See Rattigan's Digest, paragraph 23, clause (II), sub-clause (2), and authorities quoted at p. 84 and following). This general rule, prevalent in the entire province, appears to have found expression in s. 6 of the Punjab Act II of 1920, which lays down the fifth degree as the limit of collateral relationship able to contest an alienation of ancestral immovable property, on the ground that it is contrary to custom.

(5) It is remarkable that in answer 16 as recorded in the English version of the *riwaj-i-am*, no limit is mentioned within which the kindred must stand towards the deceased in order to exclude his daughters, though the question clearly contemplated enquiry into this point. It is not possible to say whether the omission to answer this part of the question was due to the fact that the point was lost sight of in the investigation or whether the answer was really intended to lay down that custom permitted collaterals, however remote (even of the tenth, fifteenth, or remoter degrees), to exclude daughters. Tek Chand J., in the course of an examination of answer 16 in *Khan Beg v. Mst. Fateh Khatun*,<sup>1</sup> had occasion to consult the vernacular version of the *riwaz-i-am*. He came to the conclusion that, though the last part of the question was not specifically answered, it was clear from certain expressions—*Chacha* (father's younger brother) and *Taya* (father's elder brother) used in the corresponding vernacular answer, that it was not intended to lay down that collaterals of remote degrees should be preferred to daughters.

This case of *Khan Beg v. Mst. Fateh Khatun* (their Lordships have derived considerable assistance from Tek Chand J.'s judgment) deserves to be examined carefully as it related to the Shahpur district and the dispute was also very similar to the one in the present case. [After discussing this and other cases the judgment proceeded:]

Their Lordships have thought it desirable to refer, in some detail, to these observations of the Judges of the Punjab Court, because they held eminent positions and some of them had experience of the preparation of official codes

of tribal custom. But none of these considerations appear to have been kept in view by the learned Judges of the High Court in this case, who, in arriving at their decision, have not only ignored (as will be shown below) the entire body of evidence adduced in the suit, but also a long course of judicial decisions of their own province, extending over nearly thirty years, in which similar questions arose with reference to the tribes in the Shahpur and neighbouring districts and which were uniformly decided against the collaterals of much nearer degree than in the present suit, except in two cases of exceptional character where there was no rebutting evidence at all. (See *Jawaya Shah v. Mst. Fatima*, and *Gulab v. Umar Bibi*.)<sup>1</sup> As the question at issue affects large classes of the Muslim community, it is, in their Lordships' opinion, of sufficient importance to justify their briefly reviewing a few of these important decisions. [After reviewing the decisions the judgment proceeded :].

It now remains to consider the full bench case of *Bahadur v. Mst. Nihat Kaur*<sup>2</sup> (differing judgments of Coldstream and Bhide JJ. and full bench decision of Young C. J., Monroe and Din Mohammad JJ.). As the High Court in the present case has treated this ruling as an authority for ignoring the previous judicial decisions, it is necessary to examine closely the facts and effect of this ruling. The case related to the Jats of Daska tahsil in Sialkot district. The contest was between a married daughter (plaintiff) and collaterals of the fourth degree (defendants). The land was non-ancestral. The trial Court decreed the suit, holding that the land being non-ancestral the custom favoured the daughter's preferential right. This decision was upheld on appeal by the District Judge. The collaterals appealed to the High Court, and that Court dismissed the suit. It is to be noted that neither party had proved any specific instances in the case, so there was no rebutting evidence against the presumption raised in favour of the collaterals by the answers in the *riwaj-i-am* relating to the district. The only material question was whether previous decisions of the Lahore High Court of a character contrary to the custom recorded in the *riwaj-i-am* would be sufficient evidence to rebut the presumption. None of the earlier decisions, for instance those cited above, nor even those relating to the Jats in the Sialkot district, were noticed in the full bench judgment, which referred only to two previous decisions : one of 1922, which Young C. J. (who delivered the judgment of the full bench) thought was based on a wrong view of the law ; and the other of 1928, which was held to be too recent to prove a custom. The *riwaj-i-am* relevant to the suit, which was noticed and commented on in some of the earlier decisions cited above, was clear so far as it went, but its qualifications were not given effect to as was done in some of the earlier decisions. There was a difference of opinion between Coldstream J. and Bhide J., and on reference to the full bench, the reasoning adopted by the former Judge was virtually approved, but several vital considerations urged by Bhide J. in his differing judgment do not appear to have received adequate consideration in the full bench judgment.

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1 (1925) I. L. R. 6 Lah. 356.

3 (1937) I. L. R. 18 Lah. 594, F.B.

2 [1936] A. I. R. Lah. 403.

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If the full bench decision is intended to lay down the rule that a *riwaj-i-am*, being presumptive evidence, cannot be over-riden by recent instances, either in the form of specific cases proved at the trial or the decisions of the law Courts, their Lordships have little comment to make on it. The case cannot, however, be treated as an authority for the view that judicial decisions, even if they are not of recent date, cannot be treated as evidence against the statements in the *riwaj-i-am*. A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption. In such a case, the value of the decision arises from the fact not that it is relevant under ss. 13 and 42 of the Indian Evidence Act as forming in itself a "transaction by which the custom in question was recognised, etc., etc.," but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the *riwaj-i-am* would add greatly to the perplexities and difficulties of proving a custom.

Their Lordships are not convinced that Young C. J.'s reference to the English rule, stated in Blackstone's Commentaries, that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" was either apposite or useful, when applied to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. Having regard to the circumstances under which local customs have arisen and do arise in India, both with reference to Muslims and Hindus, and the ease and frequency with which people migrate from one district or province to another, it would, in their Lordships' opinion, create great perplexity in the already uncertain character of customary law to require that, in every case, the antiquity of a custom must be carried back to a period which is beyond the memory of man. Insistence upon such proof would also involve a complete ignoring of the caution, which was uttered in a judgment of this Board in the case of *Abdul Hussein Khan v. Bibi Sona Dero*,<sup>1</sup> where their Lordships adverted to the difficulty of applying "the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here." Likewise, their Lordships do not find themselves in agreement with the view of the full bench that the effect of the statements in the *riwaj-i-am* was not weakened by the fact that women had no opportunity of being consulted by the officer compiling the customary law or by the fact that the custom recorded was not in conformity with the general customary law. The presumption enjoyed by the *riwaj-i-am* was, in their

1 (1917) L. R. 45 I. A. 10, 14.

Lordships' opinion, weakened to the extent of both these considerations, though the degree of the weakening would depend upon the facts of each case. Their Lordships prefer, in this behalf, the observations of the Punjab Judges, cited in a previous part of this judgment, which are of a contrary character. -

Whatever value the full bench decision might have with reference to the customs of the Sialkot district, the High Court in the present case was in error in accepting it as an authority for excluding from consideration the several instances, both judicial and otherwise, which were proved in this case with reference to the customs of the Shahpur district. By no straining of language could these decisions be described as recent. They commence from 1905-6 and range over a period of nearly thirty years. In many of these decisions the claimants in the position of the daughters proved specific instances of their superseding collaterals of varying degrees of remoteness, sometimes even nephews, with reference to non-ancestral property. The case of *Gulab v. Umar Bibi*,<sup>1</sup> on which the full bench judgment relied, was, as shown above, of an exceptional character and could hardly be regarded as indicating any rule of custom of general application as against numerous instances of a contrary character. Besides, both parties had led, in the present case, evidence of specific instances which had received careful consideration in the judgment of the Subordinate Judge. The High Court virtually ignored all this evidence on the basis of the full bench judgment. Their Lordships have examined this evidence and they agree with the view of the Subordinate Judge that the evidence produced by the daughters was of a more convincing character.

For the reasons indicated in this judgment, their Lordships are of opinion that the true legal position was that, the property being non-ancestral, the initial onus lay on the plaintiffs to prove that the general custom in favour of the daughters' succession had been varied by a special custom enabling the plaintiffs to exclude the daughters and that the plaintiffs have not discharged this onus. Their Lordships would add that even if it be held that the answers in Wilson's Manual raised an initial presumption against the daughters, having regard to the considerations mentioned in this judgment it was a weak presumption, which has been sufficiently discharged by the evidence adduced in the case.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, that the decree of the High Court be reversed and that of the Subordinate Judge restored. The respondents will pay the appellants' costs in the High Court and before this Board.

*Appeal allowed.*

Solicitors for appellants : *Hy S. L. Polak & Co.*

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SUBHANI

v.

NAWAB

*Mr. Jayakar*

[On appeal from the High Court of Judicature at Madras.]

Present :

VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT,  
SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

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O. RM. O. M. Sp. (FIRM)

v.

September 17.

NAGAPPA CHETTIAR.

*Trust—Charities—Money belonging to charity credited in name of charities in bank—Bank crediting trust money to overdraft account of person committing breach of trust with knowledge of breach of trust—Suit against bank for refunding moneys to charities—Limitation applicable to such suit—Indian Limitation Act (IX of 1908), Arts. 36, 120—Consent of Advocate General whether necessary to such suit—Civil Procedure Code (Act V of 1908), Sec. 92.*

Where relief is sought against defendant on the ground of fraud, misconduct, or mistake, the right to sue is deemed to accrue from the time when the fraud, misconduct or mistake becomes known to the plaintiff.

The plaintiff, his brother, father and uncle (defendant No. 2) were members of a joint Hindu family having a family business. The share of the plaintiff's branch in the business was ten annas and that of defendant No. 2 six annas. After the death of the plaintiff's father a partition of the assets of the business was effected and the business was taken over by defendant No. 2. The plaintiff's father was interested in two religious charities and it was decided at the time of the partition that the two branches of the family should provide Rs. 10,000 for each of the charities according to their shares in the business. Rupees. 2,000 having been already provided for one of the charities before the partition, the plaintiff's branch had to find Rs. 5,000 for that charity and Rs. 6,250 for the other charity. The plaintiff, thereupon, drew two hundis, dated December 1, 1916, for Rs. 5,000 and Rs. 6,250 respectively, on defendant No. 1 bank payable to bearer. Each of the hundis was headed with the name of the charity concerned under the word 'credit,' thereby showing the charity as the party or account in whose favour it was intended. The hundis were taken to defendant No. 1 by defendant No. 2, and defendant No. 1 credited the two sums in the names of the respective charities. On February 10, 1920, the two sums amounted to Rs. 15,732-15-9 with interest, and on that date at the instance of defendant No. 2 Rs. 15,700 were credited to defendant No. 2's overdraft account with defendant No. 1, and the balance of Rs. 32-15-9 was paid to defendant No. 2, and the account in the names of the charities was closed. Defendant No. 2 opened two new accounts in the names of the two charities in his money-lending business. He was adjudicated insolvent on January 4, 1926. The plaintiff came to know in 1929 of defendant No. 1 setting off the charity monies against the overdraft account of defendant No. 2, and he thereupon sued defendant No. 1 to refund to the charities the money received by it in reduction of defendant No. 2's overdraft on the footing that this application of the money was a breach of trust on the part of defendant No. 2 of which defendant No. 1 had notice and by which it had profited :—

*Held*, (1) that defendant No. 1 in appropriating the charity money to itself took a transfer of property which in equity it was bound to restore to the charities, as it failed to prove that the transfer was within the authority of defendant No. 2 and not a breach of trust by him ;

(2) that, even if any authority was given by the plaintiff to invest the trust funds in defendant No. 2's business, the discharge of the overdraft account of defendant No. 2 did not come within the scope or intention of that authority ;

(3) that art. 120 of the Indian Limitation Act, 1908, and not art. 36, governed the plaintiff's suit as the claim against defendant No. 1 was not that a breach of trust was committed by it but that it took the trust property by a transaction with defendant No. 2 which was a breach of trust on his part and with notice that it was a breach of trust ;

(4) that the period of limitation ran from the date in 1929 when the plaintiff came to know that the money of the charities was set off against defendant No. 2's debt to defendant No. 1 upon his overdraft.

Decisions in India have established a rule of limitation under art. 120 of the Indian Limitation Act, 1908, by which the plaintiff, in the cases to which the rule applies, cannot be debarred of his remedy, unless with knowledge of his rights he has been guilty of delay.

*Venkateswara Iyer v. Mayandi Chettiar*,<sup>1</sup> *Viswanadhan v. Narayana Doss*,<sup>2</sup> *Lal Singh v. Jai Chand*,<sup>3</sup> *Mathura Singh v. Rama Rudra Prasad Sinha*,<sup>4</sup> *Basavayya v. Babanna Rao Sowcar*,<sup>5</sup> referred to.

Consent of the Advocate General under s. 92 of the Civil Procedure Code, 1908, is not necessary where a trustee sues to recover trust property in the hands of a stranger to the trust.

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APPEAL from a decree of the High Court of Judicature at Madras, dated May 9, 1938, in its appellate jurisdiction (Leach C. J. and Krishnaswami Ayyangar J.) reversing a decree dated March 27, 1936, of that Court in its original civil jurisdiction (Lakshmana Rao J.).

The plaintiff, Nagappa, and his minor brother were, with their uncle, Subrahmanyam, members of a joint Hindu family. After the death of Nagappa's father in 1914 a partition of the assets of the family business was effected, the main term of the partition agreement being that the uncle should take over the whole of the business.

The plaintiff's father had been interested in two religious charities, and before the partition a certain sum had been credited to one of the charities in the books of the business. The partition agreement provided that the two branches of the family should furnish a capital of Rs. 10,000 for each of the charities. The plaintiff accordingly drew and gave to his uncle two hundis dated December 1, 1916, for the sums which he had agreed to find. The hundis were drawn on the plaintiff's account with the defendants, a firm of bankers. They were made payable to bearer, but each was headed with the name of the charity concerned under the word "credit". The defendants, when the uncle presented the hundis, credited them in each case to an account in the name of the charity concerned. The sums remained to the credit of the accounts of the charities until February 10, 1920, on which date they were transferred to the uncle's account with the defendants and the two accounts of the charities were closed, the result of the transaction being that the uncle's

1 [1918] M. W. N. 244.

2 [1928] M. W. N. 415.

3 (1931) 31 P. L. R. 1014.

4 (1935) I. L. R. 14 Pat. 824.

5 (1929) 58 M. L. J. 349.

P. C. , overdraft with the defendants was cancelled. The plaintiff accordingly  
 1940 brought this action to compel the defendants to refund to the charities the  
 O. RM. O. M. sums so received by them in reduction of the uncle's overdraft, contending  
 SP. (FIRM) that that application of the money constituted a breach of trust by the uncle  
 v. of which the defendants had notice and by which they profited. The trial  
 NAGAPPA Judge dismissed the action. That decision was reversed on appeal, and the  
 CHETTIAR defendants appealed to His Majesty in Council.

*Sir Herbert Cunliffe K. C.* and *W. Wallach*, for the appellants. To deal with the case first on its merits : It is submitted that the handing over by the plaintiff to Subrahmanyam of the two hundis constituted an investment of the sums which they represented in the latter's business. The heading "Credit Charity so & so" was no more than an indication of which of the several accounts which Subrahmanyam kept with the defendants was to receive the money. Subrahmanyam, having authority to invest the moneys in his own business, in fact followed the course for some time of leaving them with the defendant bank to earn interest. The ultimate transfer of the moneys to his own account by Subrahmanyam was no breach of trust. In any case the plaintiff only proceeded against the present defendants after his failure to recover against Subrahmanyam in the latter's insolvency. The former proceedings were on the same facts as the present, and while they do not operate as *res judicata* against these proceedings, it is not without relevance to call attention to them here.

[Counsel referred to ss. 40 and 42 of the Indian Evidence Act.]

The bank's exact position in relation to the transfer of February, 1920, needs consideration : First, it is submitted, it is not material that the bank had notice of the trust i.e., knew that the moneys were trust funds. Next, it is to be observed that the bank does not act on its own initiative in a matter like this. It acted under the orders of Subrahmanyam, orders which it was not entitled to refuse to obey.

If, as appears to have been admitted in the Court below, Subrahmanyam was given control over the moneys, with power to invest them in his own business, the paying in of the moneys by Subrahmanyam to the account with the defendants bank was such an investment. The transaction of 1920 was no more than a re-investment of the moneys, and the bank consequently in our submission could have committed no breach of trust in effecting the transfer as it did. More than that, the bank had actually no power to refuse to obey Subrahmanyam's instructions : see *Gray v. Johnston*.<sup>1</sup> (Counsel also referred to *Coleman v. Bucks and Oxon Union Bank*.<sup>2</sup>)

In any case, what was there in this very common or garden transaction to lead the bank to suspect that any breach of trust might be constituted by it. The plaintiff has in any case been admitted a creditor in Subrahmanyam's insolvency, and the bank are entitled to set off in respect of whatever he recovers in that insolvency. Moreover, there should be a deduction in respect of moneys spent by Subrahmanyam on the charities during the many years for which he carried them on without complaint.

(Counsel also referred to the Code of Civil Procedure, O. XXXI, r. 2, in

1 (1868) L. R. 3 H. L. 1.

2 [1897] 2 Ch. 243.



support of a submission that the action was imperfect in that all the trustees were not before the Court.)

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*Wallach*, following. Let it be assumed, first, that art. 120 of the Indian Limitation Act applies to this case : Time must have begun to run against the plaintiff either on February 10, 1920, when the money was withdrawn and used to cancel Subrahmanyam's overdraft, or in 1924 when the plaintiff received notice of the withdrawal. At one or other of those times his cause of action arose. The general remarks made in *Bolo v. Koklan*<sup>1</sup> are not applicable, because the facts in that case are so very different.

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[VISCOUNT MAUGHAM. But the expression "when the right to sue accrues" implies necessity that the plaintiff should know that he has a cause of action, does it not?]

Counsel referred to s. 18 of the Act and to the following cases : *Annamalai Chettiar v. A. M. K. C. T. Muthukaruppan Chettiar*,<sup>2</sup> *Subbiah Thevar v. Samiappa Mudaliar*,<sup>3</sup> *Lal Singh v. Jai Chand*,<sup>4</sup> *Mathura Singh v. Rama Rudra Prasad Sinha*,<sup>5</sup> *Viswanadhan v. Narayana Doss*,<sup>6</sup> *Ottaparakkal Thazhate Soopi v. Cherichil Pallikkal Uppathumma*,<sup>7</sup> and *Venkachela Reddiar v. The Collector of Trichinopoly*.<sup>8</sup>

[LORD RUSSELL OF KILLOWEN. But how can the plaintiff be said to have had the necessary knowledge before 1929?]

He knew in 1924 that the account in which the trust moneys stood had been closed. All that he did not know was the nature of the transaction—namely, that no money had passed. But it was open to him in 1924 to take proceedings.

But, it is submitted, it is not art. 120, but art. 36 "for compensation of any malfeasance, misfeasance or nonfeasance independent of contract ..." which applies to this case. For that article the period of limitation is only two years, so that the suit is clearly barred.

Finally, it is submitted, this suit is incompetent because instituted without the consent of the Advocate-General under s. 92 of the Code of Civil Procedure.

There was no appearance by or for the plaintiff-respondent.

*Cur. adv. vult.*

SIR GEORGE RANKIN. This appeal arises out of a suit filed on the Original Side of the High Court at Madras on April 29, 1933, and is brought from the decree of an Appellate Bench dated May 9, 1938, reversing a decision of Lakshmana Rao J., dated March 27, 1936, whereby the suit had been dismissed. All the parties to the suit are Nattukottai Chettiars. The appellant is a firm which is known by the letters O. R. M. O. M. SP., and which carries on business at Madras as bankers and money-lenders. It was defendant No. 1 to the suit and it will be conveniently referred to as the appel-

1 (1930)\* L. R. 57 I. A. 325,  
s. c. 32 Bom. L. R. 1596.

2 (1930) L. R. 58 I. A. 1,  
s. c. 33 Bom. L. R. 168.

3 [1938] Mad. 586.

4 (1930) I. L. R. 12 Lah. 262.

5 (1935) I. L. R. 14 Pat. 824,  
847.

6 [1928] M. W. N. 415.

7 (1909) I. L. R. 33 Mad. 31.

8 (1914) I. L. R. 38 Mad. 1064.

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lant bank. The plaintiff Nagappa and his younger brother Lakshmanan were the sons of one Minakshisundaram, whose brother Subrahmanyam, though not an original defendant, was added as defendant No. 2 to the suit by an order dated January 24, 1934. They were members of a joint Hindu family and had a family business in "piece-goods" (cloth) at Madras and other places—the plaintiff's father's share being ten annas and Subrahmanyam's six annas. After the death of the plaintiff's father in 1914 a partition of the assets of business was effected with the aid of certain business friends and the terms of this arrangement were embodied in a *yadast* or note dated January 17, 1916, which the plaintiff signed on behalf of himself and his brother, who was then a minor. The main term was that the business should be taken over in its entirety by Subrahmanyam. It appears that the plaintiff's father had been interested in two religious charities, one for the supply of water to worshippers at a certain place in the hills, and one for the supply of cloth for the purposes of a temple. Before the partition a sum of Rs. 2,000 had been credited in the books of the business to the temple and it was arranged at the time of the partition that the two branches of the family should provide in all a capital of Rs. 10,000 for each of these two charities. The shares in which they were to provide the money were five-eighths and three-eighths—*i.e.*, ten annas and six annas, according to their shares in the business. As Rs. 2,000 had already been provided for the temple, the plaintiff's branch had to find Rs. 5,000 for that and Rs. 6,250 for the water charity. The *yadast* by cl. 13 thereof provided that both branches of the family should manage and conduct the charities. Acting upon this arrangement the plaintiff drew and handed to his uncle, Subrahmanyam, two hundis, each dated December 1, 1916, for the money which his branch had agreed to find—that is for Rs. 5,000 and Rs. 6,250 respectively with interest at the Madras *madappu* rate from January 17, 1916, the date of the *yadast*. The plaintiff had a banking account with the appellant firm and the hundis were drawn on that firm. Though made payable to bearer they were headed with the name of the charity concerned under the word "credit"—that is, showing the charity as the party or account in whose favour they were intended. It is not necessary that the terms of the hundis should be here set out. They were taken by Subrahmanyam to the appellant bank and on September 11, 1917, the bank endorsed each with a statement that the amount with interest to date had been received. It is admitted that the bank credited these sums in each case to an account in the name of the charity concerned, though Subrahmanyam had had an account with the appellant bank since January 6, 1917. The monies remained at the credit of the charities with the appellant firm until February 10, 1920, by which time they amounted in all to Rs. 15,732-15-9. On that date they were transferred to the credit of Subrahmanyam's account and the accounts in the name of the charities were closed. The transaction is clearly and simply described in the case of the appellant bank as follows :—A book entry of Rs. 15,700 was made in favour of the appellant bank thereby cancelling an overdraft of Subrahmanyam in the books of the appellant bank and the balance of Rs. 32-15-9 was paid to Subrahmanyam in cash. At the same time Subrahmanyam in his own books in his money-lending business opened new accounts in the names of the two

charities—that is Rs. 8,740-8-9 in favour of one and Rs. 6,992-7-0 in favour of the other charity.

To challenge this transaction is the purpose of the present suit. The plaintiff seeks to make the appellant bank liable to refund to the charities the money received by it in reduction of Subrahmanyam's overdraft on the footing that this application of the money was a breach of trust on the part of Subrahmanyam of which the appellant bank had notice and by which the appellant bank has profited.

Some evidence has been given by a witness on behalf of the appellant bank to the effect that when Subrahmanyam first handed over the hundis and opened the two accounts in the name of the charities he had intimated, "I shall take it whenever I want". Their Lordships regard this evidence as unreliable. The witness also deposed that at the time of the transfer of the monies on February 10, 1920, cash was actually borrowed from Marwaris, was paid to one Chidambaram on behalf of Subrahmanyam, repaid to the bank by him and repaid to the Marwaris by the bank on the same day. Their Lordships regard these statements as untrue and they are here mentioned only to be put aside.

Admittedly, the substantial effect of the transaction of February 10, 1920, was to empty the charity accounts and to cancel Subrahmanyam's overdraft. Though a Hindu religious endowment is not technically for all purposes in the same position as an English trust and its property is not vested in its manager as trust property is vested in a trustee, such differences are of small importance for the purposes of the present case. *Gray v. Johnston*<sup>1</sup> and *Coleman v. Bucks and Oxon Union Bank*<sup>2</sup> were cited at the bar, but their Lordships do not consider that an examination of the case-law is required to show that the appellant bank in appropriating the charity moneys to itself was taking a transfer of property which in equity it would be bound to restore to the charities unless it could show that Subrahmanyam had authority to use these funds to pay off his overdraft. In that event no doubt the transfer which seemed on its face to be highly improper would turn out to be justified. Their Lordships will assume that if the transfer was within Subrahmanyam's authority, the appellant bank would not be liable to restore the money by reason merely that Subrahmanyam in exercising his authority had failed to pay due regard to the interests of the charities. But the appellant bank on the facts of this case is without defence upon the merits unless it first establishes that the transfer was within the authority of Subrahmanyam and not a breach of trust by him. It avails nothing to dispute whether the transfer was due more to Subrahmanyam's desire to put his account in credit or to the bank's desire to be repaid.

It is said that Subrahmanyam had received from the plaintiff authority to do what he did. Upon this question and upon the question of limitation—in their Lordships' opinion the only substantial questions in this case—it is necessary to notice some events which took place after the transfer had been made. Subrahmanyam's account with the appellant bank is in evidence and while it shows a credit balance of Rs. 4,500 in May, 1920, it continues

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P. C. thereafter to be in debit, the balances as struck rising in 1920 to Rs. 60,000,  
 1940 in April, 1921, to Rs. 1,12,680 and continuing throughout the rest of that year  
 O. RM. O. M. in the neighbourhood of half a lac. In 1924 the charities were no longer  
 SP. (FIRM) being kept up and before the end of 1925 an insolvency petition was presented  
 v. in the High Court which resulted in Subrahmanyam being adjudicated in-  
 NAGAPPA solvent on January 4, 1926. It appears that he had engaged in speculative  
 CHETTIAR purchases of immovable property involving considerable sums.

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In 1924 the plaintiff came to know that the funds were no longer in deposit with the appellant bank and on March 1 of that year a letter written on the plaintiff's behalf by an advocate claimed from Subrahmanyam the amount of the hundis with the interest as having been deposited by the plaintiff and his younger brother in Subrahmanyam's firm for the purposes of the charities at the *nadappu* rate of interest. This allegation was repeated incidentally in a plaint dated April 25, 1924 (C. S. No. 328 of 1924) filed in the Madras High Court with reference to Subrahmanyam's collections from the branches of the joint family business which had been partitioned by the *yadast* of January 17, 1916. Again in 1929 the plaintiff took steps in the insolvency to have it declared that the monies now in question did not pass to the Official Assignee as part of the estate of Subrahmanyam but were trust monies. He brought a motion to obtain a declaration to that effect on the footing that Subrahmanyam had withdrawn the monies from the appellant bank, and it is clear enough that this proceeding was taken and maintained upon the basis that Subrahmanyam had been authorised to withdraw them. The motion failed on the ground (*inter alia*) that there were no assets left at the time of the insolvency which could be traced to the monies which had been withdrawn from the appellant bank. It is stated in the judgment of the learned Chief Justice in the present case that the plaintiff came to know in 1929 of the fact that the monies were not really withdrawn from the appellant bank in 1920 but were taken by the appellant bank in cancellation of Subrahmanyam's overdraft so that the funds had disappeared altogether. The case made by the plaintiff in his pleading and by his own evidence in the present suit was different from his previous statements. It was to the effect that at the time the charitable funds were constituted in 1916 it was agreed that they should be invested with a third-party and not with Subrahmanyam; and that Subrahmanyam should not vary the investment without the plaintiff's consent. The learned trial Judge in view of the letter of March 1, 1924, which the plaintiff endeavoured to repudiate as a misinterpretation of his instructions to his advocate, disbelieved this part of the plaintiff's evidence and came to the following conclusion:—

"Under the circumstances it cannot reasonably be doubted that (Subrahmanyam) was authorised to invest the trust funds in his own business in consideration of his paying *nadappu* interest and the amount in question was on the same day—*i.e.*, February 10, 1920, credited by him in the accounts of the *dharma* in his books. The result of the transaction on either supposition would be to transfer the trust money to the business (of Subrahmanyam) and he was acting within his rights in doing so."

The finding of fact as to the authority given to Subrahmanyam, contrary though it was to the plaintiff's evidence, was not contested before the learned

Chief Justice and Krishnaswami Ayyangar J. on appeal. The Chief Justice states :—

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"The trust funds were created and it is admitted that the second respondent (Subrahmanyam) being the uncle of the appellant (plaintiff) and much older was given the management of them. It is also admitted that the second respondent (Subrahmanyam) was given the right of investing the trust funds in his own business if he so decided."

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But the appellate bench did not consider that Subrahmanyam had acted within his authority :—

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"There could be no investment of the trust monies in (Subrahmanyam's) business unless they were replaced. They were not replaced and therefore there was no investment. The first respondent (that is the appellant bank) was not entitled to do what he did without being satisfied that the entries in (Subrahmanyam's) books were going to be supported by cash. He took no steps to satisfy himself that this would be done. On the other hand he applied the trust monies for his own benefit knowing full well that (Subrahmanyam) was merely intending to constitute himself a debtor to the trusts."

"To invest the trust funds in his own business" is a phrase which stands in need of some interpretation, and it is possible that the trial Judge may have taken it too broadly and that the appellate bench may have taken it too narrowly. The burden of proving the nature and extent of the authority is on the appellant bank, and the fact that the plaintiff's evidence was not believed does not necessarily imply that the statements previously made by him in the letter of March 1, 1924, the suit of 1924 and the insolvency proceedings of 1929 can be accepted. Subrahmanyam was not called nor was his absence from the witness-box explained. The result is that there is no direct and reliable evidence as to what was said by the plaintiff or his uncle on the subject of investment. It is to be inferred that the authority relied upon is an authority given by the plaintiff at the time of handing over the hundis in 1916 or 1917—while he still bore the character of settlor and the endowment was not yet perfected. The trust having arisen in connection with the family piece-goods business, it is not very difficult to support that Subrahmanyam who was to carry it on after the partition might be authorised to use the money in that business. It is a common practice among Chettiers to carry sums in their books to the credit of a charity without intending that the money should be set apart or taken out of the business. The present was a case in which the money was the money of the plaintiff and his brother and the business was to be their uncle's, but this may not have been regarded as calling for a stricter system. Any wider authority to deal with the monies, even if alleged to have been given to the uncle, must, however, be established by the strictest proof. To arrive at a correct interpretation of the arrangement made, and to ascertain whether it covered what was done by Subrahmanyam in February, 1920, it is important to know what business he was engaged in at the time of the arrangement and to ascertain the character of the account into which the money went. In addition to continuing the piece-goods business and collecting the assets of certain shops which are mentioned in the *yadast*, Subrahmanyam seems in 1917 to have done business of some sort at Penang. Whether his speculations in immovable property had then begun it is not possible on the evidence to ascertain, though it appears

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in evidence that one large transaction of this character took place in May, 1920. An account which the appellant bank called the "go-down" account was opened by Subrahmanyam in January, 1917, and would appear to have had reference to the piece-goods business. At some date before March, 1918, he began a money-lending business in Coral Merchant Street and in that month an account was opened with the appellant bank called the amount of the "street-shop" in connection with this business. The "go-down" account was closed in April, 1919, by a transfer to the "street-shop" account of Rs. 4,401. From that date the latter account can only be described as Subrahmanyam's "private account" to use the words of the Chief Justice, or as the appellant bank's written statement calls it "his personal ledger in the defendant firm". It is this account which was overdrawn in February, 1920, and into which the charity money was paid, and it was in the books of the money lending business or "street-shop" that Subrahmanyam made credit entries in favour of the charities and debited the bank's account. What other books of account were kept by him does not appear. It is not possible on the evidence to ascertain that the overdraft outstanding on February 10, 1920, had been incurred on account of the piece-goods business or the money-lending business or any other business in particular: still less can it be said that any particular business got the benefit of the charity money. Unless it can be held that the plaintiff at the time of handing over the hundis authorised his uncle to borrow the money and use it as he chose—whether for buying property, lending money, dealing in piece-goods or any other business purpose, the appellant bank has not shown the authority of Subrahmanyam to make the transfer of February 10, 1920. The learned Chief Justice may have gone too far if his language was intended to exclude all possibility of investing money in a business by paying off a liability of the business. It would not be impossible to put a case in which a business in need of new stock or having occasion to acquire new premises paid for its requirements in the first instance by means of an overdraft. In such a case, a stranger finding money to discharge the overdraft might without difficulty be said to be investing money in the business. Their Lordships are not construing a document or even arriving at the terms of an oral bargain spoken to by reliable witnesses but are in the position of arriving at the facts of the case in the light of an admission made in the appellate Court; and they find it impossible to be satisfied that the discharge of an overdraft on this particular account comes within the scope or intention of any authority given by the plaintiff "to invest the trust funds in his own business". The disappearance of the money into this account would not among ordinary business men be deemed an "investment" of the money, and the appellant bank has not succeeded in showing that Subrahmanyam in February, 1920, acted within any authority given to him when the hundis were handed over.

The question of limitation has next to be considered. The claim against the appellant bank is not that a breach of trust was committed by it but that it took the trust property by a transaction with Subrahmanyam which was a breach of trust on his part and with notice that it was a breach of trust. Their Lordships are of opinion that art. 36 of the Indian Limitation Act does not apply to the case and that it comes under art. 120

which prescribes a period of six years from the time "when the right to sue accrues". The question is whether time began to run from February 10, 1920, or from the date in 1929 when the plaintiff came to know that the money of the charities was set off against Subrahmanyam's debt to the appellant bank upon his overdraft. The suit having been brought in 1933, it is necessary for the plaintiff to be able to calculate the time from the later date. The language of art. 120 makes no reference to the knowledge of the plaintiff and is in this respect in contrast to that of other articles, e.g., 90, 91, 92, 95, 96, 114. On the other hand it was recognised by the Board in *Bolo v. Koklan*<sup>1</sup> that an infringement of the plaintiff's right or at least a clear and unequivocal threat to infringe it is necessary before time begins to run against the plaintiff under the article. The appellate bench acted upon a principle which has been accepted as applicable to this article in a number of cases in several of the High Courts : *Venkateswara Iyer v. Mayandi Chettiar*,<sup>2</sup> *Viswanadhan v. Narayana Doss*,<sup>3</sup> *Lal Singh v. Jai Chand*,<sup>4</sup> *Mathura Singh v. Rama Rudra Prasad Sinha*,<sup>5</sup> *Basavayya v. Bapanna Row Sowcar*.<sup>6</sup> In the last mentioned case it was said that in cases in which the relief is sought on the ground of fraud, misconduct, mistake, etc., it would appear that limitation is made to commence from the time when the fraud, misconduct or mistake becomes known to the plaintiff. Such articles as 90, 91, 92, 95 and 96 were mentioned by way of illustration of this principle, and it was considered that art. 120 being an omnibus one the general expression employed in col. 3 is necessitated by the variety of suits coming within its purview, in some only of which would fraud, misconduct or mistake be part of the cause of action. It was accordingly held that it would be in consonance with the scheme of the Act if the right to sue should be deemed to accrue under art. 120 from the time of the plaintiff's knowledge of the fraud, misconduct or mistake where such a ground was the basis of the suit. Their Lordships can see some difficulties in this reasoning as a matter of interpretation of the language of the statute, and had the matter been *res integra*, they are not certain that this interpretation would have prevailed with them. But the decisions in India have established a rule of limitation under art. 120, by which the plaintiff in the cases to which the rule applies cannot be debarred of his remedy unless with knowledge of his rights he has been guilty of delay. The decisions which have been referred to were given in cases where the plaintiff sought to set aside a decree passed against him when a minor owing to the negligence of his guardian, or a mortgage of property which belonged not to the mortgagor but to a temple, or a transfer by a debtor to defeat his creditors. The subject-matter of the present suit is somewhat different, but their Lordships are prepared to follow the principle of the Indian decisions in the present case and to hold that the suit is within time.

It was suggested in the course of argument that the suit should only have been brought with the consent of the Advocate General under s. 92 of the Civil Procedure Code, but their Lordships think it clear that no such

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1 (1930) L. R. 57 I. A. 325,  
s. c. 32 Bom. L. R. 1596.

2 [1918] M. W. N. 244.

3 [1928] M. W. N. 415.

4 (1930) I. L. R. 12 Lah. 262.

5 (1935) I. L. R. 14 Pat. 824.

6 (1929) 58 M. L. J. 349.

P. C. consent is necessary in order that a trustee may recover trust property in the  
 1940 hands of a stranger to the trust. It was also contended that an account should  
 ~~~~~ have been taken as to the monies expended by Subrahmanyam upon the chari-  
 O. RM. O. M. ties up to the year 1924 after which he seems to have neglected them; but  
 SP. (FIRM) as no such point appears to have been taken in the High Court, their Lord-  
 v. ships do not think right to direct any such account. They will humbly advise  
 NAGAPPA His Majesty that the appeal should be dismissed. Respondent No. 1 enter-  
 CHETTIAR ed an appearance but no case was lodged for any of the respondents. Res-  
 ~~~~~ pondent No. 1 will get from the appellant firm such costs as he has incurred.  
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*Appeal dismissed.*

Solicitors for appellants : Hy. S. L. Polak & Co.

Solicitors for respondent No. 1 : T. L. Wilson & Co.

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[On appeal from the High Court of Judicature at Calcutta.]

*Present :*

VISCOUNT MAUGHAM, LORD WRIGHT and SIR GEORGE RANKIN.

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T. & J. BROCKLEBANK LTD.

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*v.*

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*Tort—Negligence—Shipowner—Responsibility of shipowner for health of crew—  
 Illness of crew—Duty of master and Chief Steward—Reasonable and proper  
 care—Doctrine of common employment—Whether this doctrine applies in India.*

The responsibility of a ship-owner in regard to the securing of the health and safety of the crew is in general limited to the exercise of reasonable care, though a higher degree of responsibility may be imposed on him by statute, in which case the duty is generally imposed in mandatory terms.

The plaintiff was serving as a lascar on board the defendants' steamship on a voyage from Calcutta to ports on the east coast of North America and the United Kingdom in September and October, 1933. The plaintiff fell ill near Gibraltar with a bad cold on September 18, 1933. He was given cough mixture by the Chief Steward with the approval of the Master and was put off duty. Subsequently at every port of call the plaintiff was examined by doctors, but as they declared that it was not a hospital case, he could not be removed to a hospital on shore. When the ship arrived at Avonmouth on the return voyage, the doctor diagnosed the plaintiff's illness to be advanced phthisis, and advised his removal to hospital. This was done on November 3, 1933. He was eventually after treatment sent back as a distressed seaman to India, where he was finally discharged. He sued the defendants for the negligence of the Master or the Chief Steward or both for not taking proper care in regard to the illness from which he suffered during the voyage. No breach of any statutory obligation under the Merchant Shipping Act, 1894, was alleged or proved. The High Court held that the Master and the Chief Steward had failed to take pro-



per care of the plaintiff when they knew that he had a bad cold and that the defendants were therefore responsible for the negligence of their two officers, and awarded Rs. 5,000 as damages to the plaintiff. On appeal by the defendants to the Judicial Committee of the Privy Council :—

*Held*, setting aside the decree of the High Court, that the shipowners were not personally guilty of any neglect or default ;

that no defects were found in the equipment of the vessel or in regard to the competence of the officers or to the system of working the ship ;

that, on the evidence in the case, the Master and Chief Steward did all that was possible for them to do under the circumstances ; and

that it had not been established that the Master and Chief Steward failed in their duty to the plaintiff and were careless or negligent in the matter of taking reasonable and proper care of him.

Under the law of England shipowners can raise a defence based on the doctrine of common employment to a claim by a seaman against them based on negligence of a fellow servant including in that category the Master of the vessel.

*Hedley v. Pinkney and Son's Steamship Company*,<sup>1</sup> referred to.

The basis of the doctrine of common employment is the implied contract by the servant to accept the risk of his fellow servants' negligence ; and if that contract is to be implied, the servants must be engaged in common work, that is work which necessarily and naturally or in the normal course involves juxtaposition, local or casual, of the fellow employees, and exposure to the risk of the negligence of the one affecting the other. Difference in grade and responsibility does not exclude the doctrine so long as the nexus exists.

*Radcliffe v. Ribble Motor Services, Ltd.*<sup>2</sup> and *Wilson v. Merry*,<sup>3</sup> referred to.

*Quere.* Whether the doctrine of common employment is part of the law of India.

Questions have been raised whether a doctrine so unsatisfactory both as to its policy and as to its practical results ought to be followed at all or at any rate without qualifications by the Indian Courts as a part of the law of India, particularly when in England it has been qualified and largely abrogated by legislation which has no counterpart in India.

*Radcliffe v. Ribble Motor Service Ltd.*<sup>2</sup>, *Wilson and Clyde Coal Co. v. English*,<sup>4</sup> and *Secretary of State v. Rukhminibai*,<sup>5</sup> referred to.

THIS was an appeal from the judgment and decree of the High Court of Judicature at Calcutta.

The facts appear fully in the judgment.

The question for determination in the appeal was whether the plaintiff-respondent was entitled to damages from the defendants-appellants for an illness from which he suffered while serving as a lascar on board the defendants' steamship *Markhor* on a voyage from Calcutta to ports on the east coast of North America and the United Kingdom in September and October, 1933.

Basing his calculations on his possible earnings up to the age of sixty-five, the plaintiff-respondent claimed damages in the sum of Rs. 19,000 together

1 [1894] A. C. 222.

2 [1939] A. C. 215.

3 (1868) L. R. 1 H. L. (s.c.) 326.

4 [1938] A. C. 57.

5 [1937] A. I. R. Nag. 354.

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with Rs. 1,000 for worry, and Rs. 500 as special damage, making a total of Rs. 20,500.

The trial Court allowed Rs. 1,500 for pain and suffering and special damage but disallowed the whole claim of Rs. 19,000 as adventitious and absurd.

The High Court (Guha and Mitter JJ.) on appeal reversed the judgment of the trial Court on the question of negligence of doctors, but they agreed in the finding of negligence against the Master and the Chief Steward. The High Court increased the sum of damages awarded to the plaintiff-respondent to Rs. 5,000.

The defendants appealed to His Majesty in Council.

*Justin Lynskey* and *Cyril Miller*, for the appellants.

*Nalini Ranjan Bhattacharya*, for the respondent.

LORD WRIGHT. This is an appeal from the amended decree of the High Court of Judicature at Fort William in Bengal (exercising its appellate civil jurisdiction), dated January 25, 1938, allowing an appeal and cross-appeal from a judgment and decree of the Subordinate Judge of the Fourth Court, 24 Parganas at Alipore, in Money Suit No. 96 of 1934 dated July 31, 1935.

The question for determination is whether or no the respondent is entitled to recover damages from the appellants in respect of an illness from which he suffered while, and since, serving as a lascar on board the appellants' steamship *Markhor* on a voyage from Calcutta to ports on the east coast of North America and the United Kingdom in and about the months of September and October, 1933.

The claim was for damages for the negligence of the Master or the Chief Steward of the *Markhor* or both of them for not taking proper steps to deal with the illness of the respondent. The action was originally brought not only against the appellants, but against the ship's agents at Calcutta, and also the Master and the Chief Steward. The action was brought in the Fourth Court of the Subordinate Judge at 24 Parganas at Alipore. In that Court the ship's agents were dismissed from the action, and so also were the Master and Chief Steward. But judgment was given against the appellants for Rs. 1,500 for pain and suffering and special damage. The total claim had been for not only Rs. 1,500 for pain and suffering and special damage, but a further Rs. 19,000 for general damages. The Subordinate Judge dismissed that latter claim as adventitious and absurd. Before the High Court there were appeals and cross-appeals. The appeals against the Master and Chief Steward were not proceeded with and these parties went out of the proceedings. The High Court upheld the judgment of the Subordinate Judge in so far as the Court held the appellants liable in damages, but did so on quite different grounds from those on which the Subordinate Judge gave his judgment. On the respondent's cross-appeal on damages the High Court held that the sum awarded by the Subordinate Judge was inadequate and increased the award to Rs. 5,000.

The grounds of claim were originally twofold. But one of these grounds was negatived by both Courts below. It depended on an issue of fact, and in their Lordships' opinion the concurrent finding of fact should stand. That ground of claim was based on the terms of the statutory articles of agreement

under which the appellant agreed to serve on the *Markhor*. One of the provisions of the articles was that the lascar crew (which included the respondent) should not serve between October 1 in any one year and March 31 in the next year on voyages to any port on the east coast of North America north of 38°N. latitude. The respondent claimed that that provision had been broken. The appellants' witnesses denied that any lascars (including the respondent) had worked in contravention of that provision. The Judges in both Courts accepted the evidence called on behalf of the appellants, which was supported by entries in the official log book. This ground of claim accordingly failed, and need not be further considered

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The other ground of complaint was that there had been a failure on the part of the Master and Chief Steward to exercise proper care in regard to the illness from which the respondent suffered during the voyage. The voyage on which the respondent was engaged was from Calcutta to Atlantic ports in North America. The respondent fell ill near Gibraltar, on or about September 18, 1933, with a bad cold. He did not do any further work on the vessel till he was discharged on November 3, 1933, at Avonmouth, where the doctor diagnosed the illness from which he was suffering to be phthisis, and advised his removal to hospital. This was done. He was eventually after treatment sent back to India as a distressed seaman, where he was finally discharged. The medical officer at Avonmouth gave a certificate that the respondent was suffering from advanced phthisis. It is not disputed that the respondent's health has since been very bad.

After the respondent fell ill, the ship reached ports in America and England as follow :-

|              |    |    |               |
|--------------|----|----|---------------|
| November 3   | .. | .. | Avonmouth.    |
| October 30   | .. | .. | Southampton.  |
| October 29   | .. | .. | London.       |
| October 16   | .. | .. | Boston.       |
| October 14   | .. | .. | New York.     |
| October 11   | .. | .. | Newport News. |
| October 10   | .. | .. | Norfolk, Va.  |
| October 7    | .. | .. | Baltimore.    |
| October 5    | .. | .. | Philadelphia. |
| October 2    | .. | .. | New York.     |
| September 28 | .. | .. | Boston.       |

There was a serious variance between the respondent's account of what happened on the voyage and that given by the appellants' witnesses. But in substance the Judges in both Courts accepted the evidence of the witnesses called by the appellants, which may be thus summarised.

When the respondent fell ill, he was, with the approval of the Master, given cough mixture by the Chief Steward, whose duty it was to administer medical attention to sick members of the crew. About the same time warm clothing was issued to all the deck lascars, including the respondent. When the ship reached Boston on September 28, 1933, there was a special muster of the crew for the United States quarantine authorities, and the respondent was examined by the Port Medical Officer, on whose advice he was put on a diet of eggs and milk, and was given medicine and codliver oil. At every subsequent port of call the respondent was examined by

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doctors habitually employed by the appellants. At Philadelphia and Norfolk the Master (according to his evidence) requested the doctors to have the respondent removed to hospital, but they each said that it was not a hospital case. Without the authority of a doctor the respondent could not be removed to a hospital on shore. On the second call at Boston the doctor gave the respondent enough codliver oil for the voyage to London, and at London the doctor who examined the respondent gave him turpentine liniment for massaging his throat and chest. There is a conflict of evidence as to whether there was a medical examination of the respondent at London. The Chief Steward deposed that there was, but the Master denied this. This last question cannot be regarded as very material, as it was only a very few days between the time when the ship was at London and her arrival at Avonmouth, where, as already stated, on the advice of the doctor who, in accordance with the practice of the appellants, examined the respondent, and who diagnosed phthisis, he was removed to hospital.

The Subordinate Judge held the appellants responsible to the respondent in damages on the ground that the cause of the respondent's damage was the negligence of the doctors engaged by the appellants at the various ports of call in not diagnosing the respondent's condition as tubercular or indeed as anything worse than a common cold. But negligence on the part of these doctors was not pleaded as a cause of action, and no evidence was given on the point. Neither they nor the appellants had any opportunity of answering such a case. No evidence was given as to the relationship between the doctors at the various ports and the appellants. There is nothing in the evidence to justify the conclusion that the doctors were negligent or that even if they were negligent, the appellants were responsible for that negligence. The High Court rightly reversed the finding of the Subordinate Judge on that point.

But the High Court held that the appellants were responsible for the negligence of the Master and Chief Steward which the Court found. The Court held that the Master and Chief Steward had failed to take proper care of the respondent when they knew he had a bad cold. The High Court expressed their opinion in these words :—

"... We have no hesitation in expressing our concurrence with the view indicated in the judgment of the Court below, that the defendant No. 3 should have in view of the prolonged illness of the plaintiff, suspected something serious with the plaintiff, and to that has to be added that the negligence in this behalf was fully shared by the Chief Steward, whose duty was to look after the ailing crew on board the ship. In our judgment, the Chief Steward, charged with the duty of attending to complaints in cases of sickness, and the Master of the vessel, who, by the very nature of things, exercised the functions of the owners of the ship when on high seas, for the purpose of looking after the health and safety of the crew employed on the ship, were careless and negligent in the matter of taking reasonable and proper care of the plaintiff in his illness, which within the period of time from September 18, to November 3, 1933, had developed into an advanced case of phthisis. The plaintiff, on account of the omission on the part of the servants of defendant No. 1 had been placed in a position of risk of life. If the life of the plaintiff has been saved, he has, according to medical evidence, been incapacitated from doing work for the rest of his life."

Their Lordships, after carefully considering the evidence, have found themselves unable to concur in this view.

There is a want of authority as to the precise extent of the duty of a shipowner in regard to the securing of the health and safety of the crew. But the responsibility of the owner in these respects is in general limited to the exercise of reasonable care, though a higher degree of responsibility may be imposed on him by statute, in which case the duty is generally imposed in mandatory terms. In *Couch v. Steel*<sup>1</sup> the allegation was that the seaman had suffered in health and become ill because of the unseaworthy and leaking condition of the ship, by reason of which he was continually wet and was compelled to undergo excessive and unreasonable labour. The seaman's claim was rejected. It could only, it was held, be maintained in the absence of proof of an express warranty or of knowledge or want of due care, if there was an implied warranty by the shipowner to the seaman that the ship was seaworthy. But the warranty of seaworthiness which is implied, where not excluded in marine insurance policies of bills of lading, is not, it was held in *Couch v. Steel* (*supra*), to be implied in agreements between shipowners and seamen, though it may be in some cases imposed by statute. But there was in that case a second count alleging that the plaintiff could not be cured of his illness because the shipowner, the defendant, had neglected to provide a proper supply of medicines suitable to diseases arising on sea voyages. That claim was based on a statutory obligation laid upon the defendant by s. 18, 7 & 8 Vic. c. 112. This, it was held, was not an obligation which could be fulfilled by the exercise of care but was positive in its terms. The plaintiff was accordingly held entitled to recover on that count on proof that a proper supply had not in fact been provided. A similar provision is now contained in s. 200 of the Merchant Shipping Act, 1894. There are also various other provisions in the Act dealing with medical attendance. Thus s. 209 provides that a foreign-going ship is to carry a fully qualified medical practitioner if she has on board one hundred persons or upwards. Again, s. 458 puts on a shipowner an obligation which is to be deemed to be part of the agreement with the seamen that he should use all reasonable means to ensure that the ship is seaworthy when the voyage commences and to keep her seaworthy during the voyage. In the present case there is no claim that any of these statutory obligations have been infringed. The *Markhor* carried less than one hundred persons. It is not suggested that she was unseaworthy in any respect, or that she was not equipped with medical stores or did not in any other respects satisfy the requirements of the Act. Section 34 of the Merchant Shipping Act, 1906, requires that all expenses of medical attendance and all expenses of medicines on the voyage are to be defrayed by the shipowner. There is no complaint on this head.

The ground on which the High Court held the appellants liable was for breach of their common law obligations which were for purposes of this case taken to be to require the exercise of due care in attending to and looking after the health of the seaman by themselves and their servants. The shipowners were not held to have been personally guilty of any neglect or default. No defects were found in the equipment of the vessel or in regard to the competence of the officers or to the system of working the ship. The negli-

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gence which was found was purely that of the Master and the Chief Steward, as stated in the passage just quoted from the judgment of the High Court. Their Lordships, after carefully considering the whole of the evidence, find themselves unable to concur in the judgment of the High Court. There was, in their opinion, no evidence which would justify a finding that the Master and Chief Steward or either of them were careless or negligent in the matter of taking reasonable and proper care of the respondent. On the contrary, their Lordships are of opinion that on the evidence the two officers did all that was possible for them to do under the circumstances. The only other thing that might have been done was to land the respondent and put him in hospital at one of the United States ports. But that could not have been done unless the terms of s. 36 of the Merchant Shipping Act, 1906, were satisfied, that is that a certificate of the proper authority, who was, under s. 49, in this case, the British Consular Officer, had been obtained, stating the cause of the seaman being left behind, as, for instance, unfitness or inability to proceed to sea. Furthermore, the Immigration Authorities in the United States would not allow a seaman to be landed at their ports unless for sufficient grounds. The evidence is that the Master, both at Philadelphia and Norfolk, requested the doctors who examined the respondent to have him removed to hospital, but they said that it was not a hospital case. All that the Master could do was to follow the directions of the different medical men who examined the respondent at the different ports, and to supply him with the special diet, eggs and milk, and the special remedies, codliver oil and liniment, which were prescribed. The respondent was off duty all the time after September 18, 1933. There is no reason to hold that the Master did not suspect that something serious was the matter with the respondent. He did all that could be done on the ship. The difficulty was that the medical officers at the various ports would not certify that it was a hospital case. The Master and Chief Steward could not be held blameworthy for that.

There was no satisfactory medical evidence as to the general nature and symptoms of phthisis or as to the development of the disease in this case.

Their Lordships are of opinion that the claim fails and that the judgment of the High Court should be set aside because it has not been established that the Master and Chief Steward or either of them failed in their duty to the respondent.

This conclusion is sufficient to dispose of the case against the appellants, but in the High Court the appellants raised a further defence based on the doctrine of common employment. It was said that even if the Master and Chief Steward were negligent, they were fellow servants of the respondent and hence the appellants were entitled to plead common employment as a defence. This question was first raised in the High Court. It was not raised either in the written statement filed in the suit, or at the hearing before the Subordinate Judge. As their Lordships understand the judgment of the High Court on this point, they were of opinion that as the decision of the question depended on evidence in the particular case, it could not be allowed to be argued in face of objections to that course made by the respondent. Their Lordships are not willing to overrule the discretion of the High Court on this point. There is also now the further and conclusive objection that as

their Lordships have decided that the Master and Chief Steward were not guilty of negligence, the point would not in any event have been material.

Their Lordships might leave the matter there. But the High Court, though, it seems, without departing from their decision that the point was not open to the appellants, did go on to make some observations on the doctrine of common employment. Their Lordships do not think it proper in this case to examine in any detail this doctrine or its applicability in the law of India. But they will remark that if the law of England had applied, the shipowners could have raised a defence based on the doctrine of common employment to a claim by a seaman against them based on negligence of a fellow servant, including in that category the Master of the vessel. Such a claim was rejected on that ground by the House of Lords in *Hedley v. Pinkney and Son's Steamship Company*.<sup>1</sup> Lord Herschell, at p. 226, said :—

"My Lords, it cannot be doubted that there was evidence of negligence on the part of the master of the vessel, but it is equally free from doubt that if he is to be regarded as the servant of the owner engaged in a common employment with the seaman who lost his life, liability does not, in the existing state of the law, attach to the respondents. It was argued that the master of a vessel, although in some respects the servant of the shipowner, possesses in relation to the crew powers and duties independent of him, and that the law which exempts a master from liability to his servant for the negligence of another servant engaged in a common employment with him did not apply in such a case.

"The only authority cited for this proposition was a case of *Ramsay v. Quinn*,<sup>2</sup> in the Court of Common Pleas (Ireland). But in view of the judgment of this House in *Wilson v. Merry*,<sup>3</sup> which was recently considered in the case of *Johnson v. Lindsay*,<sup>4</sup> I do not think it is possible to give effect to the contention of the appellant."

The House then went on to consider an alternative claim based not on negligence but on a breach of the statutory obligation of the shipowner to provide a seaworthy ship. That claim did not depend on negligence in the ordinary sense and the doctrine of common employment did not apply. But it failed because the House held that the ship was not in fact unseaworthy. There has recently been in the House of Lords a discussion of the doctrine in *Radcliffe v. Ribble Motor Services, Ltd.*,<sup>5</sup> where it was held that the basis of the doctrine was the implied contract by the servant to accept the risk of his fellow servants' negligence (see Lord Atkin at p. 227), and that if the contract was to be implied, the servants must be engaged in common work, that is, work which necessarily and naturally or in the normal course involves juxtaposition, local or causal, of the fellow employees, and exposure to the risk of the negligence of the one affecting the other. It was held in *Radcliffe's* case (*supra*) that this condition was not fulfilled. But *Hedley's* case (*supra*) shows that difference in grade and responsibility does not exclude the doctrine, so long as the nexus exists. Similarly in *Wilson v. Merry*,<sup>6</sup> it was held that there was common employment between a miner and a works manager of the mine.

But there is a serious question whether the doctrine of common employment is part of the law of India. It has been severely criticised in England by

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1 [1894] A. C. 222.

2 (1874) 8 Ir. R. C. L. 322.

3 (1868) L. R. 1 H. L. s.c. 326.

4 [1891] A. C. 371.

5 [1939] A. C. 215.

6 (1868) L. R. 1 H. L. s.c. 326.

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many high judicial authorities, as, for instance, in *Radcliffe's* case, *Wilsons and Clyde Coal Co. v. English*<sup>1</sup> and in many other judgments. It has indeed in England only been made enduring by reason of legislative measures. Thus the Employers Liability Act, 1880, established exceptions to its application, though with restrictions as to mode of procedure and amount of damages recoverable which made the Act unsatisfactory. Later there came the series of Workmen's Compensation Acts commencing with that of 1897 which have given the workman rights against his employer in the nature of insurance against the risk of injury arising out of and in the course of his employment apart from negligence. These measures have made the doctrine of common employment less objectionable in England. In addition the doctrine does not apply to claims by workmen for injuries caused by breaches of statutory duties imposed for their protection or for breach of duties personal to the employer. Questions have been raised whether a doctrine so unsatisfactory both as to its policy and as to its practical results ought to be followed at all or at any rate without qualifications by the Indian Courts as a part of the law of India, particularly when in England it has been qualified and largely abrogated by legislation which has no counterpart in India. Thus in *Secretary of State v. Rukhminibai*,<sup>2</sup> Stone C. J., in the Nagpur High Court, refused to apply it. It may further be observed that the fiction of an implied contract has always been regarded as difficult, but it becomes even more difficult to accept in the case of a workman like a lascar. But their Lordships do not desire to discuss or express any opinion upon this important question since it does not arise in this case. It must be left for full discussion in some case in which it is material and has been fully argued.

In the result they are of opinion that the appeal should be allowed, the judgments below should be set aside and judgment should be entered for the appellants.

They will humbly so advise His Majesty.

In the circumstances there will be no order respecting costs either in the Courts below or of this appeal.

*Appeal allowed.*

Solicitors for appellants : *Hill Dickinson & Co.*

Solicitor for respondent : *Harold Shephard.*



[On appeal from the High Court of Judicature at Rangoon.]

Present :

LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON, AND  
MR. M. R. JAYAKAR.

S. R. M. C. T. S. S. P. A. CHETTYAR FIRM

v.

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July 8.

*Provincial Insolvency Act (V of 1920), Sec. 53—Fraudulent transfer—Good faith—Power of attorney, scope of.*

Where the agent of a creditor, taking advantage of the dominating position he holds, seizes the title-deeds of the debtor, with the view of taking hold of as much property as he can get, regardless of the solvency of the debtor or the claims of other creditors, whom he puts off by a false assurance that their money is safe, the transaction is entirely devoid of the element of good faith, which is a necessary ingredient of the provisions of s. 53 of the Provincial Insolvency Act, 1920, and is liable to be avoided under the section.

A person holding a power-of-attorney, which authorises him to appoint a substitute, is not at liberty to authorise a stranger orally to mortgage the property of the principal.

THE facts appear sufficiently from the judgment.

*J. P. Eddy and W. Wallach*, for the appellants.

*H. J. Wallington and R. W. Leach*, for the respondent.

MR. M. R. JAYAKAR. The question raised by this appeal is whether a mortgage by deposit of deeds made in favour of the appellants within two years of an adjudication in insolvency under circumstances mentioned below was voidable against the respondent (the receiver of the insolvent's estate) under s. 53 of the Provincial Insolvency Act, 1920. The District Court held that it was not voidable, and the appellate Court that it was.

The material portion of s. 53 is as follows :—

"Any transfer of property not being a transfer made . . . in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court."

The insolvent, L. M. R. S. M. Somasundaram Chettyar, carried on business as Chettyar at Kyaikto in the district of Thaton in Burma. In 1931, he left Burma for India. The business was then carried on by his son-in-law Swaminathan, under a power of attorney dated June 29, 1928 (exhibit 3a). In May, 1932, Swaminathan also went to India, leaving the business in charge of the insolvent's son Valliappa, who was then a minor under the age of eighteen years.

The appellants' firm carried on the business of money lending at Rangoon. Between 1928 and 1931, the insolvent was their agent, and for a period before 1928, and again for a period after 1931 (which includes the times material to this appeal) their agent was one Arunachalam.

P. C. On April 13, 1933, the insolvent owed to the appellants' firm the sum of  
 1940 Rs. 25,942-13-6. On that date, one Nagalingam, an employee of the insolvent's firm, handed over to Arunachalam documents of title to about 560 acres of land owned by the insolvent and valued at Rs. 67,000, and also registered mortgage deeds valued at Rs. 12,000, making a total value of Rs. 79,000.  
 CHETTYAR FIRM v. U ON MAUNG This is the transaction in issue in the appeal.

Mr. Jayakar On September 26, 1933, a petition for the adjudication of the insolvent was presented by a creditor in the District Court of Thaton, and on August 14, 1934, an order of adjudication was made against the insolvent. In an inventory filed in the Court thereafter, the insolvent's properties were shown as of the total acreage of 739, and of the value of Rs. 1,06,078-3-0. The list of debts owed to him were of the total amount of Rs. 66,907-7-9. Thus his total assets were of the estimated value of Rs. 1,72,985. His total liabilities, on the other hand, were shown as of the value of Rs. 1,78,655. In the list of creditors the appellants' firm was shown as a creditor, claiming as security for the debt owing to it (Rs. 25,942-13-6) an equitable mortgage of the lands and mortgage bonds mentioned above.

On May 10, 1935, the respondent was appointed receiver of the insolvent's property under s. 59 of the Act, and on August 26, 1935, the respondent instituted the present suit in the District Court of Thaton by a petition praying that the appellants' mortgage might be held null and void. He alleged that at the date of the mortgage the insolvent was not in Burma and was not duly represented by an agent; that the mortgage was a fraudulent and a sham transaction entered into by collusion between Arunachalam and Nagalingam with a view to defeat and delay other creditors; that the mortgage was not validly created and was void, and if it was created in Rangoon, it was equally void, as the mortgagor did not create it and his agent Nagalingam was not duly authorised by a proper power of attorney. The respondent's petition did not expressly raise the issue that any authority to create the mortgage which the insolvent might have given to Nagalingam was terminated by the insolvent's subsequent insanity, which existed at the material date. It appears, however, that both parties led evidence about the insolvent's state of mind.

By their written statement the appellants denied the allegations of law and fact made in the petition, except that they admitted that the title deeds in issue were in deposit with them and that the insolvent was not in Burma at the time. Evidence was led on both sides, some of which was on commission.

On December 5, 1936, the District Judge decided in favour of the appellants, holding that the evidence did not show that the transfer was either fraudulent or without consideration. He disallowed the allegation of insanity on the ground that it was not taken in the receiver's petition, and held that the evidence was not sufficiently strong in its favour. He further held that Nagalingam was the agent of the insolvent and deposited the deeds under a power of attorney obtained from Swaminathan, authorising him to do so. Their Lordships have derived very little help from the judgment of the District Judge, which is a mere abstract of the depositions, and contains no discussion of the evidence or of the reasons which led him to his conclu-

sions. This may be due to the fact that, as the High Court observes, the judge was ill at the time, suffering from a nervous breakdown, and had soon to be relieved of his duties. Some of the important witnesses were examined on commission and he had not the benefit of hearing their evidence given, nor of an argument addressed in open Court by the respondent's counsel, who submitted only a written note, which, the judge said, it was difficult for him to understand.

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The respondent filed an appeal to the High Court at Rangoon, and Goodman Roberts C. J., who delivered the judgment of the Court, set aside the order of the District Court. He held that though the burden of proof lay on the receiver, he had discharged it by showing that Nagalingam had no power to make the transfer; that the alleged power of attorney in his favour was not proved, and that even if Nagalingam had authority to make the transfer, it was terminated by the insanity of the insolvent. He further held that the evidence clearly showed that Arunachalam had stepped in to manage the insolvent's business when there was no effective manager, taking good care that creditors in whom he was interested should be given security and the rest excluded, and that Nagalingam, who was a mere debt-collecting clerk, was "seized upon to go through the farce of pretending to execute" the mortgage, and that there was an entire absence of good faith. The High Court accordingly passed a decree setting aside the order of the District Court and declaring that the mortgage was null and void against the respondent. From this decree an appeal has been preferred to His Majesty in Council.

The questions which arise for decision are, first, whether it is proved that Nagalingam had authority to make the transfer. The appellants urge that the onus of disproving this lay on the respondent, who, on the other hand, contends that the properties transferred admittedly belonged to the insolvent, and were found to be in the possession of the appellants. The latter, therefore, had to prove how they had come by them, as against the respondent, who was trying to secure them as belonging to the insolvent's estate. The appellants' possession of the said properties did not necessarily indicate that they held them under a valid title, which had to be made out by affirmative evidence. The onus, therefore, it was urged, lay in the first instance, on the appellants to prove their title to the said properties.

Their Lordships think that there is great force in this contention. There was nothing in the shape of a memorandum of deposit or any document indicating how and when the deeds had come into the possession of the appellants. Their possession was obtained at a time and under circumstances showing that the insolvent himself could not have delivered them, and, as this was clearly established by the evidence, the appellants could retain the deeds only by showing that they had obtained them from someone acting on behalf of the insolvent and under his authority. The only person alleged to have had this authority was Nagalingam and, though he was available as a witness and was present in Court, he was not called by the appellants to give evidence. An alleged power of attorney given to him by Swaminathan on June 30, 1928, was relied upon, but there is no satisfactory evidence that such a power of attorney existed or was operative at the material date. The evidence shows that the document, if it existed, would be with Nagalingam. It was alleged

P. C. on the appellants' behalf that the document was with the insolvent in India,  
 1940 but of this there is no satisfactory proof. A notice to produce the document  
 — was served upon the son of the insolvent, but it was not produced. Second-  
 CHETTYAR ary evidence was therefore given of the contents of the alleged power by call-  
 FIRM ing one Mr. Daniel, a lawyer, who had occasion, in connection with the case  
 v. of another client, to examine the contents of the alleged power. He clearly  
 U ON MAUNG stated that the power which was shown to him did not give to Nagalingam  
 — any right to mortgage the property. The witness Karuppan also produced  
 Mr. Jayakar a document (exhibit K), which he stated was a copy of the alleged power  
 — given to Nagalingam. Exhibit K is dated June 30, 1928, a day later than  
 the date of exhibit 3a, and the number 28 which it bears identifies it with  
 the document mentioned in exhibit 6 (certified copy of the extract from the  
 register of powers) on which the appellants rely. On an examination of the  
 contents of exhibit K, however, it is clear that it gives no authority to make  
 a mortgage of the insolvent's property. To meet this difficulty, Arunachalam,  
 called for the appellants, relied in his evidence on another document, exhibit  
 3b, which he said was an exact copy of Swaminathan's power (exhibit 3a)  
 made on the same date, namely June 29, 1928. This is obviously incorrect,  
 because it is clearly stated at the bottom of exhibit 3b that the copy was  
 made on April 27, 1933.

It is thus clear that the power of attorney by which Swaminathan is alleged  
 to have given authority to Nagalingam to make the mortgage on April 13,  
 1933, has not been proved. Besides, the existence of such a power in 1928  
 would be totally inconsistent with exhibit 2a (read along with exhibit 1a)  
 which is a letter written by Swaminathan on May 12, 1932, stating that as  
 he was leaving for the country by the next day the letter was given as an  
 authority to Nagalingam to carry on debit and credit transactions as per  
 instructions.

Their Lordships are, therefore, of opinion that, in the absence of such a  
 power, the mortgage in question must fail. The appellants argued that the  
 absence of this power made no difference, because the evidence clearly showed  
 that Nagalingam was managing the insolvent's business and that Swami-  
 nathan, who had authority under exhibit 3a to appoint a substitute, exercised  
 the authority by giving oral instructions to Nagalingam to make the mort-  
 gage. It is hardly necessary to observe that this view cannot be sustained  
 on the wording of exhibit 3a. By that document the insolvent gave power  
 to Swaminathan to appoint a substitute and not to authorise a stranger orally  
 to mortgage the insolvent's property.

There is a further difficulty in the appellants' way, caused by the alleged  
 insanity of the insolvent at the material date. If it existed, then, under  
 s. 201 of the Indian Contract Act (1872) it would terminate any authority  
 previously given. Their Lordships have examined the evidence and they  
 think that there is satisfactory proof to support the finding of the High Court  
 that the insanity existed at the material time. The witness Kadiresan, exa-  
 mined on the respondent's behalf, states, and their Lordships see no reason  
 to doubt his testimony, that the insolvent was insane in February, March  
 and April, 1933. This is corroborated by other evidence, including that of a  
 medical witness (No. 17) who attended the insolvent between March 7 and

11, 1933, and found him insane and violent. There is also an affidavit sworn by the insolvent on October 3, 1933, in which he states that he suddenly became insane and remained so for about six months, and even at the date of the affidavit he was not completely free from the effects of insanity. Lastly, there are exhibits C.1 and C.2, the Commissioner's report and memo. dated March 14, 1933, made in the course of the insolvency proceedings, initiated against the insolvent by another creditor at Devacottai, in which it is clearly stated that the insolvent's vakil informed the Commissioner on March 11, that the insolvent, who was to be examined as a witness, was suffering from mental derangement and could not, therefore, be examined.

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The insanity is denied by Arunachalam, who was called as a witness on behalf of the appellants. Before commenting on his evidence, it is material to observe that this witness occupied a very dubious position in these proceedings. Though he was an agent of the appellants' firm from and after 1931, it appears from the evidence that, at or about the material time, he was also in effective control and management of the insolvent's firm and practically in a position to dominate its affairs. In support of this view, there is enough evidence on the record, some of which may be briefly noticed. Witnesses Nos. 13, 15 and 16 examined before the Court on behalf of the receiver, and witnesses Nos. 18, 19 and 20 examined on commission, clearly testify to the dominating position which Arunachalam held in connection with the conduct of the insolvent's business at or about the material times. Their testimony is corroborated by a letter (exhibit E) written by Arunachalam to Nagalingam on September 17, 1933, directing him, with reference to another creditor of the insolvent's firm, to show the creditor the accounts and bring and deliver at Rangoon, by way of security, a good document acceptable to him. The petitioning creditor in his evidence states that this letter was given to him and this also accords with the probabilities. Arunachalam denied that he gave such a letter. On such denial, the respondent asked the Court for an order calling upon the appellants to produce the press copy book of correspondence from April, 1932, to December, 1933. The judge made the order but the press copy book was not produced on the ground that the book was in India. There is another letter which confirms the above view, namely exhibit 1 (English translation 1a) which has already been referred to in another connection. It is the letter written by Swaminathan giving directions to Nagalingam to carry on debit and credit transactions as per his instructions. Arunachalam admits that the draft of this letter is in his handwriting, and Swaminathan states that he wrote this letter under the instructions of Arunachalam. If, as this evidence shows, Arunachalam was in effective control and management of the insolvent's business at the material date, it is futile to contend that he was ignorant of the debtor's insanity or insolvency.

The third question relates to the good faith of the transaction. Here also their Lordships agree with the finding of the High Court. On this question it is not easy to disregard the fact that the disputed transaction was not an isolated one but formed one of a series, and further, as the judgment of the High Court states, a relationship existed between Arunachalam and the appellants and also between him and the creditors preferred in some of the other

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transactions. Apart from this, there is enough evidence to prove that the transaction was a collusive one between Arunachalam and Nagalingam. Even if the fact is ignored that for a debt of Rs. 25,942 the appellants obtained title deeds to property worth Rs. 79,000, the method in which the transaction was brought about is amply suggestive of bad faith and also of the fact that Arunachalam, though aware of the insolvent condition of the debtor, took care to conceal it from the other creditors. The denials of Arunachalam in this behalf are palpably false and on one or two points on which he could have easily admitted the truth he has prevaricated. Their Lordships, therefore, prefer to accept the testimony of Subramaniam and Kadiresan that when they asked for securities from the insolvent's firm as regards their dues, Arunachalam assured them, apparently on behalf of the insolvent, that there was no need to fear and that the matter would be settled. Arunachalam appears to have been examined virtually to deny all matters which were adverse to the appellants' claim, and has proved himself unworthy of credit. His version about having exhibits 3a and 3b before him at the same time and his copying the one from the other, to which reference has already been made, has to be rejected having regard to the dates. Further, his own version of the manner in which the title deeds in question were obtained exposes the true nature of the transaction. Briefly stated, his evidence is that on one and the same day, from morning till evening, all the documents were handed over to him in three lots. He had not looked into the accounts and other matters relating to the documents, although the ledgers were produced by Nagalingam. Nagalingam came alone, without the insolvent's son. Arunachalam never saw the properties at the time of taking the deposit. He took whatever deeds he thought to be good, and returned the rest. This was done in the kitchen room. He never enquired what the debts were which the insolvent owed to other creditors. He only asked for his firm's (appellants') dues, without ascertaining what the assets and the liabilities of the insolvent were. He had not ascertained them even at the date of his cross-examination (July 4, 1936).

It is clear from this evidence that by the use of his dominating position he seized the title deeds, with the view of taking hold of as much property as he could get, regardless of the solvency of the debtor or the claims of the other creditors, whom he put off by a false assurance that their money was safe. Such a transaction must be held to be entirely devoid of the element of good faith, which is a necessary ingredient of the provisions of s. 53 of the Act.

Their Lordships are, therefore, of opinion that, on each of these grounds, the transaction in dispute must fail. The decree of the High Court will, therefore, be confirmed, and the appeal dismissed. The appellants will pay the respondent's costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

*Appeal dismissed.*

Solicitors for appellants : *Lambert & White.*

Solicitors for respondents : *Gard Lyell & Co.*

[On appeal from the Chief Court of Oudh, Lucknow.]

Present :

LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON AND  
MR. M. R. JAYAKAR.

BABU NISAR AHMAD KHAN

v.

BABU RAJA MOHAN MANUCHA

BABU RAJA MOHAN MANUCHA

v.

BABU NISAR AHMAD KHAN.

1940

July 18:

*Mortgage—Personal covenant to pay—Limitation—Indian Limitation Act (IX of 1908), Art. 116—Mortgage deed executed in course of execution proceedings—Permission of Collector not obtained as required by sch. III, para. 11, Civil Procedure Code (Act V of 1908)—Deed whether null and void—Applicability of s. 65 of the Indian Contract Act (IX of 1872)—Personal liability in respect of such transaction—Transaction of mortgage between legal adviser and client—Scrutiny by Court—Circumstances under which such transaction is valid—Joint Hindu family—Presumption, whether such family has joint property.*

A personal covenant to pay contained in a registered mortgage deed is governed by art. 116 of the Indian Limitation Act, 1908.

A deed of mortgage effected in the course of execution proceedings before a Collector without his permission, as required by sch. III, para. 11, of the Civil Procedure Code, 1908, is null and void. Such a deed falls within the words "discovered to be void" in s. 65 of the Indian Contract Act, 1872. The mortgage, however, stands in respect of the personal liability for the money actually paid, with proper interest thereon. If the loan is bona fide and is actually received and the terms are not unreasonable, the mortgagee is entitled to receive payment of whatever may be due on the mortgage, with interest thereon at reasonable rate.

Transactions of mortgage between a legal adviser and client to secure the repayment of money advanced at the time are not ordinarily subjected by Courts to the same jealous scrutiny as, for instance, a gift from a client to a legal adviser, or purchases or sales at undervalue between a legal adviser and client. If the money is sorely needed and is paid, the mortgagor has its benefit, the rate of interest is reasonable, and the terms neither excessive nor onerous, the transaction stands as a valid mortgage between the parties.

In the case of a joint Hindu family there is no presumption that it possesses joint property or any property at all. There must be affirmative evidence to show that the family has property.

THIS was an appeal from the judgment and decree of the Chief Court of Oudh, Lucknow.

The facts appear fully in their Lordships' judgment.

J. P. Eddy K. C. and H. D. Cornish, for the appellant.

R. F. Roxburgh K. C. and L. M. Jopling, for the respondents.

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—

MR. M. R. JAYAKAR. These proceedings arise out of two mortgage deeds exhibits 3 and 5 executed on January 18, 1919, and August 14, 1919, respectively. The respondents' father Motilal was the mortgagee and the appellant's father Yar Mohammad Khan the mortgagor.

The events which led to the present litigation are as follows—

By a mortgage deed dated July 8, 1908, Mohammad Ewaz Ali Khan, the appellant's grandfather, who was the taluqdar of Mahona, District Sultanpur, in Oudh, mortgaged his estate, consisting of twenty-six villages, to the Allahabad Bank, Limited, for securing payment of a sum of Rs. 1,50,000 with compound interest at the rate of seven per cent. per annum with half-yearly rests. In 1914, the bank instituted a suit against the mortgagor and certain transferees from him, including his wife Saifuran Bibi, and on April 12, 1915, a preliminary decree was passed for Rs. 1,77,001-13-9 with interest and costs, to be paid by October 12, 1915, and, in default, the mortgaged property was to be sold. On July 24, 1915, the mortgagor died and his son Yar Mohammad Khan succeeded to the taluqa. On June 17, 1916, a final decree was passed for the amount of Rs. 2,05,382-12-6 against Yar Mohammad Khan and others. The bank instituted proceedings for executing the decree in the Court of the Subordinate Judge at Sultanpur, who, on February 5, 1917, transferred the case to the Court of the Deputy Commissioner at Sultanpur for execution under the provisions of s. 68 of the Civil Procedure Code, 1908. It may be noted that the Deputy Commissioner had the powers of a Collector under that section.

On March 6, 1918, Yar Mohammad Khan applied to the Deputy Commissioner for leave to pay the decretal amount by instalments or under some other arrangement intended to save the estate. Thereupon, a revenue officer, called the sale officer, reported to the Deputy Commissioner on June 11, 1918, that the debt could be discharged either by taking the property into direct management or by mortgaging or letting it in perpetuity. Inquiries about the last two alternatives were then instituted by the Deputy Commissioner. Consequent on this, applications were made before the Deputy Commissioner by various persons, offering to lease the property or suggesting arrangements under which the debt could be paid off.

On September 11, 1918, Yar Mohammad Khan, by a power-of-attorney signed by his general agent Sahib Rai, appointed Manoharlal, a well-known pleader of Fyzabad, his vakil in the execution proceedings. On the same day, when the matter came before the Deputy Commissioner, Yar Mohammad Khan was represented by three pleaders, including Manoharlal, and also by his general agent, Sahib Rai; and the various persons who desired to lease the property were represented by vakils. A statement of Sahib Rai was recorded, and by an order of this date the application of Yar Mohammad Khan for permission to mortgage the property was granted.

Thereupon, Motilal, the son of Manoharlal, paid Rs. 1,50,000 into Court and twenty villages out of the twenty-six were mortgaged to him by Yar Mohammad Khan by a document of January 18, 1919, exhibit 3, to secure payment of the sum with compound interest at eight per cent. per annum with six-monthly rests.

Out of the remaining six villages, one was sold for Rs. 45,000 and another



(Gadaryadih) for Rs. 60,000. The latter village was in the possession of Saifuran Bibi, who raised a claim to it, and for satisfying it Yar Mohammad Khan desired to cancel its sale by repaying to the purchaser the price he had paid. For that purpose Yar Mohammad Khan borrowed another sum of Rs. 70,000 from Motilal on the security of a further charge on the twenty villages. The document relating to this mortgage is exhibit 5 and is dated August 14, 1919. The written permission of the Deputy Commissioner was not obtained for this mortgage. With the moneys borrowed from Motilal under exhibits 3 and 5, the bank's decree was paid off. Gadaryadih and the other four villages were then exempted from sale and, the bank's decree having been satisfied, the execution proceedings were returned to the Court and came to an end on May 31, 1920.

Yar Mohammad Khan died on January 31, 1924, and his son, the appellant, succeeded to the taluq. Interest was duly paid for a time by Yar Mohammad Khan and the appellant on the principal sums owing in respect of the mortgages, exhibits 3 and 5, but default having occurred in the subsequent payments of the principal amount and of the interest, on April 30, 1932, Motilal instituted the present suit against the appellant in the Court of the Additional Subordinate Judge, Sultanpur. He claimed payment of the sum of Rs. 2,26,170-5-0 due in respect of the mortgages, exhibits 3 and 5, and in default of payment asked for a sale of the mortgaged property (the twenty villages).

The claim was contested on various grounds, and the Subordinate Judge framed certain issues, of which only the following are now material :—

“(4) (a) Was Manoharlal the legal adviser of Yar Mahommad Khan at the time of exhibits 3 and 5? (b) If so, were these transactions entered into in good faith?

(6) (a) Were exhibits 3 and 5 executed with the permission of the Collector of Sultanpur? (b) If so; what is its effect? (c) If not, what is its effect?

(10) Is the interest stipulated in the mortgage deeds unfair and extortionate?”

It may be noticed that an issue (No. 5) was raised, whether the mortgaged deeds were procured by the exercise of undue influence on the part of Manoharlal, but it was not pressed at the hearing.

Motilal died pending the suit, and the names of his sons the present respondents were substituted in his place.

On October 30, 1933, the Subordinate Judge gave judgment. He held (a) that at the time when the two mortgage deeds were executed Manoharlal was the pleader and legal adviser of Yar Mohammad Khan and that a fiduciary relationship consequently existed between them; (b) that in view of such relationship, the onus rested upon the plaintiffs to prove that the transactions in question were entered into in good faith, and that they had totally failed to discharge the onus; (c) that, since Manoharlal had committed a breach of duty by which he had obtained an undue or unconscionable advantage, he had been guilty of fraud; (d) that the Deputy Commissioner's permission had been duly obtained for the execution of exhibit 3, as required by paragraph 11, schedule III, of the Civil Procedure Code, but that no such permission had been obtained for the execution of exhibit 5 and that deed was therefore void *ab initio*; (e); that exhibit 3 was voidable but plaintiffs

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were entitled to recover Rs. 1,50,000 with simple interest at six per cent. per annum under the provisions of s. 65 of the Indian Contract Act; (f) that since exhibit 5 was void, *ab initio*, the defendant was not liable to make any payment thereunder; (g) that the rate of interest was not unfair or extortionate.

On the above findings, the Subordinate Judge dismissed the suit for sale, but gave a decree to the respondents for Rs. 1,50,000 (the amount of the mortgage exhibit 3) with simple interest at six per cent. per annum from January 18, 1919, the date of exhibit 3, until the date of the suit, subject to the condition that the payments made by the appellant and his father under both the mortgage deeds should be set off. On calculation it was found that the amounts paid by the appellant exceeded those due to the respondents. The latter were therefore ordered to pay the appellant's full costs.

The respondents appealed to the Chief Court, and on August 18, 1936, the learned Judges of that Court delivered judgment in which they upheld the findings of the Subordinate Judge on issues (4) (a), (4) (b) and (6). As regards repayment of the amounts lent under exhibit 5, they differed from the Subordinate Judge's view and ordered payment of the amount due under it. Their reasons, *inter alia*, were (a) that in the circumstances of the case exhibit 5 fell within the words "discovered to be void" occurring in s. 65; (b) that though the deed failed as a mortgage, as the defendant sought equity he must do equity; (c) that the deed contained a personal covenant to pay, the enforcement of which was not barred by limitation. Accordingly, they confirmed the decree of the Subordinate Judge with respect to the refund of the amounts due under exhibit 3, but modified it by ordering the appellant to repay the amount due under exhibit 5, at the same rate of interest, from and up to the same dates and subject to the same conditions as in the case of exhibit 3. Interest *pendente lite* and future interest was allowed at three per cent. per annum on any sums which might be found due after calculations had been made in accordance with the direction contained in the decree. In the end, they passed a decree for the respondent for the amount of Rs. 1,62,370-9-9.

Both parties have appealed to His Majesty in Council. The two appeals were consolidated and heard together.

The first question argued on behalf of the appellant was that as the suit was for sale and was dismissed, the Courts below had no power to pass a decree for the repayment of the money due under the mortgages. Apart from the reasons mentioned in the Chief Court's judgment, this argument loses sight of the fact that the plaintiffs in their prayer (a) asked for a repayment of the amounts due on the mortgages, and a sale in default of it. There was also a prayer (d) asking for such further and other relief as the Court might think fit. Their Lordships are therefore of opinion that the Courts in Oudh (hereinafter referred to as the two Courts) were justified in making the order of repayment.

It was also urged that the enforcement of the personal covenant to pay contained in the deeds was barred by limitation at the date of the suit. This view is unsustainable, for the covenant being in writing registered, the rele-

vant article is 116 of the Indian Limitation Act, 1908, which provides for a period of six years, and the suit was well within that period.

It was next contended that exhibit 5, being void *ab initio*, s. 65 of the Indian Contract Act had no application. Their Lordships are, however, satisfied that the grounds on which the appellate Court rested its opinion are sound, and there is enough justification for the view that the deed exhibit 5 is one which fell within the words "discovered to be void" in that section.

Their Lordships, therefore, think that there is no substance in the contentions raised on behalf of the appellant and his appeal must fail.

In the respondents' appeal, the main attack was directed against the findings on issues (4) (a), and (b) and the effect on exhibit 5 of the finding on issue (6). It was argued that in arriving at the findings on issue (4) the two Courts had misconceived the true nature of exhibits 3 and 5 and of the circumstances relating to them, that the transactions in reality were between Motilal and Yar Mohammad Khan and did not therefore fall within the principle governing transactions between parties one of whom stands to the other in a position of active confidence.

Their Lordships had the benefit of a careful and elaborate argument from the respondents' counsel, and, on a review of the circumstances, they are of opinion that the respondents are entitled to succeed in their contentions. There is no doubt that if the transactions were really between Motilal as the mortgagee and Yar Mohammad Khan as the mortgagor, there was no occasion for the application of the principle embodied in s. 111 of the Indian Evidence Act. As the two Courts have relied on this section, it is necessary to set out its terms, which are as follows :—

"Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

Illustration (a) concerns the case of a sale by a client to his attorney. The principle of the rule embodied in this section, which was called "the great rule of the Court," was explained by Eldon L. C., in the case of *Gibson v. Jeyes*,<sup>1</sup> as follows (p. 278) :—

"...he, who bargains in a matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else."

It is therefore necessary to enquire who were the parties to the mortgages, exhibits 3 and 5, and whether one of them (the mortgagee) stood in the position of active confidence to the other (the mortgagor). The two Courts have proceeded on the assumption that Manoharlal was the mortgagee and as he was the mortgagor's vakil in the execution proceedings, he stood in a position of active confidence to the mortgagor and the transactions fell within the provisions of the section. If, on the other hand, Motilal was the mortgagee as the deeds state and the proceedings before the Deputy Commissioner make clear, the case would not fall within the rule embodied in the section, for it is not urged, nor is there any evidence, that Motilal ever stood in a

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- P. C. position of active confidence to Yar Mohammad Khan. The two Courts  
1940 appear to be in great confusion on this question. In many passages in their  
— judgment, to which their Lordships' attention was invited, they take the  
NISAR view that the money belonged to the joint family of which Manoharlal was  
AHMAD the karta. Some other passages, on the other hand, clearly indicate their view  
KHAN that the money was Manoharlal's own, advanced through his son as his  
v. benamidar.  
MOHAN
- MANUCHA These two are clearly distinct positions, and the two Courts appear to hover  
— between them. This is probably the result of a confusion caused by what  
MOHAN was supposed to be an admission in the pleadings that Manoharlal and his  
MANUCHA sons, including Motilal, formed a joint Hindu family. This may lead to a  
v. presumption that the money advanced on the mortgage was joint family  
NISAR property, but, as Mayne points out in his Hindu Law (9th edition, pp. 374-  
AHMAD 376) this presumption is very slender and has to be taken along with the  
KHAN other facts proved or admitted. Besides, even in the case of a joint Hindu  
— family there is no presumption that it possesses joint property, or any prop-  
erty at all. This has to be shown by affirmative evidence. Such evidence  
Mr. Jayakar in this case proves that the money advanced on the two mortgages really  
— belonged to Motilal as his own property. In the documents (exhibit 3 and  
exhibit 5) Motilal was mentioned as the mortgagee, and in the proceedings  
before the Deputy Commissioner, whenever any reference was made to the  
mortgagee, Motilal's name was mentioned as the person advancing the money.  
Manoharlal had long been dead before the suit, but Motilal was alive and  
was examined. His deposition is clear on the question. He carries on busi-  
ness on an extensive scale, pays an income-tax of Rs. 10,000 a year, and  
owns, as his property, rice and oil mills and an ice factory. In the very  
beginning of his cross-examination he referred to his account books (exhibits  
26-30) which include the accounts of the mortgage transactions in issue,  
and stated that the accounts related to his personal transactions and not to  
those of anyone else, that the entries in the account books were correct and  
were in the hand of his mukhtiar, that his father (Manoharlal) had a general  
power-of-attorney from him, that his business was separate. He supported  
this by a reference to his account books (exhibits 26-30) in which the trans-  
actions in issue are mentioned and the interest paid from time to time is  
credited through the hands of the mortgagor's agents. The payments were  
made on dates when Yar Mohammad Khan was alive, and include those  
made by him during his lifetime and by the appellant after his death. It is  
to be noted that though Motilal stated his case with precision and emphasis,  
there was no cross-examination on the point.
- The whole of this evidence appears to have escaped the attention of the  
two Courts. It may be so because his evidence was taken in the trial Court  
before a different Subordinate Judge from the one who ultimately delivered  
the judgment. Their Lordships asked the appellant's counsel whether he  
could point out any passage in either of the judgments tending to show that  
the Judges had this evidence in mind and brushed it aside as untruthful.  
Counsel could point to no such reference. Their Lordships have examined  
Motilal's evidence, and, in their opinion, it bears the impress of truth. If  
this is so, the whole of the superstructure which the two Courts have raised

upon the supposition that the money belonged to Manoharlal or his joint family crumbles to the ground.

This would be enough to entitle the respondents to obtain a reversal of the findings of the two Courts on issues (4) (a) and (b). The respondents' counsel, however, rested his case on an alternative footing and urged that even on the assumption that Manoharlal, or his joint family, was the mortgagee, the evidence disclosed no ground justifying the condemnation by the two Courts of the transactions in exhibits 3 and 5 and of Manoharlal's connection with them. Their Lordships were accordingly invited to consider the detailed evidence connected with the transactions in exhibits 3 and 5. After carefully considering it, their Lordships have come to the conclusion that there is nothing either in the circumstances antecedent to these transactions or in those relating to their execution and thereafter, which shows that the mortgages were obtained by Manoharlal in bad faith, or that he took any unfair advantage of the mortgagor to secure onerous or unconscionable terms. Apart from the fact that this argument was presented as an alternative one, their Lordships felt it necessary to examine the whole evidence because at the date of the suit Manoharlal, an experienced and well-known pleader of Sultanpur, whose integrity was impugned, had long been dead, and therefore had no opportunity to defend himself.

On examining the circumstances relating to the inception of the two mortgages, it is clear that the mortgagor entered into them under circumstances of extreme stringency. The bank's decree was for a very large amount, the date finally fixed for its payment had long expired, and there was great danger of the property being sold in execution. Yar Mohammad Khan was anxious to retain control and management of his estate, because it was an ancestral holding and he desired to avoid the odium of having it either sold outright or leased out for long periods. In the applications made by his agent Sahib Rai and by himself before the Deputy Commissioner from time to time, there is enough indication of his desire to retain control and possession of his paternal estate. It is further to be noted that the idea of effectuating a mortgage of the property originated not with Manoharlal but with a revenue officer called the sale officer, who, in his report at an early date (June 11, 1918) and long before Manoharlal came on the scene, suggested a mortgage as a means of saving the property for Yar Mahommed Khan.

Another fact which has not received adequate consideration from the two Courts is that Manoharlal was appointed Yar Mohammad Khan's vakil on September 11, 1918, and that, on the same day, Yar Mohammad Khan's application to mortgage the property was granted. It is to be noted that on the latter occasion, Yar Mohammad Khan was represented by three vakils, of whom Manoharlal, engaged on that day, was only one, and Yar Mohammad Khan had besides the advice of his trusted agent Sahib Rai, who represented him on all material occasions. The application for permission to make a mortgage of the property was granted after a statement was made by Sahib Rai before the Deputy Commissioner, indicating the advantages of having a mortgage to the exclusion of other means of raising the money. The application was granted by the Deputy Commissioner after reviewing all the circumstances. It is suggested that this was the occasion when Manoharlal

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should have disclosed to the Deputy Commissioner his intention to take the mortgage in the name of his son, but there is no evidence to suggest that Manoharlal had formed any such intention at that date.

Subsequently, Yar Mohammad Khan and Sahib Rai, in a document which they both signed, applied to the Deputy Commissioner, stating that they had prepared a draft of the mortgage which was attached to the document and prayed that the draft might be passed and written permission granted for the mortgage of the property. The Deputy Commissioner thereupon reviewed the matter and accorded his sanction. He observed that the interest was undoubtedly severe but as the judgment debtor's pleader had told him that money was difficult to obtain, he gave his consent. There is no clear evidence that the pleader referred to was Manoharlal. As stated above, Yar Mohammad Khan had two other pleaders. Nor does it appear that the statement that money was difficult to obtain was a misrepresentation.

As regards the circumstances relating to the execution of exhibit 3, its recitals are material as showing the circumstances under which the mortgage was made. These recitals were substantially correct. The document was presented for registration at the office of the Sub-Registrar by Yar Mohammad Khan personally, who made, in the presence of the Sub-Registrar, his autograph signature and also put his thumb mark. He admitted the completion of the deed after hearing and understanding the contents thereof in the presence of the Sub-Registrar, who personally knew him. A week later when the matter came before the Deputy Commissioner, Manoharlal appeared on behalf of his son Motilal. On this occasion Sahib Rai, Nanhe Mian the son of Yar Mohammad, the agent of Saifuran Bibi, and the bank's vakil, were also present. The mortgage deed was admitted. The amount of the mortgage money was stated to be in deposit in the Treasury, and the mortgage deed was returned to Manoharlal as the agent of his son. Permission was given to the bank's vakil to apply for a withdrawal of the amount. The matter came again a few days later before the Deputy Commissioner. Manoharlal again appeared on behalf of his son, Sahib Rai on behalf of Yar Mohammad Khan, and the bank was represented by its vakil. On all subsequent occasions, Manoharlal continued to appear for his son. It was suggested that in so appearing Manoharlal was guilty of misbehaviour. It is difficult to see the basis of this criticism or how far it affects the merits of the case. These appearances were all open and do not appear to have been disapproved by the Deputy Commissioner, or by Yar Mohammad Khan or his agent Sahib Rai, to all of whom the true facts must have been well known. Different theories might be suggested with regard to these appearances. It may be that as there were already two other vakils representing Yar Mohammad Khan and also a trusted agent Sahib Rai, the parties might have thought it desirable that Manoharlal should no longer represent the mortgagor. Manoharlal is dead and his explanation is not known. Their Lordships have not enough evidence before them to suggest that in acting as he did Manoharlal was guilty of any misbehaviour throwing light upon the merits of the transaction. It may be that, as the respondents' counsel has urged, Manoharlal's open appearance exclusively for Motilal after a certain stage of the proceedings indicates his honesty.

The subsequent story of the sale of the two villages has already been mentioned, and how the four villages were saved to the mortgagor by Motilal's advance of the Rs. 70,000 on exhibit 5. This mortgage also was made and registered under circumstances indicating that it had Yar Mohammad Khan's and Sahib Rai's consent. The subsequent conduct of the parties also points to the same conclusion. Interest was paid by Yar Mohammad Khan from time to time during his lifetime, and also a part of the principal amount. After his death, the appellant did the same, until default was made and the suit brought on April 30, 1930.

It is suggested that there are at least two circumstances showing that unfair advantage was taken by Manoharlal of the mortgagor's position. The first of these, it is said, is clause 3 in exhibit 3 (which is repeated in exhibit 5) by which Yar Mohammad Khan agreed that, in addition to the interest, he should pay annually Rs. 10,000 in the month of June and a like sum in the month of December, with a view to the liquidation of the debt, and that he should have no power to pay anything more and Motilal also should have no power to realise anything in excess of the amount. It is said that this clause was a fetter on the equity of redemption. Their Lordships do not take this view. It is a provision which often occurs in mortgage deeds, and in the light of the fact that Yar Mohammad Khan was an old defaulter, and also that the obligation mentioned in the clause was reciprocal, their Lordships cannot regard it as in any way onerous. The clause, besides, is immaterial for the purposes of the present dispute. The mortgagee is not seeking to enforce it, and would lose nothing if it were expunged. There is no reference to this question in the judgments of the two Courts except in one place where the trial Court suggests that this clause could not have been the result of the mortgagor's free will. There is no evidence in support of this suggestion. On the contrary, the clause was approved by the Court and by Yar Mohammad Khan and his trusted agent, and the loan was accepted on that basis.

The other onerous clause suggested is the rate of compound interest of eight per cent. with half-yearly rests. On this issue there is a clear finding of both the Courts that even eleven per cent., charged on another mortgage executed shortly after exhibit 5, was not unreasonable. The eight per cent. was only one per cent. more than what the bank had charged, and exhibits 3 and 5 were besides subsequent mortgages to the bank's, made by an old defaulter.

There is likewise no evidence in support of the suggestion which found favour with the two Courts that a lease would have been more beneficial than a mortgage. A lease would certainly have been contrary to the cherished wishes of Yar Mohammad Khan to remain in possession of the property as long as he could. Amongst several proposals for leasing, there were a few for such long periods as fifteen years, and one in perpetuity. These would certainly not have suited Yar Mohammad Khan's intentions, and Manoharlal's objection to one of these proposals may be due to Yar Mohammad Khan's desire to retain possession of the property, and cannot indicate any dishonest motive on Manoharlal's part.

On a review of all these circumstances, their Lordships are of opinion that

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exhibits 3 and 5 were both straightforward and honest transactions and there was no justification for the aspersions cast upon Manoharlal's conduct.

Before leaving this subject, their Lordships would desire to add that transactions of mortgage between a solicitor and client to secure the repayment of money advanced at the time are not ordinarily subjected by the Courts to the same jealous scrutiny as, for instance, a gift from a client to a solicitor, or purchases or sales at under-value between a solicitor and client. If the money was sorely needed and was paid, the mortgagor had its benefit, the rate of interest was reasonable, and the terms neither excessive nor onerous, their Lordships can see no reason why the transaction should not stand as a valid mortgage between the parties. The rulings relied on in the Chief Court's judgment relate to sales to or by solicitors, which, on the facts, were detrimental to the client's interest.

As to the effect of the finding on issue (6) on the validity of exhibit 5, it is admitted that the permission of the Deputy Commissioner was not obtained to this mortgage. There is no doubt that, as stated above, the transaction was beneficial to the mortgagor, but this will not affect its invalidity, under the provisions of the Civil Procedure Code. It is urged in support of its validity that this mortgage was an extra-judicial proceeding and no sanction was necessary. Their Lordships cannot accept this view, having regard to the clear terms of paragraph 11. The transaction was a mortgage and therefore covered by the plain terms of the paragraph. It was next urged that the bank's claim had been completely paid off under the circumstances mentioned above and consequently the interest which the mortgagor had was only his equity of redemption, which was not subject to the bank's mortgage and was therefore outside the execution proceedings and the Deputy Commissioner's power under paragraph 11. The only evidence in support of this contention is Motilal's letter to the bank, dated October 1, 1918, in which he offered to pay the bank's debt if the bank would unconditionally release from its lien the twenty villages. It is not clear, however, from the terms of his letter whether the bank was not asked only to release its claim to rank in priority to Motilal's debt. Motilal had made another proposal to purchase the decretal debt of the bank, but there is nothing to show that this proposal was accepted. The execution proceedings continued until May 31, 1920, and up to this date the Deputy Commissioner could exercise his powers under paragraph 11. There is therefore no escape from the conclusion that under the peremptory provisions of this paragraph this mortgage must be held to be null and void.

It will, however, stand in respect of the personal liability for the money actually paid, with proper interest thereon. If the loan was bona fide and was actually received and the terms were not unreasonable, the mortgagee is entitled to receive payment of whatever may be due on the mortgage, with interest thereon at a reasonable rate. In the circumstances found by both the Courts, eight per cent. compound interest with half yearly rests was not unreasonable.

The result is that the respondents are entitled to an order for repayment of the money which may be due under exhibit 3, with compound interest thereon at eight per cent. per annum with six-monthly rests, from the date of



the document up to payment, and to an order for the sale of the mortgaged property in default of payment of whatever may be found due on the taking of accounts.

As regards exhibit 5, they are entitled to a decree for repayment of the amount lent under that mortgage, with compound interest thereon at eight per cent. with six-monthly rests, from the date of the document up to payment. All payments made by the appellant and his father under the respective mortgages will be set off on the dates they were made. The matter will accordingly be referred to the Chief Court, Oudh, for drawing up a proper decree under the directions contained in this judgment.

The respondents' appeal here is allowed and the decree of the Chief Court varied as stated above. The appellant's appeal here is dismissed. The appellant will pay the respondents' costs in the two Courts and in both the appeals before this Board.

Their Lordships will humbly advise His Majesty accordingly.

*Appellant's appeal dismissed.*

*Respondents' appeal allowed : decree varied.*

Solicitors for appellant : *Nehra & Co.*

Solicitors for respondents : *Hy. S. L. Polak & Co.*

## APPELLATE CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

KASHIRAM SENU CHAUDHURI

*v.*

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*Court-fees Act (VII of 1870), Sec. 7 (iv) (f)—Suit for account—Valuation of claim of arbitrary figure for purposes of court-fees—Decree for specific amount—Appeal from decree—Valuation of claim in appeal at decretal amount—Rejection of appeal for non-payment of additional court-fees—Preliminary objection—Payment of costs to respondent on preliminary objection—Scale of costs—Bombay High Court Rules, Appellate Side, r. 130—Cross-objections fail on such rejection of appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 22.*

Where a suit for account, in which the claim is valued at an arbitrary figure, results in a decree for a sum of money, the party appealing from the decree should value the claim in appeal at the amount of the decree, and not at the arbitrary figure, for purposes of paying the court-fees.

*Kantichandra Tarafdar v. Radharaman Sarkar*<sup>1</sup> and *Dhanukodi*, In re<sup>2</sup>, followed.\*

*Fazlullah Khan v. Mauladad Khan*,<sup>3</sup> distinguished.

\*First Appeal No. 56 of 1939, from the decision of R. G. Karkhanis, First Class Subordinate Judge at Jalgaon, in Civil Suit No. 554 of

1934.

1 (1929) I. L. R. 57 Cal. 463.

2 [1938] Mad. 598, F.B.

3 (1929) 31 Bom. L. R. 841, P.C.

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Where on a preliminary objection taken at the hearing of an appeal, the Court orders payment of additional court-fees on the memorandum of appeal, and the appeal is rejected for non-payment of such fees, the respondent is entitled to payment of his costs of the hearing of the preliminary objection. Such costs should be taxed at Rs. 30 under r. 130 of the Bombay High Court, Appellate Side, Rules.

Where a memorandum of appeal is rejected for non-payment of court-fees, the cross-objections filed in the appeal fail with the appeal.

*U Shin v. Maung Tha Gywe*,<sup>1</sup> followed.

*Ayilu Reddi v. Venkata Reddi*,<sup>2</sup> dissented from.

#### COURT-FEES.

The plaintiff Kashinath filed a suit in the Court of the First Class Subordinate Judge of Jalgaon against the defendant Ranglal for taking accounts of dealings between the parties under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The claim in the suit was valued at Rs. 5 for all purposes. The suit resulted in a decree for Rs. 6,464-7-0 against the plaintiff.

The plaintiff appealed to the High Court and valued his claim in appeal again at Rs. 5 for purposes of court-fees and pleader's fees.

At the hearing, the respondent's pleader raised a preliminary objection that the claim in appeal should have been valued at Rs. 6,464-7-0 for purposes of court-fees.

*M. W. Pradhan*, for the appellant.

*G. S. Gupte*, for the respondent.

BEAUMONT C. J. This is an appeal against an order made by the First Class Subordinate Judge of Jalgaon, and a preliminary point is taken that the memorandum of appeal has not a proper court-fee.

The plaintiff's suit was a suit for account, and the plaint was stamped with Rs. 5. The suit resulted in a decree against the plaintiff for a sum of Rs. 6,464-7-0. The appeal is against that decree, and the appellant has valued his appeal at Rs. 5.

Mr. Pradhan for the appellant relies on s. 7 (iv) (f) of the Court-fees Act which provides that in a suit for accounts the stamp is to be according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. No doubt in the plaint the plaintiff was entitled to place his own value on the relief claimed, because he could not know what the result of taking an account was likely to be. If the plaintiff's suit had failed and he had appealed against the refusal to take an account, the appeal would have related solely to a right to an account, and I agree that the appellant might have placed his own value on the memorandum of appeal. But as the suit resulted in a decree for a certain amount against the plaintiff, it seems to me that the appeal is not merely in relation to an account, but is really an appeal against a money decree, and he must at any rate stamp his memorandum of appeal with an *ad valorem* stamp in respect of the amount of the decree. He may add a nominal amount in respect of any further relief claimed which may accrue by reason of the account being taken on a different

1 (1930) I. L. R. 8 Ran. 538.

2 [1931] A. I. R. Mad. 133.

basis from that adopted by the lower Court; but the stamp on the memorandum of appeal must, to my mind, cover the amount of the decree which is standing against the appellant, and which he seeks to have set aside. That was the view adopted by Rankin C. J. in *Kantichandra Tarafdar v. Radharaman Sarkar*,<sup>1</sup> and in a recent decision of a full bench of the Madras High Court in *Dhanukodi*, In re,<sup>2</sup> and in my opinion that view is clearly right. Mr. Pradhan has relied on a decision of the Privy Council in *Faizullah Khan v. Mauladad Khan*,<sup>3</sup> but there is nothing in that decision to suggest that an appellant in a suit originally instituted for an account seeking to set aside a final decree for a specific sum found to be due from him, is not bound to value his appeal at the amount of that decree at the least.

In my opinion, the preliminary objection must succeed. The appellant will get three weeks' time to pay the amount.

SEN J. I agree.

No doubt under s. 7, sub-s. (iv), cl. (f), of the Court-fees Act, the court-fee payable in a suit for accounts is to be computed according to the amount at which the relief sought is valued in the plaint or in the memorandum of appeal. But the present appeal is from a final decree in which the plaintiff has been ordered to pay a sum of Rs. 6,464-7-0 to the defendants, and the question arises whether in such a case, when the plaintiff-appellant seeks to set aside the decree against him for a specific sum, it is open to him to value his appeal at a notional amount.

In *Kantichandra Tarafdar v. Radharaman Sarkar*<sup>4</sup> there was a final decree against the defendants for Rs. 6,000 and odd, and the plaintiff had originally valued his claim for accounts at Rs. 1,000. The defendants appealed against the final decree and paid a court-fee of Rs. 2. It was held that in a suit for accounts a defendant appealing against the final decree must value his appeal according to that decree, though the claim in the suit and the preliminary decree might have been for a lower sum. About the time this decision was given the Privy Council in *Faizullah Khan v. Mauladad Khan*<sup>5</sup> decided a case which was a suit for partnership accounts and in which the plaintiffs had claimed Rs. 3,000 and valued the suit accordingly. The trial Court found that Rs. 19,000 and odd were due to the defendants by the plaintiffs and no sum was found due to the plaintiffs under their claim for Rs. 3,000. The plaintiffs appealed, valuing the appeal for purposes of court-fees at Rs. 19,000 and odd. A question was raised whether the plaintiffs should not value their appeal at Rs. 19,000 *plus* Rs. 3,000, i.e. Rs. 22,000, and their Lordships held that the amount of Rs. 19,000 "may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach and it covered the appeal as a whole", and therefore they held that the court-fee already paid was the proper court-fee. This decision was construed by the Madras High Court in *Venkatanandam*, In re,<sup>6</sup> as meaning that even where the appellant had been fixed with a liability for a specific sum, he was entitled under s. 7 (iv) (f) of the

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1 (1929) I. L. R. 57 Cal. 463.

2 [1938] Mad. 598, F.B.

3 (1929) 31 Bom. L. R. 841, P.C.

4 (1929) I. L. R. 57 Cal. 463.

5 (1929) 31 Bom. L. R. 841, P.C.

6 (1932) I. L. R. 56 Mad. 705.

A. C. J. Court-fees Act to put his own valuation on his appeal. Ramesam J., who delivered the judgment, said (p. 710) :—

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"If the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid court-fees for, the proper thing would be to post the case for orders and direct the appellant to pay additional court-fee and only then the judgment should be delivered and the decree should be allowed to be drawn up."

This interpretation of the Privy Council's decision was overruled by the same High Court in a full bench decision in *Dhanukodi*, In re,<sup>1</sup> and their Lordships held that though a defendant appealing from a preliminary decree in a suit for accounts was ordinarily bound to accept the valuation given by the plaintiff in the plaint, when a defendant appealed against a final decree, he should pay the court-fee on the amount of the decree passed against him except in cases where he appealed only against a portion of the decree; and they remarked (p. 607) :—

"Until the decision in *Venkatanandam*, In re,<sup>2</sup> it was never questioned in the High Courts of India that a defendant appealing against a final decree should pay a court-fee on the amount of the decree passed against him—except in cases where he appealed only against a portion of the decree—and we are unable to concur in the opinion that *Faizullah Khan's* case [L. R. 56 I. A. 232; 31 Bom. L. R. 841] has put a different construction on the section."

The learned advocate for the appellant has contended that the decision of the Privy Council in *Faizullah Khan v. Mauladad Khan* enables his client to value the appeal at any figure that he likes. But it seems to me that the decisions in *Kantichandra's* case and *Dhanukodi's* case should govern this point and that the Privy Council's decision does not really cover the facts of this case. It is true that both these cases were cases of defendants' appeals, but I do not think that should make any difference in the principle, as in the present case it is the plaintiff who has been fixed with a liability for a specific sum, and in his appeal not only wants to question the accounts as taken by the trial Court but also to get rid of the liability for the sum of Rs. 6,464-7-0, and in such a case it would be inconsistent for him to value his appeal at Rs. 5. The first ground stated in his memorandum of appeal is that the lower Court erred in finding the decreed sum to be due from the plaintiff to the defendant, and under s. 7 (iv) of the Act he is required to put a definite valuation to the relief that he claims. It cannot, therefore, be held that he is entitled to value the relief that he claims at only Rs. 5. I think that the principles enunciated by the Calcutta and Madras High Courts ought to be followed in this case and that the appellant must pay court-fee for the sum of Rs. 6,464-7-0 in this appeal.

THE appellant failed to pay the additional court-fees within three weeks' time which was given to him.

On January 10, 1941, the appeal was placed before Beaumont C. J. and Sen J. for disposal.

W. B. Pradhan, and M. W. Pradhan, for the appellant.

G. S. Gupta, for the respondent.

1 [1938] Mad. 598, F.B.

2 (1932) I. L. R. 56 Mad. 708.

BEAUMONT C. J. In this appeal a preliminary objection was taken that the memorandum of appeal was insufficiently stamped, and the Court upheld that objection, and, acting under the power conferred by s. 149 of the Civil Procedure Code, 1908, gave the appellant three weeks' time in which to pay the proper amount of court-fee. He has not done so, and the appeal comes before us today for disposal.

The correct court-fee not having been paid, it is quite clear that under s. 4 of the Court-fees Act, and also under O. VII, r. 11 read with s. 107 of the Civil Procedure Code, we are bound to order that the memorandum of appeal be rejected.

The first question which arises is whether we can, in making that order, direct the appellant to pay the costs of the hearing of the preliminary objection. Logically it seems to me rather difficult to reject an appeal, and then proceed to make an order for costs in the appeal; but at the same time orders for costs are frequently made in these cases. The position is that the appellant managed to get his memorandum of appeal accepted by the office, which considered that it was properly stamped. The matter was brought before this Court; the question as to the amount of court-fee was argued by counsel on both sides, and in the result the appellant got a concession, in that he was allowed extended time in which to pay the court-fee. It certainly seems unreasonable that he should not be ordered to pay the costs of the hearing of the preliminary objection on which he failed, and, in my opinion, having brought the appeal before this Court and obtained an order of this Court in the appeal, the appellant can be ordered to pay the costs of the hearing of the preliminary objection, notwithstanding that the memorandum of appeal is ultimately rejected.

The question then arises as to the basis on which the costs should be taxed, the appellant not having stamped his memorandum of appeal with the correct court-fee. Rule 130 of the Appellate Side Rules provides that when the Court awards costs in any matter without specifying the amount or the scale thereof and the amount thereof is not prescribed under any Act or rule, a sum of Rs. 30 shall be allowed as the advocate's fee. We think that that rule should be applied in this case. We, therefore, direct the appellant to pay Rs. 30 the advocate's fee of the respondents in the appeal.

The next question which arises is with regard to cross-objections. In my opinion, it is quite clear that if an appeal is rejected for non-payment of court-fee, cross-objections must fail with the appeal. Cross-objections, under O. XLI, r. 22, are a method by which the respondent may himself complain against the decree appealed from, but the right to lodge cross-objections is only given to a respondent on an appeal, and if the appeal is rejected, there can be no respondent and no cross-objections. Sub-rule (4) of r. 22 provides that when an appeal is withdrawn or dismissed for default, cross-objections may be proceeded with; but where an appeal is rejected, it cannot, in my opinion, be said to be withdrawn or dismissed for default. The cases on the subject were discussed by the Rangoon High Court in *U Shin v. Moung Tha Gywe*,<sup>1</sup> and the learned Judges there came to the conclusion that where the memo-

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A. C. J. random of appeal is rejected for non-payment of court-fees, the cross-objections must fail with the appeal. I think that decision is correct.

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The case on which Mr. Gupte relies, *Ayilu Reddi v. Venkata Reddi*,<sup>1</sup> in which a single Judge held that rejection of a memorandum of appeal for non-payment of court-fees amounted to dismissal for default within O. XLI, r. 22(4), seems to me to have been wrongly decided.

We, therefore, reject the appeal but direct the appellant to pay Rs. 30 respondent's costs, and make no order on the cross-objections.

Beaumont Cj. SEN J. I agree.

*Appeal dismissed.*

*Before Mr. Justice Broomfield and Mr. Justice Macklin.*

1940

December 4.

MITHALAL RANCHHODDAS

v.

MANEKLAL MOHANLAL MODIA.\*

*Civil Procedure Code (Act V of 1908), Sec. 115, O. XXI, r. 95—Application by auction-purchaser for possession of property—Application rejected by lower Court on ground of limitation—Whether application in revision to High Court against order of lower Court competent.*

An application under O. XXI, r. 95, of the Civil Procedure Code, 1908, made by an auction-purchaser to get possession of the property of the judgment-debtor, was rejected by the trial Court on the ground that it was barred by limitation. The auction-purchaser applied in revision to the High Court under s. 115 of the Code against the order of the lower Court. On the question whether the application came within the terms of s. 115 :—

*Held*, that the finding of the lower Court on a question of limitation, whether right or wrong, was a finding on a point of law which the Court had jurisdiction to decide and therefore it did not come within the ambit of s. 115.

*Veerappa v. Iratappa*<sup>2</sup> and *Amritrav Krishna Deshpande v. Balkrishna Ganesh Amrapurkar*,<sup>3</sup> followed.

*The British India Steam Navigation Company v. Sharafally*,<sup>4</sup> not followed. *Bombay Steam Navigation Co. v. Vasudev*,<sup>5</sup> referred to.

ONE Mithalal (applicant) as auction-purchaser filed an application in April, 1938, under O. XXI, r. 95, Civil Procedure Code, 1908, in the Court of the Subordinate Judge at Dohad, to get possession of the property of the judgment-debtor. This application was rejected by the trial Judge on the ground that it was barred by limitation. Against this order the applicant

1 [1931] A. I. R. Mad. 133.

\* Civil Revision Application No. 249 of 1940, from an order passed by I. K. Master, Subordinate Judge at Dohad, in D. Miscellaneous No. 17

of 1938.

2 (1937) 40 Bom. L. R. 152.

3 (1887) I. L. R. 11 Bom. 488.

4 (1922) I. L. R. 46 Mad. 938.

5 (1927) 29 Bom. L. R. 1551.

applied in revision to the High Court under s. 115 of the Civil Procedure Code.

*B. G. Thakor*, for the applicant.

*V. N. Chhatrapati*, for the opponents.

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BROOMFIELD J. This purports to be an application in revision under s. 115 of the Civil Procedure Code, and as in our opinion it does not come within the terms of that section, we propose to reject it as incompetent without going into the merits of the matter.

The applicant made an application under O. XXI, r. 95, that is to say he applied as auction-purchaser to get possession of the property of the judgment-debtor, and his application was rejected by the Court on the ground that it was barred by limitation. The only point which can be urged in this revision application is the point of limitation, and in our view a finding on a question of limitation, whether right or wrong, is generally speaking a finding on a point of law which does not bring the case within the ambit of s. 115, because it cannot be said that the Court has exercised a jurisdiction not vested in it by law, or failed to exercise a jurisdiction vested in it, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. The point was one which the Court had jurisdiction to decide, and whether the decision was right or wrong, the decision is final, unless it is subject to appeal, and in this case there is no appeal.

Learned advocate for the applicant drew our attention to *The British India Steam Navigation Company v. Sharafally*,<sup>1</sup> in which it was held that where a lower Court declines to exercise jurisdiction by refusing to entertain an appeal on account of a wrong decision on a question of limitation as to when the appeal should have been filed, the High Court has power to revise the order under s. 115. But that case has been dissented from by the learned Chief Justice in *Veerappa v. Iratappa*.<sup>2</sup> He there pointed out that although a Judge who dismisses an application by disregarding the plain words of a provision of the Indian Limitation Act may be said to exercise his jurisdiction illegally and with material irregularity so that the High Court can interfere under s. 115, the position is different where the Court has considered a question of limitation and disposes of the case in accordance with its interpretation of the law. Where a Court dismisses a suit on the ground of limitation, it takes cognizance of the suit and exercises jurisdiction by holding that the suit fails on a point of law. In such a case s. 115 cannot apply.

This view is in accordance with previous decisions of this High Court. The learned Chief Justice referred to *Amritrav Krishna Deshpande v. Balakrishna Ganesh Amrapurkar*.<sup>3</sup> The Court was actually concerned there with a wrong decision, or a decision which was alleged to be wrong, on a question of *res judicata*. It was held that the decision, even though wrong, of a question of *res judicata* was not a failure to exercise jurisdiction, and did not warrant the interference of the High Court under the section of the Code which corresponded to the present s. 115. *Hari Bhikaji v. Naro Vishva-*

1 (1922) I. L. R. 46 Mad. 938.

3 (1887) I. L. R. 11 Bom. 488.

2 (1937) 40 Bom. L. R. 152.

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*nath*<sup>1</sup> was followed. Mr. Justice West in his judgment in *Amritav v. Bakkrishna* said that the same considerations would apply in the case of a decision on a point of limitation. The same view has been taken by other High Courts. We are not therefore prepared to follow the ruling of the Madras High Court which Mr. Thakor has cited.

I may mention with reference to *Verrappa v. Iratappa* that what happened here was this. The point was when the auction-sale became absolute within the meaning of art. 180 of the Indian Limitation Act. The learned Subordinate Judge held on the construction of the article and on a consideration of the authorities cited to him that the sale became absolute on a particular date, and that the applicant was not entitled to exclude the time taken up in a certain suit in the computation of the period of limitation. Obviously then this was not a case of a Judge ignoring the plain words of a provision of the Indian Limitation Act. The case is covered by the ruling of the learned Chief Justice and the earlier authorities to which I have referred, and we hold that s. 115 does not apply.

Mr. Thakor suggested that we might interfere even apart from the provisions of s. 115, and relied on *Bombay Steam Navigation Co. v. Vasudev*.<sup>2</sup> The view was expressed in that case that the High Court of Bombay has, apart from s. 115 of the Civil Procedure Code, the power to call for the proceedings of any subordinate civil Court and to issue orders thereon, under Bombay Regulation II of 1827, s. 5, cl. (2), in spite of its repeal by Act XII of 1873, by virtue of ss. 106 and 130 of the Government of India Act, 1915. As the Government of India Act of 1915 is no longer in force, and as under the present Government of India Act the High Court's power of superintendence does not extend to interference with judicial orders, it may be doubted whether the proposition laid down in this case is still sound. But whether it is or not, we can see no reason why we should go out of our way to interfere in revision in the present case, and we discharge the rule with costs.

*Rule discharged.*



Before Mr. Justice Broomfield and Mr. Justice Mackinn.

KRISHNAWA YELAGOUDA PATIL

v.

RAMAGOUDA KADAGOUDA PATIL.\*

1940

December 12.

*Hindu law—Adoption—Power to adopt—Construction of will—Prohibition to adopt.*

The testator, who was joint with his brother, made, shortly before his death, a will, addressed to his brother, in which he said : "You are the only heir of the property . . . After their death [i.e. death of the testator's two widows] they [i.e. ornaments] are yours only. Excepting maintenance, they have no other right whatsoever . . . In order that my name should remain after my death, Rs. 100 per annum should be spent on religious acts &c. You should do this, and you and your descendants, heirs and legatees should enjoy the ownership of the entire estate from generation to generation. On the strength of this will, you should get the khata transferred to your name in respect of the above lands. In regard to that my wives and anybody else whatever have no sort of right at all. Consequently, all the rights go to you only and are with you." Shortly after the testator's death, one of his widows adopted a son. After the death of that son, she adopted the plaintiff, who was a son-in-law of the surviving brother. Thereafter the surviving brother gifted away portions of the family property to his two daughters. After the death of the brother, the plaintiff sued to recover possession of the properties, when it was contended by the daughters that the will contained an implied prohibition to the widows to adopt and the plaintiff's adoption was therefore invalid :—

*Held*, (1) that inasmuch as the testator had said nothing about an adoption one way or the other and the prohibition of adoption was sought to be inferred from statements about other matters or from conduct, it stood to reason that the inference suggested, if it was to be acted upon, should be a necessary inference ;

(2) that the Court should be able to say with confidence that what the testator had said or done showed that he would have prohibited an adoption, either in any circumstances or in the circumstances existing at the material time, if he could have foreseen them ;

(3) that if the Court could say no more than that he might have, or even that he probably would have, prohibited adoption in any circumstances or in those particular circumstances, it could not be said that his statements or his actions were equivalent to a prohibition ;

(4) that in his will the testator was obviously anxious that the family should continue to be regarded as what it was in fact, a joint family, and that the fact that some lands were in his separate name should not give rise to any claim of separate ownership ;

(5) that though he emphasised the rights of his brother as the sole surviving coparcener, it did not follow from that that he was opposed to one of the ordinary incidents of a joint family or that he would have objected to an adoption by his widow if his brother himself did not object ;

(6) that the plaintiff having been at the date of adoption the brother's

\* First Appeal No. 119 of 1939, from the decision of H. R. Suryavanshi, Joint First Class Subordinate

Judge at Belgaum, in Special Regular Civil Suit No. 320 of 1936.

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son-in-law, it could not be said with any confidence that the testator would have prohibited the adoption if he had foreseen it ;

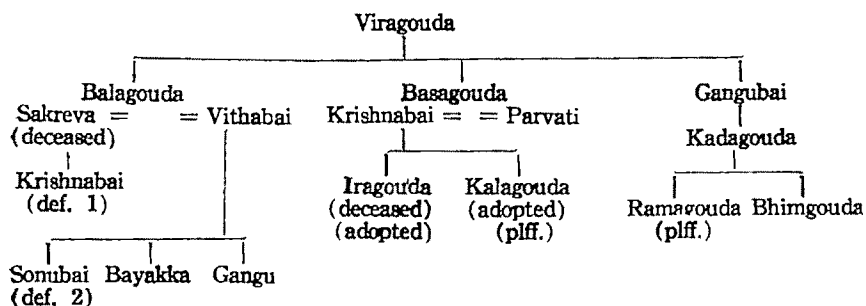
\* (7) that from the terms of the will the Court could not spell out any implied prohibition to adopt ; and

(8) that therefore the plaintiff's adoption was valid :

*Lakshmibai v. Sarasvatibai*,<sup>1</sup> *Malgauda Paragouda v. Balaji Dattu*,<sup>2</sup> *Yadav v. Namdeo*,<sup>3</sup> *Damodar Vishnu Juvekar v. Shriram Lakshman Juvekar*,<sup>4</sup> and *Vithagouda v. Secretary of State*,<sup>5</sup> referred to

SUIT to recover possession of property.

The property in dispute belonged originally to one Viragouda, to whom the parties were related as shown in the following genealogical tree :—



Viragouda had two sons, Balagouda and Basagouda, who were undivided. Basagouda died in 1907. A few days before his death Basagouda made his will, on August 29, 1907, addressed to his undivided brother Balagouda, by which he left his share in the family property to Balagouda, subject to maintenance of his widows Krishnabai and Parvatibai. The material portions of the will are set out in the judgment of Broomfield J. Within four months of her husband's death, Krishnabai adopted Iragouda ; but the boy died unmarried in 1911. Then, on April 29, 1931, Krishnabai adopted another son Ramagouda (plaintiff), who was a grandson of Basagouda's sister Gangubai and a son-in-law of Balagouda.

On July 9, 1934, Balagouda made gifts of portions of the family property to his two daughters, Krishnabai and Sonubai (defendants Nos. 1 and 2). Balagouda died on August 8, 1936.

On September 3, 1936, the plaintiff filed a suit to recover possession of the properties gifted by Balagouda to his two daughters (defendants).

The defendants contended *inter alia* that the adoption of plaintiff was invalid, because the will of Basagouda contained an implied prohibition forbidding his widows to adopt.

The trial Judge decreed the suit holding that the plaintiff's adoption was valid inasmuch as the will contained no prohibition to adopt, for the following reasons :—

"The terms of the will go to show that Basagouda was very anxious that the family property should all go to Balagouda and that he and his descendants should

1 (1899) I. L. R. 23 Bom. 789,  
s. c. 1 Bom. L. R. 420.

2 (1912) I. L. R. 37 Bom. 107,  
s. c. 14 Bom. L. R. 1121.

3 (1921) L. R. 48 I. A. 513,  
s. c. 24 Bom. L. R. 609.

4 (1940) 42 Bom. L. R. 1086.

5 (1932) 34 Bom. L. R. 818.

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—

go on enjoying for ever from generation to generation and that his wives had no other right except to receive maintenance. It is submitted that the recitals by implication go to show that the wives were prohibited from making an adoption. In support of this view, I am referred to the decisions in 14 Bom. L. R. 1121 and 1928, A. I. R. Mad. 118. It must be noted that the testator in this case also was the sole and full owner while it must be borne in mind Basagouda and his elder brother Balagouda were members of a joint Hindu family. The will in the present case is not valid under Hindu law as it has been made by a coparcener... are the recitals such as to warrant and justify a conclusion that there was prohibition of adoption? Answer to this question depends on the consideration of one or two circumstances which are of the utmost importance in construing and interpreting this will. The circumstances that the rule of law as understood then was that a widow in a joint Hindu family could not adopt and that some lands stood in the name of Basagouda alone, even though the family was joint, cannot be overlooked, and they would be helpful in knowing what Basagouda and Balagouda might have been thinking then. One can understand very well the anxiety and concern of Basagouda in seeing that the lands that stood in his name should go to Balagouda as joint family property and that his widows should have no other right except to receive maintenance. It must be remembered that Basagouda was attacked with a deadly disease of plague and that he was apprehending that fast approaching awful thing 'death', being almost at its door as his illness lasted only four or five days. Can it be conceived, in these circumstances, and is it reasonable to suppose that a man suffering from high fever of plague should have such mental frame of mind and peace as to probe into the intricacies of law not in force but to come as yet and make certain arrangement by way of prohibition as contended? How could he have forethought, imagined and dreamt of any trouble on the score of adoption by his wives and that too when he knew his wives could not make any adoption, after his death? The very prevailing ideas regarding the rule of law as understood then (and referred to above) precludes an assumption even that Basagouda had in his mind any intention to direct his wives not to adopt. The idea of adoption was thus far remote and foreign too, and I do not think it should have occurred to Basagouda while he was seriously ill. To hold otherwise is in my judgment to disregard and discard the realities and plunge into an imaginative world of unrealities. The construction of the will must, therefore, be made only in the light of and with reference to the two circumstances pointed out by me. If that is done, the natural inference would be that both Balagouda and Basagouda wanted to avoid trouble by Krishnabai and Parvati regarding the lands that stood in Basagouda's name and that therefore the will came into being. This seems to me to be the natural reading, construction and interpretation of the will. If that is so, it has to be held that there was no prohibition of adoption by the wives under the terms of the will by implication and that the plaintiff's adoption is perfectly valid and good. In this connection the ruling in 34 Bom. L. R. 818 may be referred to with advantage and benefit. The testator's desire in the will, if no son was born to him, was 'I have formed the resolve of giving all my moveable and immoveable property for charity after my death. For this reason, I am not going to adopt a son and I have neither given nor am I going to give authority to make an adoption either to my wife or to anybody else. If anybody should take a son in adoption and say there was my permission for it, it should be regarded as untrue and the disposition of all my property should be made in the way I describe below.' It was held that there was no express prohibition against adoption in the will and that the will only prohibited adoption during the testator's lifetime. When such clear and unambiguous terms have been considered to be not sufficient to justify a prohibition of adoption, by implication, it would indeed be going out of the way to make an inference of prohibition by implication under the terms of the present will. The case quoted therefore fortifies and strengthens the view I have taken."

Defendants appealed to the High Court.

A. C. J. *Purshottam Trikamdas*, with *B. D. Belvi*, for the appellants.  
 1940 *P. V. Kane* and *B. M. Kalagate*, for the respondent.

**KRISHNAWA**  
**YELAGOUDA**  
 v. **BROOMFIELD J.** This is an appeal by the defendants in a suit brought by the respondent to recover possession of certain land.

**RAMAGOUDA**  
**KADAGOUDA**  
 — The land at one time belonged to two undivided brothers, Balagouda and Basagouda, who formed a joint Hindu family. Basagouda died in the year 1907 and soon after his death Krishnabai, one of his two widows, adopted a boy named Iragouda who died in or about the year 1911. The plaintiff claims to have been adopted by Krishnabai on April 29, 1931, and he claims also that by that adoption he became a coparcener with Balagouda and on the death of Balagouda, which took place in August, 1936, he became the sole surviving coparcener. In this suit he seeks to set aside two gifts which were made by Balagouda in July, 1934. These gifts were in favour of two daughters of Balagouda, who are the defendants in the suit. He also made gifts to his other two daughters, one of whom is the wife of the plaintiff, but we are not concerned in this suit with those transactions. It is common ground that if the adoption of plaintiff is proved and valid, the gifts are invalid and plaintiff is entitled to recover the property gifted.

The defendants denied the adoption. They also alleged that it was invalid on the ground that Krishnabai was the junior widow of Basagouda and could not adopt without the consent of the senior widow Parvatibai. It was further contended that Basagouda had prohibited his widows from adopting anybody in a will which he made shortly before his death.

The trial Court found that the adoption of plaintiff is proved and valid as Krishnabai was Basagouda's senior widow and as there was no prohibition of the adoption. The suit was therefore decreed.

In this appeal the factum of the adoption has not been challenged. The points urged on behalf of the appellants are (1) that Krishnabai was the junior widow and Parvatibai the senior widow did not consent to the adoption, (2) that the adoption was impliedly prohibited by Basagouda's will, (3) that the plaintiff is bound by an award decree in certain litigation between Balagouda and Krishnabai in 1908 by which Balagouda was declared to be the owner of the estate after the death of Krishnabai.

On the first question whether Krishnabai was Basagouda's senior widow the evidence is conflicting and not very satisfactory, but we see no reason to differ from the decision of the trial Court. The most important piece of evidence on which the learned trial Judge has, quite rightly, strongly relied is a statement made by Giriappa, the father of Parvati, in the year 1908. In that year Krishnabai made an application to obtain a succession certificate on behalf of her adopted son Iragouda and Giriappa was examined in those proceedings. He said :

"My daughter's name is Parvati. She is the second wife of Basagouda. She is about twenty or twenty-two years old. The name of the first wife of Basagouda is Krishna. She is four or five years younger than my daughter. She has taken in adoption the son of Sardar Ramgouda."

It has been argued on behalf of the appellants, as it was in the trial Court, that there may have been ill-feeling between Giriappa and Balagouda, and the reason suggested is that in the year 1904 a man named Yelagouda brought

a suit against Giriappa for partition and in that suit Balagouda gave evidence in favour of the plaintiff. It seems to us, however, to be unreasonable and far-fetched to suppose that for this reason Giriappa made a false statement in 1908 when he said that his daughter Parvati was the junior wife of Basagouda. The statement was or might have been detrimental to his daughter and cannot be explained; we think, by the suggestion of spite against Balagouda.

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In this same year 1908 there were disputes between Balagouda and the two widows of Basagouda about the amount of their maintenance. Basagouda in his will had fixed the amount of their maintenance at Rs. 50 a year and they were not unnaturally dissatisfied with this. The dispute was referred to arbitration and there were two award decrees, one between Balagouda and Krishnabai and the other between Balagouda and Parvatibai. It was provided that Krishnabai's maintenance was to be Rs. 300 a year and Parvati's Rs. 200 and some land was handed over to Krishnabai out of the income of which she was to pay both her own maintenance and that of Parvati. The award decree also provided that on the death of Krishnabai the land was to go back to Balagouda who was declared to be the owner of the whole estate. The fact that Krishnabai's maintenance was fixed at Rs. 300 and that she was given the land out of which maintenance of both widows was to be paid rather points to the conclusion that she was the senior widow, although no great stress perhaps can be laid upon it.

In the year 1916 Balagouda applied to the Mamlatdar in connection with some change which he wanted made in the khata in the revenue books. He made a statement, exhibit 126, in which he said referring to his deceased brother Basagouda: "He has only two wives. They are Krishnabai his wife by marriage and Parvatibai his wife by pat. Parvati is the senior and Krishnabai is the junior wife." The question of the seniority of Basagouda's two widows would hardly seem to have been material for the purposes of Balagouda's application. Nevertheless no doubt this statement made in 1916 is important, but we agree with the learned trial Judge that it is not entitled to as much weight as the statement of Parvati's father in 1908.

In the year 1925 there was litigation between Parvatibai and Krishnabai and in that suit the question which was the senior widow fell to be decided. The decision was that Krishnabai was the senior. This again cannot be described as a very cogent piece of evidence as against the defendant, although it is a relevant fact.

The oral evidence given in this suit is conflicting. There are several witnesses on both sides who say that they were present at both marriages. Plaintiff's witnesses say that Krishnabai's marriage took place first and was followed not long after by Parvati's. Defendants' witnesses say that Parvati's marriage was the first and Krishnabai's took place two or three years later. The best of the defendants' witnesses and in some respects the best of all the witnesses on this question of the marriages is Ramagouda, who is the watandar patil of the village where the parties reside. But his evidence can hardly be regarded as disinterested because his own son is married to Balagouda's daughter and he might be inclined therefore to take Balagouda's side in this dispute. His daughter-in-law is one of the persons to whom

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Balagouda has made a gift of property. We rely particularly on the statement of Giriappa and we think that the balance of evidence is in favour of the view taken by the trial Court viz., that Krishnabai was the senior widow. Even if Krishnabai was the junior widow, the adoption of the plaintiff would be valid if Parvati consented. An issue was raised on that point in the trial Court, but the trial Judge did not think it necessary to decide it in view of his finding that Krishnabai was the senior. If necessary we should be prepared to hold on the evidence that Parvati did consent. Both the plaintiff and Krishnabai have deposed that she did and their statements derive strong support from the fact, which is admitted even by the defendants' witness Ramagouda, that Parvati was present at the adoption ceremony. It is quite true, as pointed out in *Bhimappa v. Basawa*,<sup>1</sup> that a person's presence at an adoption ceremony is not necessarily equivalent to consent to it. But we have on record a group photograph of the ceremony which shows that Parvati took a prominent part. She is shown right in the front and the plaintiff, the adopted son, is between Krishnabai on one side and Parvati on the other. We think it would be unreasonable to hold under the circumstances that Parvati merely acquiesced.

The most important and difficult point in the case is whether the adoption of the plaintiff has been impliedly prohibited by Basagouda. That depends on the construction of Basagouda's will. The plaintiff has not admitted that the will is genuine. But the trial Court found that it was, and we feel no doubt upon that point. At one time the will was admitted by Krishnabai and it is proved by the evidence of Ramagouda, who is one of the two attesting witnesses, the other being dead. The will is as follows :—

"To, Tirtharupa Rajamanya Rajeshri Balagouda Viragouda Herewade of Sulkud, Petha Alte, Kolhapur State.

Deed of arrangement to operate after death and will passed by me, Basagouda Viragouda Herewade of same village is as under :—

I have no male issue. You are my elder brother and we are undivided. I am now attacked by plague and I fear that I may not survive the illness. Therefore, there are lands, etc. standing against my khata. The arrangement about that to operate after my death is as follows :—Rayatawa lands, houses, wadas, etc. standing in my name at Sulkud, Kolhapur State.

(Description of lands is given.)

The lands, houses and two wadas are there. The boundaries of the entire property are set out in two decrees of Shirol Court. Accordingly all the estate, pots, clothes, cattle also the entire property are joint. You are the only heir of the property and the said property is in your possession. I have two wives and they live with you in one family. If they do not live with you, Rs. 50 should be given to them each for their maintenance. Ornaments worth Rs. 1,000 are on the person of each of them. Let them remain on their persons during their lifetime. After their death, they are yours only. Excepting maintenance, they have no other right whatsoever. I have a daughter's daughter. She should be brought up, and when grown up, she should be married into a family of good income. About Rs. 500 should be given as dowry for the marriage. In order that my name should remain after my death, Rs. 100 per annum should be spent on religious acts, Jangams, Naivedya, etc. You should do this, and you and your descendants, heirs and legatees should enjoy the ownership of the entire estate from generation to generation. On the strength of this will, you should get the khata transferred to your name in respect of the above lands. In

regard to that my wives and anybody else whatever have no sort of right at all. I have passed this to you of my own free will and accord. Consequently, all the rights go to you only and are with you. You and I were living with one mind and I lived in accordance with your wishes and intended to live like that in future also. But there is no remedy for the wrath of God. Thus the will is passed, dated August 29, 1907."

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It is argued by learned counsel on behalf of the appellants that the disposition of his property which Basagouda made in this will indicates that he desired no adoption by either of his widows. It is pointed out that the widows' rights are restricted to mere maintenance. Even their ornaments are to go to Balagouda after their death and the testator provides for his annual ceremonies, "in order that my name should remain after my death", and Balagouda is directed to perform the ceremonies. It is urged that Basagouda must have intended to prohibit any adoption which would defeat the purposes of the will. Mr. Kane for the respondent on the other hand contends that the dominant object of the will was simply to prevent difficulties arising in respect of transference of the khata in the revenue books. There were some of the family lands standing in Basagouda's name and it was anticipated that this might cause difficulty. The defendants' witness Ramagouda has himself said that this was the object of the will. "Basagouda said that some lands stood in his name and that he would pass a will with regard to them to avoid future trouble by his two wives at the instigation of others." So the argument is that the testator was only emphasising the fact that the family was joint. There might be trouble with the revenue authorities if the widows applied to have their names entered as heirs. But there is nothing said about adoption and nothing from which any prohibition of an adoption can be inferred. According to Mr. Kane there was nothing in the testator's mind except to make it clear that it was joint family property and in his will he has merely stated the normal consequences of that position. Therefore it cannot be inferred that the testator's intention was that there should be no adoption to him.

There is a good deal of force in both of these arguments. There are also difficulties in both. If Basagouda's desire was that his widows were not to have the right of adoption, it seems surprising that he did not say so. On the other hand, if his object merely was to avoid difficulties about the khata, he obviously stated a great deal more than was necessary for that purpose.

We have been referred to several authorities. None of the cases cited has any very direct bearing on the facts, but they are useful no doubt in ascertaining the principles to be followed. There are some observations of Sir Lawrence Jenkins in *Lakshmbai v. Sarasvatibai*<sup>1</sup> showing that a disposition of property by the husband inconsistent with the wife's right of adoption may justify an inference that adoption was impliedly prohibited. In that case there was as a matter of fact no such disposition. But in a later case, *Malgouda Paragouda v. Babaji Dattu*,<sup>2</sup> it was held that an adoption by a widow was impliedly prohibited because the husband by his will had left his property to his daughters. The wife in that case was enjoined by the will not

<sup>1</sup> (1899) I. L. R. 23 Bom. 789,  
s. c. 1 Bom. L. R. 420.

<sup>2</sup> (1912) I. L. R. 37 Bom. 107,  
s. c. 14 Bom. L. R. 1121.

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to make over the property to anybody except the daughters. The adoption was held to be invalid as it could not be upheld without giving the go-by to the testator's expressed wishes. It may be noted that the testator mentioned that he had not taken any one in adoption which showed that it was present to his mind that any adoption would run counter to the provisions of the will. We do not think that such cases can be distinguished on the ground that Basagouda's will in the present case was invalid and of no effect, the family being joint. What is material is not the validity of the will but the intention of the testator as to the way in which the property is to devolve. Whether it devolves by his own volition or independently of it is not important if the course of devolution would be altered by an adoption which he could prohibit.

Then we were referred to *Yadao v. Namdeo*.<sup>1</sup> In that case a Hindu husband had stated before his death that he did not wish to adopt a son, but that if an adoption were made, the son of his brother should be adopted. His widow did adopt the son of his brother but the boy died and she then made another adoption. It was objected that that adoption was impliedly prohibited by the husband. But their Lordships of the Privy Council overruled that contention and held that there was no direction to the widow forbidding her to make an adoption if the boy named was not available or died. In the course of the judgment their Lordships said (p. 522) :—

"...such a direction to operate as a prohibition against his widow adopting any boy to him as a son except the boy named by him must be explicitly made and clearly intended by the husband to limit the discretion of his widow for all time, and on every occasion on which otherwise after his death his widow might validly make an adoption to him."

The principle laid down in this case has been followed in a very recent case of this Court, *Damodar Vishnu Juwekar v. Shriram Lakshman Juwekar*.<sup>2</sup>

In *Vithagouda v. Secretary of State*<sup>3</sup> the testator said :

"...I have formed the resolve of giving all my moveable and immoveable property for charity after my death. For this reason I am not going to adopt a son. And I have neither given nor am going to give authority to make an adoption either to my wife or to anybody else. If anybody should take a son in adoption and say that there was my permission for it it should be regarded as untrue and the disposition of all my property should be made in the way I describe below."

It was held that though there was a prohibition against any such adoption as would defeat the provisions of the will, there was no prohibition in respect of property which could not pass under the will, and an adoption by the widow as the result of which the adopted son became the owner of watan property not affected by the will was held to be valid.

Cases where the husband has given directions about the adoption of a boy and where the particular boy for some reason is not available are not very helpful here because, as I pointed out in my judgment in *Damodar Vishnu Juwekar v. Shriram Lakshman Juwekar*, there is a presumption in such cases that an adoption was desired by the husband. Obviously no such presumption can arise in the present case. But when, as in this case, the husband

1 (1921) L. R. 48, I. A. 513,  
 s. c. 24 Bom. L. R. 609.

2 (1940) 42 Bom. L. R. 1086.  
 3 (1932) 34 Bom. L. R. 818.



has said nothing about an adoption one way or the other and the prohibition of adoption is sought to be inferred from statements about other matters or from conduct, it stands to reason that the inference suggested, if it is to be acted upon, must be a necessary inference. The Court must be able to say with confidence that what the husband has said or done shows that he would have prohibited an adoption, either in any circumstances or in the circumstances existing at the material time, if he could have foreseen them. If the Court can say no more than that he might have, or even that he probably would have, prohibited adoption in any circumstances or in those particular circumstances, that we think is not enough. For in that case it cannot be said that his statements or his actions are equivalent to a prohibition, and in the absence of prohibition there is an inherent right to adopt.

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The learned trial Judge thought that Basagouda could not have had the possibility of an adoption in his mind at all, because, as he says inaccurately, the law as understood then was that a widow in a joint family could not adopt. But that was never the law and it was never so understood. A widow in a joint family was always known to have the power of adopting with the consent of her husband's relations, that is to say in the absence of any prohibition from her husband. The plaintiff in this case has alleged, but has not been able to prove, that Balagouda consented to his adoption. But suppose that Balagouda had consented, could it have been argued that the adoption was invalid because Basagouda in his will had impliedly prohibited it? We think not. Basagouda was obviously anxious that the family should continue to be regarded as what it was in fact, a joint family, and that the fact that some lands were in his separate name should not give rise to any claim of separate ownership. He therefore emphasised the rights of his brother as the sole surviving coparcener. But it does not necessarily follow from that that he was opposed to one of the ordinary incidents of a joint family or that he would have objected to an adoption by his widow if his brother himself did not object. It might perhaps be argued with some plausibility, in view of his obvious anxiety to safeguard his brother's rights, that he would have objected to any adoption of a son to himself without his brother's consent, supposing that he could have contemplated that as a possibility. But we think that that might very well have depended on the circumstances of the case. The plaintiff is Balagouda's son-in-law. He was so at the time of his adoption, and from the family point of view that is certainly an important circumstance. We do not think we can say with any confidence that Basagouda would have prohibited such an adoption if he had foreseen it. At any rate the matter is far from clear and without wandering into the region of speculation, which we are not entitled to do, we cannot spell out any prohibition from the terms of this will. We therefore agree with the view taken by the trial Court on this aspect of the case.

The point that the plaintiff is bound by the award decree to which Krishnabai was a party in 1908 is a new one, not taken at the trial nor even mentioned in the memorandum of appeal. It cannot be taken therefore without special leave of the Court under O. XLI, r. 2. It is the practice of this Court not to allow such new points to be taken, unless at any rate it is clear that the point is a pure question of law which can be determined on the

A. C. J. materials already on the record. But this cannot be said to be a pure question  
 1940 of law. It is clear from the case which learned counsel for the appellants  
 — himself cited, *Ravji Andu v. Rama*,<sup>1</sup> that the question whether a decree  
 KRISHNAWA against a widow is to be regarded as one against her in a representative capa-  
 YELAGOUDA city, and therefore binding on the estate, depends partly on questions of facts,  
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 RAMAGOUDA such questions for instance as whether the action of the widow was reasonable  
 KADAGOUDA in the interests of the estate and the parties affected. From the papers re-  
 — relating to these proceedings which are on record it would seem that the widows  
 Broomfield J. were primarily concerned at any rate with the amount of their maintenance,  
 — a purely personal matter. Moreover, as Mr. Kane has pointed out, it seems  
 that as the result of these award proceedings Krishnabai abandoned the  
 proceedings which she had instituted in favour of her adopted son Iragouda.  
 Exhibit 134 is an application made by a pleader on behalf of Iragouda in  
 which it was stated that Krishnabai, Iragouda's next friend, was colluding  
 with the opponent Balagouda. There is some reason to suppose therefore that  
 Balagouda won over the widows to his point of view by giving them more  
 maintenance than was allowed by Basagouda's will. The question raised is  
 a complicated one which in our opinion could not be satisfactorily determined  
 on the available materials. But so far as the evidence on the record does go,  
 we are certainly not prepared to hold that Krishnabai represented the estate  
 in these proceedings in such a way as to make the award decree binding upon  
 the present plaintiff.

We hold therefore that the appeal fails and must be dismissed with costs.

*Appeal dismissed.*

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*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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SUBRAO BAJI PATIL

v.

December 19.

DADA BHIWA CHAWAN.\*

*Hindu law—Adoption—Widow of gotraja sapinda inheriting immovable property  
 —Adoption by widow—Whether right to sue in respect of property vests in  
 adopted son.*

Under Hindu law the widow of a gotraja sapinda cannot by adoption alter  
 the order of inheritance of the property inherited by her as such and divest  
 the reversioner, although such property consists of a right to sue for possession  
 of immovable property.

*Radhabai v. Rajaram*,<sup>2</sup> followed.

*Skivappa v. Kariappa*,<sup>3</sup> disapproved.

1 (1927) 29 Bom. L. R. 1346.

\* Second Appeal No. 459 of 1939,  
 from the decision of M. B. Honavar,  
 Assistant Judge at Satara, in Civil  
 Appeal No. 382 of 1937, confirming  
 the decree passed by M. M. Nadkarni,

Joint Second Class Subordinate Judge  
 at Tasgaon, in Civil Suit No. 184 of  
 1936.

2 (1937) 40 Bom. L. R. 559, F.B.

3 (1938) 41 Bom. L. R. 208.

has said nothing about an adoption one way or the other and the prohibition of adoption is sought to be inferred from statements about other matters or from conduct; it stands to reason that the inference suggested, if it is to be acted upon, must be a necessary inference. The Court must be able to say with confidence that what the husband has said or done shows that he would have prohibited an adoption, either in any circumstances or in the circumstances existing at the material time, if he could have foreseen them. If the Court can say no more than that he might have, or even that he probably would have, prohibited adoption in any circumstances or in those particular circumstances, that we think is not enough. For in that case it cannot be said that his statements or his actions are equivalent to a prohibition, and in the absence of prohibition there is an inherent right to adopt.

The learned trial Judge thought that Basagouda could not have had the possibility of an adoption in his mind at all, because, as he says inaccurately, the law as understood then was that a widow in a joint family could not adopt. But that was never the law and it was never so understood. A widow in a joint family was always known to have the power of adopting with the consent of her husband's relations, that is to say in the absence of any prohibition from her husband. The plaintiff in this case has alleged, but has not been able to prove, that Balagouda consented to his adoption. But suppose that Balagouda had consented, could it have been argued that the adoption was invalid because Basagouda in his will had impliedly prohibited it? We think not. Basagouda was obviously anxious that the family should continue to be regarded as what it was in fact, a joint family, and that the fact that some lands were in his separate name should not give rise to any claim of separate ownership. He therefore emphasised the rights of his brother as the sole surviving coparcener. But it does not necessarily follow from that that he was opposed to one of the ordinary incidents of a joint family or that he would have objected to an adoption by his widow if his brother himself did not object. It might perhaps be argued with some plausibility, in view of his obvious anxiety to safeguard his brother's rights, that he would have objected to any adoption of a son to himself without his brother's consent, supposing that he could have contemplated that as a possibility. But we think that that might very well have depended on the circumstances of the case. The plaintiff is Balagouda's son-in-law. He was so at the time of his adoption, and from the family point of view that is certainly an important circumstance. We do not think we can say with any confidence that Basagouda would have prohibited such an adoption if he had foreseen it. At any rate the matter is far from clear and without wandering into the region of speculation, which we are not entitled to do, we cannot spell out any prohibition from the terms of this will. We therefore agree with the view taken by the trial Court on this aspect of the case.

The point that the plaintiff is bound by the award decree to which Krishnabai was a party in 1908 is a new one, not taken at the trial nor even mentioned in the memorandum of appeal. It cannot be taken therefore without special leave of the Court under O. XLI, r. 2. It is the practice of this Court not to allow such new points to be taken, unless at any rate it is clear that the point is a pure question of law which can be determined on the

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materials already on the record. But this cannot be said to be a pure question of law. It is clear from the case which learned counsel for the appellants himself cited, *Ravji Andu v. Rama*,<sup>1</sup> that the question whether a decree against a widow is to be regarded as one against her in a representative capacity, and therefore binding on the estate, depends partly on questions of facts, and therefore binding on the estate, depends partly on questions of facts, such questions for instance as whether the action of the widow was reasonable in the interests of the estate and the parties affected. From the papers relating to these proceedings which are on record it would seem that the widows were primarily concerned at any rate with the amount of their maintenance, a purely personal matter. Moreover, as Mr. Kane has pointed out, it seems that as the result of these award proceedings Krishnabai abandoned the proceedings which she had instituted in favour of her adopted son Iragouda. Exhibit 134 is an application made by a pleader on behalf of Iragouda in which it was stated that Krishnabai, Iragouda's next friend, was colluding with the opponent Balagouda. There is some reason to suppose therefore that Balagouda won over the widows to his point of view by giving them more maintenance than was allowed by Basagouda's will. The question raised is a complicated one which in our opinion could not be satisfactorily determined on the available materials. But so far as the evidence on the record does go, we are certainly not prepared to hold that Krishnabai represented the estate in these proceedings in such a way as to make the award decree binding upon the present plaintiff.

We hold therefore that the appeal fails and must be dismissed with costs.

*Appeal dismissed.*

*Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice N. J. Wadia,*

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SUBRAO BAJI PATIL

v.

December 19.

DADA BHIWA CHAWAN.\*

*Hindu law—Adoption—Widow of gotraja sapinda inheriting immovable property—Adoption by widow—Whether right to sue in respect of property vests in adopted son.*

Under Hindu law the widow of a gotraja sapinda cannot by adoption alter the order of inheritance of the property inherited by her as such and divest the reversioner, although such property consists of a right to sue for possession of immoveable property

*Radhabai v. Rajaram*,<sup>2</sup> followed.

*Shivappa v. Kariyappa*,<sup>3</sup> disapproved.

1 (1927) 29 Bom. L. R. 1346.

\* Second Appeal No. 459 of 1939, from the decision of M. B. Honavar, Assistant Judge at Satara, in Civil Appeal No. 382 of 1937, confirming the decree passed by M. M. Nadkarni,

Joint Second Class Subordinate Judge at Tasgaon, in Civil Suit No. 184 of 1936.

2 (1937) 40 Bom. L. R. 559, F.B.

3 (1938), 41 Bom. L. R. 208.

SUIT for possession of property.

Tukaram and Baji were two separated brothers. Tukaram died leaving him surviving his widow Jana, his brother Baji and Baji's wife Ahilya. Jana inherited her husband's immoveable property and in the year 1892 she sold the property to the father of one Dada Bhiwa (defendant). Baji then died leaving him surviving his widow Ahilya. In 1913 Jana endeavoured to recover the property sold by her in 1892 on the ground that the transaction was a mortgage and not a sale. She, however, died soon after the suit was started and the suit abated. On Jana's death the property of Tukaram passed to Ahilya, as the widow of a gotraja sapinda.

In 1938 Ahilya adopted Subrao (plaintiff).

On October 15, 1936, the plaintiff sued to recover from the defendant the property which had been in his possession since 1892, on the ground that the sale by Jana was not for legal necessity. The trial Court held that the plaintiff could not divest the estate of Tukaram vested in Ahilya as an heir to Tukaram and dismissed the suit, observing as follows :—

"For the plaintiff his learned pleader argues that the plaintiff by reason of his valid adoption is in the position of a brother's son to the deceased Tukaram, that as such he is a nearer heir to Tukaram than Ahilya who is only a brother's widow, and that therefore the plaintiff's adoption has the effect of divesting Tukaram's estate from the remoter heir Ahilya, and of vesting it in the nearer heir, the plaintiff. Such argument was addressed to the Court in *Umabai v. Nani* (30 Bom. L. R. 100), and was accepted by the Court in that case. But the decision in that case has been expressly disapproved and overruled in the aforesaid full bench case of *Balu Sakharan v. Lahoo* (39 Bom. L. R. 382). As is pointed out in that full bench case at pp. 413 and 414 of the report :—'But there is another well established rule of Hindu law that on the death of a separated house-holder or last surviving member of a coparcenary, the inheritance passes at once to the nearest heir or group of heirs and cannot be held in suspense subject to a possible adoption...Hindu law does not recognise, as does English law, an estate vested but liable to be divested'. So Tukaram's estate which vested in Ahilya on Jana's death in 1913 cannot during her lifetime be divested from her by subsequent adoption made by her of the plaintiff to her own husband Baji. On Ahilya's death the succession to Tukaram's estate will re-open, and it will go to the person who happens to be his nearest heir then surviving. So the plaintiff will have to wait till Ahilya dies, and if he survives her, may then take his chance of succeeding to Tukaram's estate as the next reversioner."

On appeal the Assistant Judge held that the plaintiff could divest Ahilya of the estate vested in her as her husband's brother's heir, but that the plaintiff's suit was barred by limitation under art. 141 of the Indian Limitation Act, 1908. In his judgment he observed as follows :—

"The learned Judge has relied upon a. 502 at p. 553 of Mulla's Principles of Hindu Law, 8th edn., for his opinion that an adopted son can divest his mother only of two estates and not more, namely the one vested in her as an heir to her husband and the other vested in her as an heir to her son. He also relied upon the full bench decision of our High Court in *Balu Sakharan v. Lahoo Sambhaji* (39 Bom. L. R. 382) in which the above section in Mulla's book was referred to with approval and it was held that though the adoption by a widow in whom the property did not vest was valid it had not the effect of divesting the estate of the last male-holder vested in another widow as a gotraja sapinda and of vesting it in the adopted son. But the facts of that case are entirely different from the facts of the present case. In this case Ahilya inherited the estate of Tukaram as his brother's widow and therefore it is urged that she inherited it as a gotraja sapinda. But strictly

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A. C. J. speaking widows are not gotraja sapindas of their husbands' collaterals and therefore they were not recognised by Hindu law givers as heirs. It is only by usage that the widows of gotraja sapindas have come to be recognised as heirs in this province on the ground that in the absence of a gotraja sapinda his widow would take his place, vide *Lallubhai v. Cassibai*, 5 Bom. 110. In other provinces they are not regarded even now as heirs. Under these circumstances when a widow inherits property as gotraja sapinda it has to be deemed that she takes the place of her husband and that the estate vests in her as an heir to her husband. It is for this very reason that where she inherits property as an heir to her husband's collaterals that she takes only a widow's estate in that property. I am therefore of the opinion that if she makes an adoption to her husband, the adopted son will divest her not only of the husband's property vested in her as a widow but will also divest her of the property vested in her as gotraja sapinda's widow. In this particular case Ahilya had two estates vested in her, one of her husband and the other of her husband's brother Tukaram. The learned Judge has held that the adopted son divests her only of the property of her husband which is not included in this suit, but not the property of her husband's brother. I do not think that that view is correct. I am therefore of the opinion that the plaintiff could divest Ahilya of the property vested in her as an heir to Tukaram and could therefore maintain a suit for possession in the lifetime of Ahilya."

The plaintiff appealed to the High Court.

*Y. V. Dixit*, for the appellant.

*P. V. Kane*, for the respondent.

BEAUMONT C. J. This is an appeal against a decision of the Assistant Judge of Satara. The plaintiff sues to recover certain immoveable property, and his title is made out in this way. As long ago as the year 1892 Jana, who was the widow of Tukaram, sold the suit property to the defendant's father. In 1913 she endeavoured to recover the property on the ground that the transaction was a mortgage and not a sale, but she died soon after that suit was started, and the suit abated. On the death of Jana in 1913 the property passed to Ahilya, who was the widow of Tukaram's divided brother Baji, who had died before Jana. Ahilya, as the widow of a gotraja sapinda, according to the law in force in this Presidency, enjoyed only a widow's estate, and in 1928, she adopted the plaintiff. In 1936 the plaintiff filed this suit seeking to recover the property from the defendant, who had been in possession since 1892, on the ground that the sale by Jana was not for legal necessity. The suit failed in both the lower Courts, though for different reasons. In the trial Court the learned Judge held that the adoption of the plaintiff did not divest the estate of Tukaram, which was vested in Ahilya; whilst in the lower appellate Court it was held that the adoption did divest any estate then in Ahilya, but that the plaintiff's suit was barred by limitation under art. 141 of the Indian Limitation Act, 1908.

I think that the ground taken in the lower appellate Court cannot be supported, because the plaintiff's claim undoubtedly arose in 1928, and, although at that date any right which Ahilya had to claim possession was unquestionably barred by limitation, the plaintiff does not claim through Ahilya. But I think that the plaintiff's claim fails on the authority of the full bench decision in *Radhabai v. Rajaram*.<sup>1</sup> In that case the full bench

held that the widow of a gotraja sapinda could not by adoption divest the estate of a reversioner and thereby alter the inheritance. A. C. J.

Mr. Dixit for the appellant relies on a later decision of Mr. Justice Divatia in *Shivappa v. Kariyappa*.<sup>21</sup> In that case the facts were practically the same as in the present case. The adopted son was seeking to recover possession against a purchaser from a former widow on the ground that the sale was not for necessity, and Mr. Justice Divatia distinguished the full bench case on the ground that in the full bench case the contest was between the adopted son and the reversioner, whilst in the case before him the contest was between the adopted son and the purchaser. But with all respect to the learned Judge, I think that that is a wrong way of looking at it, and that in fact his decision is impossible to reconcile with the full bench decision. In the full bench case, the question was whether the adopted son or the reversioner was entitled to immoveable property. In the present case, as in the case decided by Mr. Justice Divatia, no doubt the actual contest is between the adopted son and the purchaser, but the defence of the purchaser is that the plaintiff cannot sue, because it is the reversioner to Tukaram's estate who has the right to sue. Who that reversioner may be, the evidence does not show, but there must be some reversioner who would have taken but for the adoption, and from the full bench decision it follows that the adoption did not oust the title of that reversioner. The only distinction between this case and the case decided by Mr. Justice Divatia on the one hand, and the full bench case on the other, is that the property to be divested in the latter case was the immoveable property itself, whereas in the former cases the property to be divested was the right to sue for possession of immoveable property. But the principle of the full bench case applies. The widow of a gotraja sapinda cannot by adoption alter the order of inheritance of the property and divest the reversioner. That applies just as much to a chose in action as to immoveable property, and I think that on that ground the appeal fails and must be dismissed with costs.

SEN J. I agree.

*Appeal dismissed.*

## FULL BENCH—CRIMINAL APPELLATE.

*Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice N. J. Wadia,  
Mr. Justice Wassoodew and Mr. Justice Sen.*

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January 16.

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v.

SAVER MANUEL DANTES.\*

*Government of India Act (26 Geo. V, c. 2), Sec. 205—Appeal—Federal Court—Certificate to appeal—"Judgment, decree or final order"—"Substantial question of law"—Such question must arise directly—Remote possibility of question arising not enough—Opinion of High Court obiter—Reference to High Court—Criminal Procedure Code (Act V of 1898), Sec. 432.*

An order made by the High Court, under s. 432 of the Criminal Procedure Code, 1898, merely answering a question raised by a Presidency Magistrate and expressing an opinion on a question of law, is not a final order within the meaning of s. 205 of the Government of India Act, 1935.

*Emperor v. Hemendra Prasad Ghosh*,<sup>1</sup> followed.

A mere possibility of "a substantial question of law as to the interpretation of" the Government of India Act, 1935, arising in a remote contingency is not enough to justify the granting of a certificate under s. 205 of the Act.

On a reference made by a Presidency Magistrate, under s. 432 of the Criminal Procedure Code, 1898, two questions arose, first, whether the Bombay Abkari Amendment Act, 1939, was *ultra vires* the Bombay Legislature, as being beyond its scope by virtue of the provisions of the Government of India Act, 1935; and, secondly, whether a certain notification issued under the Bombay Abkari Act, 1878, was revived by the Amending Act of 1939. The High Court disposed of the reference by answering the second question; but only expressed an opinion *obiter* on the first question. The Magistrate following the answer returned by the High Court on the second question acquitted the accused. The Government of Bombay appealed and the acquittal was upheld by the High Court. The Government of Bombay then applied for a certificate to appeal to the Federal Court of India under s. 205 of the Government of India Act, 1935, on the ground that the case involved a substantial question of law on the interpretation of that Act:—

*Held*, (1) that the answer given by the High Court on the second question in the reference was not a "final order" for the purpose of s. 205 of the Act;

(2) that the order passed by the High Court in appeal from the order of acquittal was the only final order, and it did not involve directly any question under the Act;

(3) that the accused having secured acquittal in two Courts, the High Court should have, to justify the grant of certificate to appeal against the acquittal to a third Court, a clear indication in the statute that it was its duty to give the certificate;

(4) that the wording of s. 205(2) indicated that the Legislature did not contemplate an appeal against a decision not based on a point of law arising under the Government of India Act;

(5) that therefore no question of law under the Act was involved in the case and no certificate should be granted under s. 205.

\* Criminal Application No. 331 of  
1940 with Criminal Application

No. 359 of 1940.  
1 [1939] 2 Cal. 411.



APPLICATION for certificate to appeal to the Federal Court under s. 205 of the Government of India Act, 1935.

The accused was prosecuted for an offence punishable under s. 43 (1) (a) of the Bombay Abkari Act, 1878, before the Presidency Magistrate, Fourth Court, Bombay.

The Magistrate referred to the High Court, under s. 432 of the Criminal Procedure Code, 1898, the following two questions for decision :—

1 (a) Has the Provincial Legislature power, under item 31 of List II of the 7th schedule to the Government of India Act, 1935, or otherwise, to pass a law of which the object is to introduce a policy of total prohibition in the Province of Bombay or in certain areas thereof ; and

(b) whether s. 3 and s. 6(b) of Bombay Act VI of 1940 are *intra vires* in particular with regard to total prohibition of possession of liquor and of intoxicating drugs.

2 In the event of the first question being answered in the affirmative, whether there is in existence any effective notification under s. 14B(2) of the Bombay Abkari Act, 1878, absolutely prohibiting the possession of intoxicants by persons generally in the City of Bombay, in other words, whether notification No. 374(c) 39 dated July 17, 1939, which was declared by the High Court to be *ultra vires* and of no effect, is to be considered as in force by virtue of s. 7 of the Bombay Act VI of 1940.

The High Court answered the second question by saying that the notification under reference was not revived by Bombay Act VI of 1940, and disposed of the reference ; but in view of the request of the Advocate General expressed their opinion *obiter* on the first question also (see 42 Bom. L. R. 791).

When the answers were received in the lower Court, the Magistrate passed, agreeably with the answer given by the High Court, an order of acquittal on July 4, 1940.

The Government of Bombay appealed against the order of acquittal (Appeal No. 371 of 1940) ; but the High Court summarily rejected it on September 2, 1940.

On September 11, 1940, the Government of Bombay applied to the High Court for a certificate to appeal to the Federal Court under s. 205 of the Government of India Act, 1935, against the orders passed by the High Court on the reference made to it by the Presidency Magistrate, Fourth Court. They also filed another application for a similar certificate against the order passed by the High Court rejecting the appeal against the order of acquittal.

The applications came on before the full bench for rule on September 13, 1940.

M. C. Setalvad, Advocate General, with R. A. Jahagirdar, Government Pleader, instructed by N. K. Petigara, Public Prosecutor, for the Crown.

M. C. Setalvad. We apply for a certificate to appeal to the Federal Court from the judgment of the full bench in *Emperor v. Dantes*,<sup>1</sup> and from the final order passed by the Presidency Magistrate in pursuance of that judgment. We say that the two pre-requisites to the grant of the certificate imposed by s. 205 of the Government of India Act, 1935, are satisfied in this case.

First of all, there is a "judgment, decree or final order." In this case,

1 (1940) 42 Bom. L. R. 791, s.b.

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two questions were framed by the Magistrate and referred to the High Court for opinion under s. 432 of the Criminal Procedure Code, 1898. Under s. 433 of the Code such a reference results in an order passed by the High Court, and the referring Magistrate is bound to "dispose of the case conformably to the said order." Thus the opinion given by the High Court on a reference under s. 432 is itself a "final order." That order the Magistrate is bound to obey and carry out.

It has been decided by the Calcutta High Court in *Emperor v. Hemendra Prasad Ghosh*<sup>1</sup> that the expression of opinion by the High Court on a reference under s. 432 is not a "judgment, decree or final order" within the meaning of s. 205(1) of the Government of India Act, 1935. I submit that the decision is erroneous. The view there is not given after consideration of the terms of s. 432 and the effect of an order passed under the section. It is difficult to say that an order which the Magistrate is bound to obey is not a final order. It is the High Court that really decides the matter. Besides, in the Calcutta case, the facts had not been ascertained. The Magistrate made a reference at the inception of the hearing before him on a mere point of law. Here, however, the evidence has been taken, and all the facts of the case are set out. There is no dispute as to facts at all.

The expression "judgment, decree or final order" should be given a wide meaning. The Federal Court itself has done so in *Hori Ram Singh v. The Crown*.<sup>2</sup> There Gwyer C. J. and Varadachariar J. (Sulaiman J. dissenting) held that the expression does not limit the appellate jurisdiction of the Court to civil cases. The facts were that the accused was convicted by a Magistrate but acquitted by the Sessions Judge. The High Court reversed the acquittal order and remitted the case to the Sessions Judge for disposal on merits. Even such an order was regarded as a final order. The question again came up for decision in *Shyamkant Lal v. Rambhajan Singh*,<sup>3</sup> and gave rise to the same diversity of opinion. The question there was whether a judgment-debtor under a mortgage decree was entitled to an order under ss. 16 and 17 of the Bihar Money-lenders Act, 1938, for the purpose of restricting the execution sale to such part of the mortgaged property as might be considered by the Court sufficient to satisfy the decree. The refusal by the High Court to make such an order was treated as a final order.

In the present case, we have distinctly an order which finally disposes of the case.

Secondly, the requirement that "the case involves a substantial question of law as to the interpretation of this Act" is also satisfied. On the judgment delivered by the High Court there is no doubt on the point. The case does *involve* a substantial question of law as to the interpretation of the Government of India Act.

The Magistrate referred to this Court two questions of law. The full bench took the view that the first question did "not really arise in connection with the prosecution" (p. 814). It considered the second question from three points of view. First, that the notification "does not fall within the

1 [1939] 2 Cal. 411, 417.

3 [1939] F. C. R. 193.

2 [1939] F. C. R. 159, 162, 183.

ambit of s. 7 of the Amending Act, and, secondly, that if it does so fall, the notification having been declared by this Court to be of no effect, the accused cannot be convicted under it" (p. 814). The third aspect was whether the notification was invalid by reason of the invalidity of the Amending Act itself (p. 815). The notification was held to be invalid under the first two points. In dealing with the third aspect the full bench said: "it must be understood that our views on this point are not intended to form part of our decision, and must be regarded as '*obiter*' only" (p. 815).

It should be remembered that s. 205 does not provide that the "judgment involves", but only that the "case involves." In the present case, the determination of the third aspect, i.e. whether the notification was valid or invalid by reason of the invalidity of the Amending Act, involved an interpretation of the Government of India Act, and as a matter of fact the full bench did interpret the provisions of that Act. The full bench said (p. 816): "We see no difficulty in reconciling the two items now in question by holding that the Provincial Legislature has no power to legislate in respect of possession of intoxicants in such a way as to encroach upon the right to import and export across the customs frontiers." The full bench has dealt with the third aspect. If it did not deal with it, even so the question about the interpretation of the Act would arise. It is true that the notification was held to be bad on the first two points only, and the opinion on the third was expressed *obiter*. Where an appeal raises several questions of law, and the decision on only one of them renders it unnecessary to decide the other questions, then even if those questions are not decided, the case does involve all the questions that arise. The fact that the opinion of the full bench on the third point is expressed *obiter* does not mean that the point is not involved in the case.

The parallel expression "the appeal must involve some substantial question of law" used in s. 110 of the Civil Procedure Code, 1908, was interpreted by the Calcutta High Court in *Gopinath Birbar v. Goluck Chunder Bose*.<sup>1</sup> The section requires that where there are concurrent findings of fact, the appeal must involve some substantial question of law, for the grant of leave to appeal to the Privy Council. In the above case, issues raised points both of law and fact. The trial Court decided all the issues against the plaintiff, but the High Court on appeal agreed with the trial Court on the first issue which was one of fact and was sufficient for the disposal of the case and gave no decision on the other issues. The plaintiff was still given leave to appeal on the ground that the appeal involved questions of law within the meaning of the section, notwithstanding that such question might be immaterial for the decision of the case. Garth C. J. said (p. 295, f. n.): "Now here, if the appeal is allowed, it will allow substantial questions of law; that is to say, questions of law will be raised in the appeal, as well as the question of fact. It is true, that those questions of law may become immaterial, if the question of fact is decided against the plaintiff; but still it seems impossible to say that the appeal does not involve questions of law." Here, if the Federal Court says that the notification is valid on the first two points, then it will assuredly go into the third point.

<sup>1</sup> (1884) I. L. R. 16 Cal. 292, f.n.

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F. B. If one of the questions arising in a case involves interpretation of a section of the Government of India Act, then the requirement of s. 205 is satisfied in spite of the fact that the other questions are sufficient for the disposal of the case.

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The above Calcutta case was followed by Ranade J. in *In re Vishwambhar Pandit*,<sup>1</sup> where the learned Judge said (p. 703) : "that the substantial question of law need not directly arise out of the concurrent findings of fact . . . , but that it is enough if it is involved in those findings, and can, if the appeal is allowed, be raised in the course of the argument."

The "case" means the matter or proceeding or all the issues arising in the case.

The test under s. 205 is whether a question as to the interpretation of the Act arises in the case. I do not suggest that merely because a section is mentioned in the pleadings that it does arise in the case. But where the question of interpretation may arise on one view of the matter, then the question is really involved though it is not decided upon. Here, the High Court has held the notification to be bad on the first two points, and delivered only an opinion on the third point. Although the opinion may not amount to a judgment, still the point is involved in the case. It is *in fact* involved, and not may be involved. "Involved in the case" is not the same thing as involved in the decision. It would include a case where there are several issues, one of which alone bears on the Government of India Act, though the decision may proceed only on the other issues. Suppose, in a civil suit questions of jurisdiction and limitation arise. The Court dismisses the suit only on the question of jurisdiction. Still the case will all the same involve the question of limitation. It arises directly in the case. Similarly, here, the third point arises directly in the case. It would be open to the Federal Court to say that even if the notification was good on the first two points, it still was bad on the third point.

The Court issued a rule.

The rule came up for final arguments on January 16, 1941.

*M. C. Setalvad*, Advocate General, with *R. A. Jahagirdar*, Government Pleader, instructed by *N. K. Petigara*, Public Prosecutor, for the Government of Bombay.

*Sir Jamshedji Kanga*, with *S. G. Velinker* and *R. J. Kolah*, instructed by *Gagrat & Co.*, for the accused.

*M. C. Setalvad*. The Presidency Magistrate referred two questions to the High Court under s. 432 of the Criminal Procedure Code (see 42 Bom. L. R. at p. 814) : first, whether Bombay Act VI of 1940 was *ultra vires* the Bombay Legislature ; and, secondly, whether the notification No. 374/39 (c) dated July 17, 1939, was still in force. The High Court answered the second question, and expressed no opinion on the first question. When the reference went back, the Magistrate followed the answers returned by the High Court, as he was bound to do under s. 433 of the Criminal Procedure Code, and acquitted the accused.

On the present application the question that arises is whether the High Court will grant a certificate to appeal to the Federal Court under s. 205 of the Government of India Act, 1935.

Section 205 consists of two parts. The first part prescribes the conditions on which the certificate can be given. The second part describes the consequences which ensue when the certificate is given. Two requisites are necessary under the first part. First, there must be a "judgment, decree or final order"; and, secondly, the case must "involve a substantial question of law as to the interpretation of this Act."

First of all, the question is, is there a "judgment, decree or final order" in the case? I submit that the order passed on a reference under s. 432 of the Criminal Procedure Code is a "judgment, decree or final order." Section 432 enables a Presidency Magistrate to refer a question of law to the High Court for opinion. What the High Court says is treated as the "decision" of the High Court. Section 433 enables the High Court to pass "such order" thereon as it thinks fit; a copy of "such order" has to be sent to the Magistrate; and the Magistrate is left with no option but to "dispose of the case conformably to the said order." It is thus for the High Court to pass an order. The matter does not rest in "opinion" but results in "order." Section 433 clearly contemplates an order, according to which the Magistrate is bound to act. Assuming that the High Court has expressed an opinion, the Magistrate is bound to pass an order based on that opinion. Treating for the moment the decision of the High Court as "opinion", even so it amounts to an "order" under s. 205 of the Government of India Act. The "opinion" is binding on the Magistrate and he is bound to pass an order conformably to the "opinion". His order or disposal of the case has to be in accordance with the expression of opinion by the High Court. It is a final order. Even in the substantive appeal the expression of opinion is a final order: it cannot be challenged in the final appeal. The opinion is an "order" under s. 433 of the Criminal Procedure Code; and it is certainly a "final order" within the meaning of s. 205 of the Government of India Act, 1935.

In *Hori Ram Singh v. The Crown*<sup>1</sup> the Federal Court held that the words "judgment, decree or final order" in s. 205 did not limit the appellate jurisdiction of the Federal Court to civil cases. The actual order under appeal there was an "order of the High Court directing a re-hearing of the criminal appeal by the Sessions Court" (p. 171). Even such an order was held to fall within s. 205. Gwyer C. J. added in that case (p. 162): "the words 'judgment, decree or final order' ought to receive no narrow interpretation." Varadachariar J. said (p. 183): "The juxtaposition of the words 'judgment, decree or final order' is, no doubt, suggestive of civil litigation; but it cannot be said that the word 'judgment' is not comprehensive enough to include a judgment pronounced in a criminal case." This also appears from the rules made by the Bombay High Court under the section. The case, therefore, is an authority for the view that s. 205 applies to criminal matters, and also for the fact that an order remitting a case to

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the Sessions Court for disposal is a final order under the section. The expression "final order" is employed in s. 109 of the Civil Procedure Code, 1908, in the sense that it is an order which finally disposes of some matter. The term "final order" is used in the sense that it disposes of the contentions of the parties. The decision of the Federal Court as to the interpretation of the words "final order" is binding on this Court. It stands to reason why the order there should be treated as final. In one view, the proceedings could not go on : on the other view the proceedings could go on. The order there went really to the root of the matter. This is how the order is a final order.

In *Shyamkant Lal v. Rambhajan Singh*<sup>1</sup> the High Court took the view that s. 16 of the Bihar Money-lenders Act, 1938, was void under s. 107 of the Constitution Act, as *ultra vires* of the Provincial Legislature. Sulaiman J. held that no appeal at all lay on the ground that the order of the High Court was not a "judgment, decree or final order;" but the majority of Judges were "unable to concur in that opinion" and added (p. 199): "A question of this kind must be determined with reference to the substance of the dispute between the parties and not merely in the light of the fact that the application is one made to the Court before whom an application to execute a decree is pending." The whole question is, is it something which determines some right between the parties or is it something which determines a mere question of procedure? Compare also the expression "final order" as used in cl. 15 of the Letters Patent.

Can it be said in the present case that the order deals with a question of procedure? Here, the question is one of rights. Therefore the order made is of a final nature. Even Sulaiman J. was of opinion (p. 204) "that if the effect of the order from which it is sought to appeal is not finally to dispose of the rights of the parties, then even though it decides an important and even a vital issue in the case, it leaves the suit alive and provides for its trial in the ordinary way."

The two cases decided by the Federal Court lay down the test to be applied. Is the order merely one regulating the procedure or is it an order which disposes of a case on its merits between the parties? The order in the present case says that the notification is dead and cannot be revived. In this sense, it is a final order. I submit that the first order passed by the High Court on reference is a final order. If I am wrong in this submission, then the second order passed by the High Court on appeal is a final order. The High Court in dismissing an appeal does not add to the finality of the first order.

The Calcutta case of *Emperor v. Hemendra Prasad Ghosh*<sup>2</sup> is not correctly decided. It altogether ignores the wording of s. 433 of the Criminal Procedure Code. The section contemplates an order passed by the High Court : and the Magistrate is bound to dispose of the case in conformity with the order. Such an order is final. The deciding view is the High Court view ; and the Magistrate merely carries out the order. The final decision of the Court is in two parts. The first part is an order under

1 [1939] F. C. R. 193.

2 [1939] 2 Cal. 411.

s. 433. The section contemplates an order and nothing else. Even if not formally drawn up it still is an order. It is a final order, because according to it the Magistrate has no option in the matter, but he is bound to carry it out. It is final because it binds the Magistrate. The Magistrate has not to exercise any judgment or discretion at all. Therefore it has the element of finality in it. The test is, can the Magistrate do anything else? The order is the disposal of the point of law between the parties. If that is so, being an order it is final. The order passed by the Magistrate was: "conformably with the order of the High Court I acquit the accused."

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Alternatively, I submit that even if the first order passed by the High Court is not a final order, the order passed by the High Court on appeal from the order of acquittal passed by the Magistrate is a final order.

The next point is whether the case "involves a substantial question of law as to the interpretation of" the Government of India Act. It is now definitely settled that s. 205 of the Act applies to all criminal matters. The title of the appeal is "*The King-Emperor v. Saver Manuel Dantes.*" Under s. 205 there is nothing to prevent an appeal against acquittal. I submit that this Court should have regard to the language used in the section. The "case" should "involve a substantial question of law." Such a question must exist. The dictionary meaning of the word "involve" is "include" or "contain." The term "case" means a proceeding either civil or criminal. The Privy Council say that the object of s. 205 is that when such a question arises it should first go to the Federal Court.

Here, the Court does in effect say that though the case raises the first point yet it prefers to decide the case on the second point, and the reference is disposed of on the second point, and though the Court expresses only an opinion on the first point, still it cannot be denied that the case involves the first point also. The test is not what the Court has proceeded upon. There may be a case, in which three points arise, one only of which relates to the interpretation of a section of the Government of India Act. Even if the Court bases its judgment on the two other points, can it be said that the case does not "involve" the third point? The question is not what the Court has decided, but whether the case "involves" the point.

In the present case, the notification can be attacked in three ways. The Court has held that the attack on the first two points is good, and expresses on the third point merely an opinion. You cannot say that the third point was fanciful.

Suppose, for instance, a case involves questions of (1) jurisdiction, (2) limitation, and (3) merits. All the three points are involved in the case, even if the case is decided on any one point. The test is the scope of the case, and not what is held in the case. If the Court decides the suit on the question of jurisdiction, can you say that the case does not involve the question of limitation? Similarly, if a case raises points of limitation and interpretation of a provision in the Government of India Act, and the Court decides the case only on the point of limitation, can you say that the case does not involve a point of the interpretation of a provision in the Government of India Act? You cannot say that the second point is not involved, merely because you consider that the decision on the first point is a sound

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one. In other words, you cannot make the question whether the interpretation of the Government of India Act is involved or not depend on the soundness or otherwise of the decision on the first point. The test is, does the case, i.e. the matter as presented to the Appeal Court, raise any question as to the interpretation of the Government of India Act? No Court has a right to say that it is not likely that any other view may be taken on the point decided by it, and therefore the other question may be treated as not arising at all.

There are two Privy Council cases as to the interpretation of s. 205. In *Errol Mackay v. Oswald Forbes*<sup>1</sup> Lord Thankerton said (p. 69): "The section imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order, the giving or withholding of the certificate. On such determination the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate, should be recorded, not only for the information of the parties, but—a matter of equal importance—also for the certification of this Board and the Federal Court as to their jurisdiction to entertain an appeal." As no such certificate was given, the Privy Council declined to entertain the appeal, for until the certificate was issued the Privy Council had no jurisdiction to interfere. In *Punjab Co-operative Bank, Ltd. v. Income-tax Commissioner, Lahore*,<sup>2</sup> Viscount Maugham thus expounded the section (p. 375): "The object of this section is plain. It is to ensure that in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder the appeal, if any, that is the direct appeal, shall lie to the Federal Court... The means adopted in the section to carry out the above object are these: (1) The appeal is stated to lie to the Federal Court if the High Court certifies that the specified question of law is involved and is a substantial question. (2) A duty is imposed on the High Court of its own motion to give or to withhold a certificate that the specified question of law being a substantial question is involved. Where such a certificate is given any party in the case may appeal to the Court on defined grounds. Where such a certificate is given no (direct) appeal shall lie to His Majesty in Council even with special leave. It is clear that the section does not provide for a case where no such certificate is given, however plain it may be that it ought to have been given. There is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal in such case, and *a fortiori* there is nothing taking away the right of direct appeal to His Majesty in Council in a case where no substantial question of law of the specified character could by any reasonable possibility arise." The above case only lays down when the High Court should certify or refuse to certify. It should certify when there is a reasonable probability of the point being involved. If the point is capable of being raised, then it is involved in the case. If it can arise, then certainly

1 (1939) L. R. 67 I. A. 64,  
s. c. 42 Bom. L. R. 315.

2 (1940) 43 Bom. L. R. 372, P.C.



it is involved. The point being a possible point in the case, the question of the view of the High Court being sound on the other points is not decisive. The sole question is, is there a point regarding the interpretation of the Act in the case if one view is taken? Even if it does not arise if the other view is taken, then all the same the point is involved in the case. The question which you have to decide is whether the case does involve the point. The "case" means the whole bundle of contentions. If some of the contentions are decided, the others do not cease to constitute the case. It is not given to you to speculate what the Federal Court will decide. If the Federal Court disagrees with the view taken by the High Court, then the decision of the Federal Court will be wholly on the Government of India Act. The point arises if one view of the case is taken; it does not arise if the other view is taken: but it is in any event involved in the case.

*Sir Jamshedji Kanga.* It is repeatedly said by the Privy Council that the word "involve" in s. 110 of the Civil Procedure Code, 1908, must mean that it is necessary to decide.

Now, suppose there were concurrent findings of fact, so that the Privy Council would decline to disturb them in appeal, and that no substantial question of law could arise before the Privy Council unless those findings were set aside by the Privy Council. The question then would arise whether the proposed appeal could be said to involve a question of law so as to entitle a party to appeal to the Privy Council? Mulla in the 10th Edition of his Civil Procedure Code, at p. 368, has answered the question thus: "No, according to the Allahabad High Court. Yes, according to the Calcutta High Court." The latter remark is inaccurate. He relies for the remark on *Moran v. Mittu Bibi*<sup>1</sup> and *Gopinath Birbar v. Goluck Chunder Bose*,<sup>2</sup> but both these cases have received a respectful burial and are overruled by the Privy Council. If a question arises only if the findings of fact are upset, then the question is not involved in the case.

On the terms of s. 205 (2) of the Government of India Act, even if the certificate is given under sub-s. (1), the question about the interpretation of the Government of India Act can be agitated in the Federal Court only if that Court grants "leave" to do so "on any other ground." Under s. 206, some day the Federal Court may become a Court of Appeal, but that can be only in civil cases. It is not contemplated that the Federal Court will ever be a Court of Criminal Appeal. The present attempt is to turn the Federal Court into an ordinary Court of Criminal Appeal.

The view taken by the Calcutta High Court in the cases of *Moran* and *Gopinath Birbar* is negatived by the Privy Council in *Toolsey Persaud Bhuck v. Benayek Misser*,<sup>3</sup> and is expressly overruled by the Calcutta High Court in *Sukalbutti Mandrani v. Babulal Mandar*.<sup>4</sup>

In the present case, can it be said on the actual decision that any point arises as to the interpretation of the Government of India Act? If you give a certificate in a case like the present then you are converting the Federal Court into a Court of Criminal Appeal. The Federal Court itself

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1 (1876) I. L. R. 2 Cal. 228.

2 (1884) I. L. R. 16 Cal. 292, f. n

3 (1896) L. R. 23 I. A. 102.

4 (1901) I. L. R. 28 Cal. 190.

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has no right to give leave to appeal.

The Allahabad High Court held in *Banke Lal v. Jagat Narain*<sup>1</sup> that the expression "involve some substantial question of law," as used in s. 596 of the Civil Procedure Code of 1882 (corresponding with s. 110 of the present Code), must be construed with reference to the practice of the Privy Council not to interfere with concurrent findings of fact of the Courts below. It cannot be said that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which can never arise so long as the Privy Council maintains those concurrent findings of fact, is a "substantial question of law" which the appeal to the Privy Council "involves." In the same case Strachey C. J. said (p. 98): "The word 'involve' implies a considerable degree of necessity. It does not mean that in certain contingencies a question of law might possibly arise... It cannot be said that an appeal involves a question of law which it is in a high degree improbable that the Privy Council will entertain, having regard to its established practice."

The actual order in the present case is the answer to question No. 2. No answer is given on the first question. The order in effect is that there is in existence no notification under the Bombay Abkari Act. Here, unless the Federal Court sets aside the answer to question No. 2, no question regarding the interpretation of the Government of India Act can arise. The appeal does not therefore involve any such question. The case must involve, not may perhaps involve, such a question.

The opinion given by the High Court on the first occasion on reference is a mere opinion. The order passed by the High Court in appeal is a final order. Otherwise, we will be faced with two final orders in one case. So long as the *lis* is alive, you cannot say that any final order is passed. Here, the litigation was continuing when the High Court decided question No. 2 in the reference.

In *Hori Ram Singh v. The Crown*<sup>2</sup> the only question raised was whether s. 205 applied to criminal cases. The Chief Justice says nothing about the finality of the order. The case of *Shyamkant Lal v. Rambhajan Singh*<sup>3</sup> does not help the other side. The order there in question was one passed in execution of a decree of a civil Court. Such an order amounts to a decree (see s. 2 (2) of the Civil Procedure Code.) The judgment there was a decree and was therefore appealable.

The case of *Abdul Rahman v. D. K. Cassim & Sons*<sup>4</sup> shows what a "final order" is. Sir George Lowndes said (p. 81): "The test of finality is whether the order 'finally disposes of the rights of the parties.' It should be noted that the Appellate Court in India was of opinion that the order it had made 'went to the root of the suit, namely the jurisdiction of the Court to entertain it', and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still

1 (1900) I. L. R. 23 All. 94.

2 [1939] F. C. R. 159.

3 [1939] F. C. R. 193.

4 (1932) L. R. 60 I. A. 76,  
s. c. 35 Bom. L. R. 331.

a live suit in which the rights of the parties have still to be determined, no appeal lies against it under s. 109 (a) of the Code."

The observations of the Privy Council in *Errol Mackay v. Oswald Forbes*<sup>1</sup> and *Punjab Co-operative Bank, Ltd. v. Income-tax Commissioner, Lahore*<sup>2</sup> are only general observations. They have nothing to do with the present case.

Here the accused has been acquitted by two Courts. Now, you are asked to give a certificate on the supposition that if the Federal Court overrules your view the question of the interpretation of the Government of India Act will arise.

How can an obiter be a judgment?

The case of *Emperor v. Hefendra Prasad Ghosh*<sup>3</sup> is rightly decided. What the High Court delivers in a case under s. 432 of the Criminal Procedure Code is an opinion, and nothing more. The capacity of the High Court in such a case is advisory only. The "order" in it means the expression of the opinion of the High Court. That order should not be regarded as a final order. The Presidency Magistrate may follow the order. He can still convict the accused on other points. The decision of the Calcutta High Court is by a bench of three Judges. It should be followed.

The Federal Court was not dealing in *Shyamkant*'s case with an opinion delivered by the High Court on a reference made under s. 432 of the Criminal Procedure Code, but only with an order of remand.

In all criminal cases, the Crown is a party. It is only in certain marital offences that the complainant is the person aggrieved. Under s. 417 the Government alone can appeal against an order of acquittal.

*M. C. Setalvad*, in reply. The first point is whether the case involves an interpretation of the Government of India Act. The decisions cited by the other side on s. 109 of the Civil Procedure Code do not help the Court. Sections 109 and 110 of the Code are, as observed in *Banke Lal v. Jagat Narain*,<sup>4</sup> framed with reference to the established practice of the Privy Council. As regards s. 205 there is no such practice of the Federal Court. Why should this Court assume that the Federal Court will not grant leave to raise the question? Assuming that this Court grants a certificate, my next step will be to apply to the Federal Court to raise the point covered by question No. 1. I will do so because the point is involved in the case. In every case the application can be made to the Federal Court if the decision proceeds upon an interpretation of the Government of India Act.

Here, the point does really arise, although it is not decided. The point is one of large importance so far as the powers of the Provincial Government are concerned. It will be a ground for the Federal Court to grant leave under s. 205 (2). The section gives jurisdiction to the Federal Court. The jurisdiction is exercised only in the case of a "judgment, decree or final order." The certificate is as regards a substantial question of law. If there is no final order, the Federal Court will not entertain the appeal even if a

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1 (1939) L. R. 67 I. A. 64,

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2 (1940) 43 Bom. L. R. 372, P.C.

3 [1939] 2 Cal. 411.

4 (1900) I. L. R. 23 All. 94

F. B. certificate is granted.  
 1941 I accept the test of finality adopted in *Abdul Rehman v. D. K. Cassim & Sons*<sup>1</sup>; but to say that the proceedings here before the Presidency Magistrate after the answer given by the High Court is a live proceeding is a contradiction in terms. The Magistrate is bound to accept the order of the High Court by virtue of s. 433 of the Criminal Procedure Code. The order really puts the proceeding to an end. Even applying the test laid down in the above case the order of the High Court here is a final order.

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In any event we have got the decision of the High Court in the appeal filed against the order of acquittal, which indisputably is a final order.

BEAUMONT C. J. These are two applications to the Court to grant a certificate under s. 205 of the Government of India Act, 1935, certifying that the case involves a substantial question of law as to the interpretation of the Act. When the matter first came before this Court, we directed notice to issue to the accused, because it appeared to us that the question involved was not free from difficulty.

The question arises in this way. In April, 1940, a full bench of this Court<sup>1</sup> held that a Notification issued by the Government of Bombay on July 17, 1939, under the Bombay Abkari Act, 1878, was invalid. Subsequently, the Government of Bombay passed an Act amending the Bombay Abkari Act, the effect of which was intended to be to revive the Notification of July 17, 1939. After the passing of the Amendment Act, the accused in the present case, that is to say, the respondent on these applications, was prosecuted for infringing the notification in question, and the learned Magistrate, before whom the case came, referred two questions for the opinion of this Court under s. 432 of the Criminal Procedure Code. The first question did involve a point of law arising under the Government of India Act. The second question dealt with the validity of the notification in question, apart altogether from the provisions of the Government of India Act. On July 1, 1940, this present bench heard the reference, and held that the first question did not arise, and that the only question which did arise was as to the validity of the notification, though we recognized that the validity of the notification might depend upon the validity of the Act under which it was passed. The Court held that the notification had not been effectively revived, and that there was not in existence any effective notification under the Bombay Abkari Act prohibiting the possession of intoxicants by persons generally in the City of Bombay, and answered the second question raised in that sense. With that answer the Court remitted the matter to the learned Magistrate. He, in conformity with the view of the law expressed by this Court, acquitted the accused. Government then appealed against the acquittal, and the appeal was summarily dismissed by a bench of this Court.

It is necessary to notice that, although this Court only decided the second question raised by the learned Magistrate, which did not involve any point of law arising under the Government of India Act, the Court did indicate

1 (1932) L. R. 60 I. A. 76,  
 s. c. 35 Bom. L. R. 331.

2 (1940) 42 Bom. L. R. 791, s.B.

an opinion as to what the position would have been under the Government of India Act, if the notification had been valid. We adopted that course, not because we had any doubt as to the correctness of our decision under the Bombay Abkari Act, but because we were anxious as far as possible to indicate to Government pitfalls which might be anticipated if they again revived the notification in question, or issued a fresh notification in the same terms. We were anxious, having twice held Government's efforts to enforce their prohibition policy to be invalid, to avoid being called upon to do the same thing on a third occasion. Therefore, we thought it right to indicate our view to Government, and the learned Advocate General invited us to adopt that course. But we made it perfectly clear in the judgment that the views we were expressing on the question arising under the Government of India Act were merely *obiter*. It is, of course, clear that no appeal lies against a mere expression of opinion by a Court; an appeal lies only against an order of the Court, and not against the reasons on which the order is founded.

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Under s. 205 of the Government of India Act an appeal lies to the Federal Court from any judgment, decree or final order of a High Court in British India. Those words are not particularly apt to describe an acquittal or a conviction by a criminal Court, but the Federal Court has held that—under the section an appeal lies against a conviction or an acquittal, and by that decision we are bound.

The first question, which arises, is what is the final order against which Government claim the right to appeal? In our opinion, it is perfectly plain that the order made by the full bench of this Court, merely answering a question raised by the learned Magistrate, and expressing an opinion on a question of law, is not a final order. That exact point has been decided by a bench of the Calcutta High Court in *Emperor v. Hemendra Prasad Ghosh*<sup>1</sup> and we have no hesitation in following that case. The only final order, which has been made, is the order of this Court dismissing the appeal against the order of acquittal passed by the learned Magistrate, and that order of dismissal does not involve directly any question under the Government of India Act. However, the actual wording of s. 205 of the Government of India Act is :

“An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder.”

The crucial words are “case involves”; not, on the one hand, “judgment decides”, nor, on the other hand, “case may involve”. The question to be decided is whether this case involves a substantial question of law as to the interpretation of the Act, when the actual decision does not determine any such question, but, in certain events, such a question might arise in the Federal Court.

It was held in a recent case in the Privy Council, *Punjab Co-operative Bank, Ltd. v. Income-tax Commissioner, Lahore*,<sup>2</sup> that a High Court in British

F. B. India is bound either to give or withhold a certificate under s. 205, if  
 1941 there is a reasonable possibility of a point of law under the Government  
 — of India Act arising. But the Privy Council did not indicate how great a  
 EMPEROR degree of probability of the point arising must exist to justify the grant  
 v. of a certificate. The mere possibility of some such question of law arising  
 DANTES in a remote contingency cannot be enough to justify the granting of a  
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*Beaumont C.J.* certificate. It is to be noticed in this case that we are dealing with a  
 — criminal matter in which there is no right of appeal from a High Court,  
 except as given by s. 205, and moreover that Government is seeking to exer-  
 cise a right of second appeal against acquittal. It is a strong thing, when a  
 man has been acquitted already by two Courts, to give leave to appeal  
 against his acquittal to a third Court, and we must find a clear indication  
 in the statute that it is our duty to give such leave. There are two con-  
 tingencies, the happening of either of which would prevent any question of  
 law under the Government of India Act from arising. The first contingency  
 is that the Federal Court may agree with the view which this Court took  
 under the Bombay Abkari Act as to the invalidity of the Notification of  
 July, 1939. The second contingency is that the Federal Court may refuse  
 to give leave for that point to be raised. That second contingency arises  
 on the words of sub-s. (2) of s. 205, which provides :

“Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given.”

That last sentence does not apply to an appeal in a criminal matter, because there is no right of appeal without special leave to His Majesty in Council. Then the sub-section goes on : “and, with the leave of the Federal Court, on any other ground.” So that, if we grant a certificate, Government can only appeal, on the ground that the question under the Bombay Abkari Act was wrongly decided, with the leave of the Federal Court, and until they have obtained such leave and succeeded on such ground of appeal, no question of law under the Government of India Act can arise. The wording of the sub-section seems to indicate that the legislature did not contemplate an appeal against a decision not based on a point of law arising under the Government of India Act. It seems to us impossible to assume that the Federal Court will give such leave and thereby enable the Government of Bombay to prosecute a second appeal against the acquittal of an accused person, merely in order to raise a question under the Government of India Act, which has not up to now been decided. That seems to us too remote a contingency. In our opinion, therefore, it cannot be said that any question of law under the Government of India Act is involved in the present case.

We, therefore, refuse the certificate. Rule in both applications discharged.

*Rule Discharged.*

## CRIMINAL REVISION.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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January 8.

*City of Bombay Police Act (Bom. IV of 1902), Secs. 27 (2A)† and 128—Commissioner of Police—Removal of certain persons out of city of Bombay—Unauthorized return of externee—Offence—Sentence—Enhancement of sentence.*

On a charge being preferred under s. 128 of the City of Bombay Police Act, 1902, against a person who has been externed and has disobeyed the order, it is competent for the Court to consider whether the order of externment made by the Commissioner of Police was legal, that is to say, whether the case fell within the terms of s. 27(2A) of the Act.

If there are more than two convictions for separate offences the case falls within s. 27 (2A), irrespective of the fact whether the offences were tried together at one trial under the provisions of the Criminal Procedure Code or tried separately; though it would normally be harsh to make an order of externment when all the offences have been committed at one and the same time and as part of the same transaction, if the Commissioner has nothing else to go upon.

The Commissioner of Police, in deciding whether to make an externment order in a case falling within s. 27 (2A), is acting in an administrative, and not in a judicial, capacity. It is, therefore, not open to the Court, in dealing with a case of breach of an order of externment made under the sub-section, to consider the reasons which induced the Commissioner to make the order of externment.

Under s. 128 all that the Court can do is to consider whether the order of the Commissioner of Police was legal; and if it was, whether it has been broken; and, if so, what is the proper punishment.

An order of externment under s. 27(2A) is made in the public interest, and it is a serious offence to ignore that order. The mere fact that it has only been ignored once is not a good reason for imposing a light sentence.

The age of the accused is only relevant in passing a sentence where the accused is very young or very old.

Where the accused proves conclusively that he had some reason for coming to Bombay unconnected with any criminal intent, it is a matter which may be taken into account in imposing the sentence.

The period of time during which the accused has remained in custody is a matter to which the Court always pays some regard in imposing a sentence.

\* Criminal Application for Revision No. 475 of 1940, by the Government of Bombay, from conviction and sentence passed by K. J. Khambata, Presidency Magistrate, Fourth Court, Girgaum, Bombay.

† Section 27(2A) runs thus:

"It shall be further competent to the Commissioner of Police to direct any person who, not having

been born in the City of Bombay or the Bombay Suburban District, has been convicted more than twice of offences punishable under Chapter XII, XVI or XVII of the Indian Penal Code, to remove himself in like manner from the City of Bombay and not to enter the said City or the Bombay Suburban District.

A. Cr. J.      ENHANCEMENT of sentence.

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The accused was served with an order made by the Commissioner of Police on August 14, 1940, under s. 27 (2A) of the City of Bombay Police Act, 1902. He was given a railway ticket for his native place of Dhandhuka and seen out of Bombay on August 16, 1940. He was, however, again found in Bombay on September 23, 1940, where he had returned without permission of the Commissioner of Police. He was arrested and tried for an offence under s. 128 of the Act.

Before the trying Magistrate the accused pleaded guilty. The Magistrate convicted the accused on his plea. It appeared that there were three previous convictions against the accused; two of which were passed at one trial for the offences of house-breaking and theft, and the third one was passed subsequently on June 20, 1938, for the offence of theft. The Magistrate sentenced the accused to rigorous imprisonment for two months, observing as follows :—

“The present is, however, the accused's first conviction under s. 128 of Bom. Act IV of 1902. He has also been in custody for eleven days already.”

The Government of Bombay applied to the High Court in revision for enhancement of the sentence passed as above.

The Magistrate submitted a report to the High Court under s. 441 of the Criminal Procedure Code, 1898, in the course of which he stated as follows :—

“In awarding sentence I usually take into consideration several factors :—

(a) The number of previous convictions, and particularly the importance or the gravity of offence in respect of each such conviction as disclosed by the quantum of punishment which the Court may have awarded in the case.

(b) Whether the case is that of a *first offence* under s. 128 or is of a second or subsequent offence. (This I regard as the most important consideration).

(c) The age of the accused.

(d) The reason which may have prompted the accused to return to Bombay.

(e) The period of time during which the accused may have remained in custody.

In the case before their Lordships the accused had three previous convictions. The first two convictions for house trespass (or house-breaking) and theft were of the same date, and it is probable that separate convictions and sentences were recorded and passed for house trespass (or house-breaking) and for theft. The sentences given to him were only fifteen days and one day for the first two convictions—suggesting that the offences could not have been serious. There was a third conviction for theft for which the accused got two months only. Further, the case before me was that of the accused's first offence under s. 128. The accused was also in custody for nearly a fortnight. All the three convictions were at Matheran; and the accused having come to Bombay had so far committed no offence in the City. Having regard to those considerations I thought that a sentence of two months was quite adequate.

It may be said that the accused already had *three* previous convictions and therefore he should have been dealt with severely. But *three* previous convictions are the minimum required in order to justify an order of externment, and if there had been less than three, no order could have been made. So that the fact of there being three convictions was, in my judgment, by no means a circumstance of aggravation. If, (as I believe may have been the case), the first two convictions were for house-breaking and theft at the same time, and there was only one trial, the two convictions together should have been regarded as a conviction ‘once’; so that, taken with the third conviction of June 20, 1938, the accused should have been regarded as convicted *twice* only, and there would not even be a basis for the



order of externment, there being no conviction 'more than twice', i.e. on at least three separate occasions." A. Cr. J.

T. N. *Walavalkar*, (appointed), for the accused.

R. A. *Jahagirdar*, Government Pleader, for the Crown.

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BEAUMONT C. J. This is an application by Government to enhance the sentence passed upon the accused.

On August 14, 1940, the Commissioner of Police made an order for externment of the accused under s. 27 (2A) of the City of Bombay Police Act. The order was duly served on the accused, and on August 16, he was given a ticket for the place to which he was going and was seen out of Bombay. But on September 23 he was found to have returned to Bombay and was accordingly arrested and put up before the learned Magistrate, Fourth Court, on a charge under s. 128 of the City of Bombay Police Act, 1902. That section provides that—

"Whoever, within two years from the date of his removal under the provisions of s. 27 ... enters the City of Bombay, without the permission in writing of the Commissioner of Police, shall be punished with imprisonment for a term which may extend to two years or with fine or with both."

The learned Magistrate convicted the accused, who had pleaded guilty, and sentenced him to two months' rigorous imprisonment. The Government of Bombay have applied to us to enhance the sentence.

The learned Magistrate has submitted a statement to this Court under s. 441 of the Criminal Procedure Code in which he gives the grounds on which he acts in determining the proper sentence in cases of this sort, and we are indebted to him for so doing. He enumerates five factors which he takes into consideration in determining what sentence to impose. The first factor, which is the only one calling for serious comment, is the number of previous convictions (i.e. those justifying the deportation order) and the importance or the gravity of the offence in respect of each such conviction as disclosed by the quantum of punishment which the Court may have awarded in the case. In my opinion, those are not legitimate matters for the Magistrate to take into account. Under s. 27(2A) of the City of Bombay Police Act it is competent to the Commissioner of Police to direct any person who, not having been born in the City of Bombay or the Bombay Suburban District, has been convicted more than twice of offences of the character specified, to remove himself from the City of Bombay and not to re-enter it. On a charge being preferred under s. 128 against a man who has been externed and has disobeyed the order, it is certainly competent for the Court to consider whether the order of externment made by the Commissioner of Police was legal, that is to say, whether the case fell within the terms of s. 27(2A). It is not disputed in this case that the accused had been convicted on one day of criminal house trespass and theft, and separate sentences had been passed under those two sections, though the sentence for theft was only one day's imprisonment; and there was also a later conviction for theft. It has been argued for the accused that the convictions on the first occasion of house trespass and theft were probably convictions arising out of the same transaction, and I will assume that to be so. Of course it may very well happen, and frequently it does happen, that in the course of a single transaction an accused person may commit several

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offences. For example, he may commit criminal house trespass, by breaking into a house; he may steal some article in the house and thereby be guilty of theft; and when he is interrupted, he may assault the owner of the house, and thereby be guilty of causing hurt. As all those offences arise out of the same transaction, they can be tried together, but there may be a separate conviction and sentence for each of the offences. In practice where more than one offence is committed in the course of the same transaction, the Court directs sentences of imprisonment to run concurrently, but in law that is not necessary. Now it is argued by Mr. Walavalkar for the accused that where there are two or more convictions for offences committed in the course of the same transaction, they cannot be treated as more than one conviction for the purposes of s. 27(2A). But in my opinion that is not right. The actual words of the sub-section are "has been convicted more than twice of offences", not "has been convicted on more than two occasions"; and whether the offences are tried together under the provisions of the Criminal Procedure Code, or tried separately, is mere matter of procedure. If in fact there are more than two convictions for separate offences, it seems to me that the case falls within s. 27(2A), though I think it would normally be harsh to make an order of externment when all the offences have been in fact committed at one and the same time and as part of the same transaction, if the Commissioner has nothing else to go upon. But, in my opinion, it is not open to the Court, in dealing with a case of breach of an order of externment made under s. 27(2A), to consider the reasons which induced the Commissioner of Police to make the order of externment. The Commissioner of Police, in deciding whether to make an externment order in a case falling within the sub-section, is acting in an administrative capacity, and not in a judicial capacity. He may know a great deal more about the person to be externed than the Court which convicted him knew. The Commissioner is not bound only by the evidence given in Court, and may consider himself justified in making an order of externment in the public interest, although the actual offences of which the accused person has been convicted were not of a serious character. In my opinion, all that the Court can do in a case under s. 128 is to consider whether the order of the Commissioner of Police was legal; and if it was, whether it has been broken; and, if so, what is the proper punishment. It is not open to the Court to consider the reasons which induced the Commissioner of Police to make the order. In my opinion, therefore, the first factor, which the learned Magistrate says that he takes into consideration in considering the sentence, is not a legitimate factor.

The second factor is whether the case under s. 128 is that of a first offence, or whether the accused has returned more than once wrongfully. That of course is a matter which the Court is entitled to take into account in determining the sentence. But at the same time it must be remembered that an order of externment is made in the public interest, and it is a serious offence to ignore that order. The mere fact that it has only been ignored once is not a good reason for imposing a light sentence.

The third factor is the age of the accused, but that is only relevant where the accused is very young or very old, and in this case he is aged thirty.

The fourth factor is the reason which may have prompted the accused to

return to Bombay. I agree that if the accused proves conclusively that he had some reason unconnected with any criminal intent, that is a matter which may be taken into account in imposing the sentence. If, for instance, he proves that he came back to Bombay to see his dying mother or something of that sort, any Court would take that into consideration in mitigation of the offence. Nothing of the sort is proved in this case.

The fifth ground is the period of time during which the accused may have remained in custody. That no doubt is a matter to which the Court always pays some regard.

I think, therefore, the principles on which the learned Magistrate says that he is in the habit of acting are correct, except as to the first matter, viz., the character of the convictions which have brought the case within s. 27(2A) of the City of Bombay Police Act, which seems to me to be irrelevant.

In the present case we think that two months' rigorous imprisonment was too little, and we propose to enhance the sentence to nine months' rigorous imprisonment.

*Sentence enhanced.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

EBRAHIM MAHOMED MUKRI

*v.*

KHURSHEDBAI EBRAHIM MUKRI.\*

1941

January 17.

*Criminal Procedure Code (Act V of 1898), Sec. 488—Maintenance—Wife and husband living apart—Children living with wife—Refusal by husband to maintain children when living with wife—Whether Magistrate competent to make order for maintenance of children—Practice.*

The object of s. 488 of the Criminal Procedure Code, 1898, is to avoid vagrancy by providing that a Magistrate may up to a limited extent see that a wife and children are maintained by a husband or father able to maintain them.

Where a Magistrate finds that the husband and wife are living apart and the children are living with the wife and the father refuses or neglects to maintain the children where they are living, the Magistrate has jurisdiction to make an order for the maintenance of the children under s. 488 of the Criminal Procedure Code, 1898. If the father's case is that the children ought not to be living with the wife, but ought to be living with him or under his direction, then he must take proper proceedings in a civil Court to get the children removed from the custody of the mother, and although such proceedings may sometimes involve expense which a father is unable or unwilling to bear, that cannot deprive the Magistrate of the right to exercise his powers under s. 488. If the civil Court makes an order under which the children cease to reside with the mother,

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ISHVARLAL

CHHAGANLAL

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\* Criminal Application for Revision No. 431 of 1940 (with Criminal Application for Revision No. 473 of 1940), from an order passed by

M. A. F. Coelho, Presidency Magistrate, Second Court, Mazagaon, Bombay.

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and if the father is then willing to provide for their maintenance, he can then apply to the Magistrate, under s. 489 of the Criminal Procedure Code, to modify his previous order.

APPLICATION for maintenance under s. 488, Criminal Procedure Code, 1898.

One Ebrahim (respondent) was married to Khurshedbai (applicant) in 1918.

On May 24, 1939, the applicant separated from the respondent with her three children who were aged fifteen, ten and seven years respectively.

The applicant filed the present application for separate maintenance alleging that the respondent had turned her out of his house after ill-treating her in various ways. The respondent denied the allegations and stated that her refusal to stay with him was due to the fact that she was living in adultery with one Jamal. At the commencement of the case before the trying Magistrate the respondent made an offer to maintain the applicant if she either came and lived with him or with her brother or sister. The applicant declined these offers.

The learned Magistrate held as a fact that the respondent had not refused or neglected to maintain the applicant and he therefore refused to make any order as to maintenance in favour of the wife. The Magistrate however made an order on the respondent for payment of maintenance to the three children observing as follows :—

“The case of the children however stands on a different footing. It is not the duty of the Court acting under s. 488 as I conceive it to decide questions of guardianship. Section 488 is intended for the relief of temporary distress and for the prevention of vagrancy as is clear from the fact that maximum sum which could be awarded is only Rs. 100/. A child within the meaning of s. 488 means a son or a daughter. Reference to age is purposely omitted, the object being that any son or daughter is entitled to maintenance so long as he or she is unable to maintain himself (See 11 Cr. L. J. 427 and 37 Mad. 565). The Calcutta High Court has also held in the case of *Hemanta Kumar Bannerjee v. Manorama Devi*, 36 Cr. L. J. 1144, as follows : ‘The word ‘child’ has not been defined in the Criminal Procedure Code. In the absence of any statutory definition or anything contrary to the Act, a child is not a person who is competent to enter into a contract or to enforce any claim under the law.’ There are three children concerned in this case, one is a boy aged 15 years named Ahmed Ibrahim, the other two are girls named Roshan and Mariambi aged 10 and 7 years respectively. These are all children within the meaning of s. 488, Criminal Procedure Code. The respondent says that he will maintain if they are handed over to him. But it has been laid down in 10 Rangoon 486 that a father may apply to the civil Court for the custody of his child but meanwhile he is bound to pay maintenance for the child even though it is living with the mother as the child cannot be made to starve because the father and the mother are living separate... For finer questions of maintenance based on rights of guardianship and custody the parties may go to a civil Court. But the object of s. 488 as I have previously said is to relieve temporary distress. I have got no power to hand over the custody of the son to the father and so far as the girls are concerned the mother is entitled to custody under the Mohamedan law. I have got to take the position as it stands and make an order for maintenance to prevent them from starving.”

The applicant as well as the respondent applied in revision to the High Court.

The trying Magistrate made a report to the High Court under s. 441 of

the Criminal Procedure Code raising the question whether in the circumstances of the case the Court can make an order under s. 488 of the Code for maintenance of the children.

The applications were heard together.

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|---------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| CRIM. REV. APPLN. NO. 431<br>OF 1940. | {<br>S. B. D'Silva, for the applicant.<br>V. N. Chhatrapati and Manubhai N. Doctor,<br>for the opponent.<br>R. A. Jahagirdar, Government Pleader, for<br>the Crown. | A. Cr. J.<br>1941<br>—<br>EBRAHIM<br>MAHOMED<br>v.<br>KHURSHED-<br>BAI<br>— |
| CRIM. REV. APPLN. NO. 473<br>OF 1940. | {<br>V. N. Chhatrapati and Manubhai M. Doctor,<br>for the applicant.<br>S. B. D'Silva, for the opponent.<br>R. A. Jahagirdar, Government Pleader, for<br>the Crown. |                                                                             |

BEAUMONT C. J. These are two revision applications, one by the husband and the other by the wife in proceedings under s. 488 of the Criminal Procedure Code. The parties are Mahomedans, and the husband and wife do not get on, and are at the moment living apart, and three children of the marriage,—a boy of fifteen and two girls of ten and seven—, are in fact living with the wife. The wife applied for maintenance, and the learned Magistrate held as a fact that the respondent had not refused or neglected to maintain her, and, therefore, he refused to make any order as to maintenance in favour of the wife, and in revision we do not see any ground for differing from the learned Magistrate on that question.

The learned Magistrate, however, made an order on the respondent for payment of maintenance to the three children, and the father applies to us to set aside that order. The learned Magistrate has made a report to the Court under s. 441 of the Criminal Procedure Code, because he says that questions of this sort frequently arise. The position being that the husband and wife are in fact living apart, and that the children are in fact living with the wife, the husband says :

"I am not going to maintain the children whilst they are living with my wife. They ought to live with me, and if they come and live with me or with somebody of whom I approve, I will maintain them."

The learned Magistrate raises the question whether in those circumstances the Court under s. 488 can make an order for maintenance of the children. In my opinion, the Court can make an order under such circumstances. Powers under s. 488 are limited. The object of the section, no doubt, is to avoid vagrancy by providing that a Magistrate may up to a limited extent see that a wife and children are maintained by a husband or father able to maintain them. But I think that the Magistrate must take the facts as he finds them to be. If in fact the children are living with the wife, and if in fact the father is refusing or neglecting to maintain them where they are living. I think that the Magistrate has jurisdiction to make an order. If the father's case is that the children ought not to be living with the wife, but ought to be living with him or under his direction, then he must take proper proceedings in a civil Court to get the children removed from the custody of the

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mother. No doubt, such proceedings may sometimes involve expense, which a father is unable or unwilling to bear, but that cannot deprive the Magistrate of the right to exercise his powers under s. 488. If the civil Court makes an order under which the children cease to reside with the mother, and if the father is then willing to provide for their maintenance, he can, of course, apply to the Magistrate under s. 489 to modify his previous order. But, in my opinion, as long as the children are in fact residing with the wife, and the husband is in fact declining to maintain them, the Magistrate can make an order for their maintenance under s. 488.

We are, therefore, not prepared to differ from the order which the learned Magistrate made.

*Order accordingly.*

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*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

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*January 22.*  
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EMPEROR

v.

SORABJI RUSTOMJI IRANI.\*

*Criminal Procedure Code (Act V of 1898), Sec. 526—Transfer of case—Sanction of prosecution by District Magistrate—Trial of case by City Magistrate.*

A High Court will not transfer a case from the Court of a Magistrate to the Court of Sessions merely because the Magistrate trying the case is subordinate to the District Magistrate who had sanctioned the prosecution. If, however, there are reasons for thinking that in fact a particular Magistrate was likely to be influenced by the opinion of the District Magistrate, the High Court will not hesitate to transfer the case to the Sessions Court.

TRANSFER of case.

The accused, along with two others, was tried by the Second Class Magistrate of Madha, on a sanction to prosecute granted by the District Magistrate of Sholapur, for an offence punishable under s. 45 of the Bombay Abkari Act, 1878. The trial ended in conviction of the accused, each of whom was sentenced to pay a fine of Rs. 25.

The accused appealed against the convictions and sentences to the Court of the District Magistrate of Sholapur, who transferred the appeal to the Court of the City Magistrate of Sholapur for hearing.

The accused applied to the High Court to obtain an order transferring the appeal to the Sessions Court of Sholapur for hearing, on the ground that the City Magistrate was subordinate to the District Magistrate.

S. G. Patwardhan, for the applicant.

R. A. Jahagirdar, Government Pleader, for the Crown.

\* Criminal Application for Transfer No. 471 of 1940.

BEAUMONT C. J. This is a revision application asking for the transfer of an appeal pending before the City Magistrate, Sholapur, and it involves a question of principle. The applicant was convicted under s. 45 of the Bombay Abkari Act, 1878, by a Second Class Magistrate, his prosecution having been sanctioned by the District Magistrate. An appeal lies from the decision of a Second Class Magistrate to the District Magistrate, and the District Magistrate, realising no doubt that it would not be proper for him to hear an appeal in a case in which he had sanctioned the prosecution, transferred the appeal to the City Magistrate of Sholapur.

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Beaumont C.J.

It is contended by the applicant that we ought to transfer the appeal to the Sessions Judge of Sholapur on the ground that the City Magistrate is subordinate to the District Magistrate who sanctioned the prosecution. No doubt, the City Magistrate is subordinate technically to the District Magistrate, but in a city like Sholapur there is no reason for supposing that the City Magistrate would be in any way influenced in his decision of a particular case by the views of the District Magistrate. The City Magistrate is in an independent position, and no suggestion is made against his personal impartiality. We think, therefore, that it would not be right for us to transfer the case, as we are not prepared to accept the general principle that no Magistrate subordinate to the District Magistrate can deal with a case in which the District Magistrate has sanctioned prosecution. But at the same time, if there were at any time reasons for thinking that in fact a particular Magistrate was likely to be influenced by the opinion of the District Magistrate, we should not hesitate to transfer the case to the Sessions Court.

The application is rejected.

*Application rejected.*

### CRIMINAL REFERENCE.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

EMPEROR

v.

DAHAYABHAI SAVCHAND JHAVERI.\*

1941

January 23.

*Indian Evidence Act (I of 1872), Sec. 105—Burden of proof—Exception contained in body of statute—Person relying upon such exception must prove it—Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 123, sub-ss. (5) and (7).†*

\* Criminal Reference No. 161 of 1940, made by P. V. R. Rao, Additional Sessions Judge, Ahmedabad, to revise conviction and sentence passed by D. G. Sheikh, Additional Stationary Magistrate, First Class, at Ahmedabad.

† The sub-sections run as follows :—

S. 123(5). A work proposed in a notice given under sub-section (1) may be proceeded with in the manner specified in such notice, provided such manner is not inconsistent

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Section 105 of the Indian Evidence Act, 1872, is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception; and there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included.

Hence, the accused who relies upon the permission given to him by sub-s. (5) of s. 123 of the Bombay Municipal Boroughs Act, 1925, has the burden cast upon him to prove that he comes within the terms of the sub-section and is thereby relieved of the liability which is otherwise upon him under sub-s. (7) of the section.

*The King against Pratten*<sup>1</sup> and *Gill against Scrivens*,<sup>2</sup> referred to.

THE accused Dahyabhai owned a house within limits of the Borough Municipality of Ahmedabad.

On May 26, 1938, he asked for permission to make certain additions to his house under s. 123(1) of the Bombay Municipal Boroughs Act, 1925.

Thereafter, on May 1, 1939, he submitted a revised plan to the Ahmedabad Municipality in which he sought permission for two projections (i) on the southern side, and (ii) on the western side of his house. No reply was given to the application till June 9, 1939, when the Municipality intimated to the accused that the question of granting permission for the southern side would be considered after the plan regarding the projection of the western side was altered.

The accused, however, started the construction of the projection on the southern side. The Municipality objected but without any effect.

On August 17, 1939, the Municipality filed a complaint against the accused for an offence punishable under s. 123(7) of the Bombay Municipal Boroughs Act, 1925.

The Magistrate convicted the accused of the offence charged and sentenced him to pay a fine of Rs. 10.

with any provision of this Act or of any by-law for the time being in force thereunder in the following cases, namely:—

(a) in case the Chief Officer within one month from the receipt of the notice given under sub-section (1) has neither—

(i) passed orders under sub-section (2) and served notice thereof in respect of the intended work; nor

(ii) issued under sub-section (4) any provisional order or any demand for further particulars;

(b) in case the Chief Officer having issued such demand for and having received such further particulars, has issued no further orders within one month from the receipt of such particulars.

(7) Whoever begins any construction, alteration, addition or reconstruction without giving the notice required by sub-section (1) or without furnishing any plan, information or particulars required by or under this section, or, except as provided in sub-section (5), without awaiting or in any manner contrary to such legal orders of the Chief Officer as may be issued under this section, or contrary to the provisions of sub-section (5) or (6) or in any other respect contrary to the provisions of this Act or of any by-law in force thereunder, shall be punished with fine which may extend to one thousand rupees;....

1 (1796) 6 T. R. 559.

2 (1796) 7 T. R. 27.



The Additional Sessions Judge of Ahmedabad being of opinion that the conviction was against law, referred the case to the High Court, observing as follows :—

"The learned trial Magistrate has held that the reply of the Municipality dated June 9, 1939, is an implicit refusal. As will be seen from the order, there is no refusal at all but a refusal to consider the matter. Besides, the order is not given in time."

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SAVCHAND

The reference was heard.

*D. V. Patel*, for the accused.

*J. C. Shah*, for the complainant.

No appearance for the Crown.

BEAUMONT C. J. This is a reference made to us by the Additional Sessions Judge of Ahmedabad, wherein he suggests that the conviction of the accused under s. 123(7) of the Bombay Municipal Boroughs Act, 1925, is illegal and ought to be quashed.

The facts are not in dispute. On May 26, 1938, the accused gave notice under s. 123(1) of the Act that he desired to make certain additions to his house, and permission was granted to him. But then on May 1, 1939, he gave a further notice that he desired to make certain other additions, one on the west side and one on the south side, and on June 9 a reply was sent to him by the Municipality saying that the projection in the west shown in the plan should be removed, and thereafter arrangements would be made for the permission. That was certainly not a refusal of permission to make the erection on the southern side, although no permission was actually given. The accused afterwards made the erection on the southern side, and he was prosecuted under s. 123(7) and convicted and fined Rs. 10.

So far as material, s. 123 provides in sub-s. (1) that before beginning to construct any building, or to alter externally or add to any existing building, notice has to be given by the building owner to the Chief Officer, and under sub-s. (7) whoever begins any construction, alteration, addition or reconstruction without giving the notice required by sub-s. (1), or, except as provided in sub-s. (5), without awaiting the legal orders of the Chief Officer, shall be punished as therein mentioned.

The contention of the accused is that he was not bound to await the orders of the Chief Officer because he came within the exception contained in sub-s. (5), which provides so far as material :—

"A work proposed in a notice given under sub-section (1) may be proceeded with in the manner specified in such notice, provided such manner is not inconsistent with any provision of this Act or of any by-law for the time being in force thereunder in the following cases, namely :—

(a) in case the Chief Officer within one month from the receipt of the notice given under sub-section (1) has not issued any orders in the matter.

It is, no doubt, a fact in this case that the Chief Officer had not issued any notice in the matter, and, therefore, the accused was entitled to proceed with the extension of his house under sub-s. (5), provided that the building was not inconsistent with any provision of the Act or of any by-law.

Mr. Shah for the Municipality says that the building in question is a pro-

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jection over a street, and is, therefore, prohibited by s. 143. The learned Magistrate seems to have inspected the premises, but there is no finding as to whether the building projects over a public street, and there is no evidence before us on the subject. Therefore, the question arises whether the burden is upon the Municipality to show that the accused's act is inconsistent with any other provision of the Act, or whether the burden is upon the accused to show that his building is not inconsistent with any provision of the Act.

Mr. Patel for the accused relies on a principle, which has been established in English cases, that where an exception is in the enacting clause imposing a prohibition, then the burden is upon the prosecution to prove that the case does not fall within the exception. In *The King against Pratten*<sup>1</sup> and in *Gill against Scrivens*<sup>2</sup> that principle was laid down, and the Court in the latter case referred to an earlier case of *Jones v. Axen*<sup>3</sup> where Treby C. J. stated the rule in this way :—

“The difference is, that where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to shew the proviso.”

That principle was applied in two later cases, *Taylor v. Humphries*<sup>4</sup> and *Davis v. Scarce*,<sup>5</sup> to the English Statute 11 & 12 Vic. c. 49. That statute made it an offence for a publican to supply refreshment before a certain hour on Sunday to anyone except travellers, and it was held that in a prosecution under the Act the burden was upon the prosecution to prove that the people supplied were not travellers, and that the burden was not upon the publican to prove that they were travellers. Those cases perhaps may be distinguished on the ground that there was a common law liability of an innkeeper to supply refreshments to those who visited his hotel, and that the prohibition against supplying refreshment on Sunday except to certain persons was in respect of the whole prohibition and exception from the common law liability, and the burden was upon the prosecution to prove that the case did not fall within such exception. However, the cases in the Term Reports seem to establish the principle for which Mr. Patel contends, and, no doubt, in this case the exception does fall within the terms of the section imposing the liability. But in India the rule is as laid down in s. 105 of the Indian Evidence Act, which provides :—

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.”

It seems to me that that is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception, and there is no distinction between a case in which the exception is contained in the body of the Statute imposing the prohibition and a case

1 (1796) 6 T. R. 559.

2 (1796) 7 T. R. 27.

3 (1694-1732) 1 Ld. Raym. 119,

120.

4 (1864) 17 C. B. N. S. 539.

5 (1869) L. R. 4 C. P. 172.

in which it is not so included. I think, therefore, that we must hold that in this case, having regard to the terms of s. 105 of the Indian Evidence Act, the burden is upon the accused, who relies upon the permission given to him by sub-s. (5) to prove that he comes within the terms of that sub-section, and is thereby relieved of the liability which is otherwise upon him under sub-s. (7), and as there is no evidence before us that what he has done is not inconsistent with any provision of the Act, the conviction must be upheld.

We, therefore, make no order on the reference.

MACKLIN J. I agree.

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No order made.

### FULL BENCH—CRIMINAL REVISION.

*Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice Divatia, and  
Mr. Justice Macklin.*

HUSSENBHOY ABDOOLABHOY LALJI

v.

RASHID B. VERSHI.\*

1941

February 7.

*Criminal Procedure Code (Act V of 1898), Sec. 94—Summons to produce books of account—Inspection of such books by prosecution—Power of Court to control inspection.*

When an application is made to a Court, or to a police-officer in the mofussil, under s. 94 of the Criminal Procedure Code, 1898, the Court is bound to consider whether there is a prima facie case for supposing that the documents are relevant, i.e. whether books of a particular type are likely to have a bearing on the case. If the Court thinks they are, then it can order production. But, such an order for production does not involve an obligation on the Court to give inspection of all the books produced to the complainant, though the Court has power to order such inspection. The Court should consider that question at a later stage of the proceeding, either at the trial or inquiry or on a special application, at which it could hear the accused as well as the complainant, and it should order inspection of only those books which the complainant satisfies it are really relevant.

Judgment of Broomfield and N. J. Wadia JJ., on the point in *Central Bank of India, Limited v. Shamdasani*,<sup>1</sup> overruled.

RIGHT to inspect documents produced under a summons issued under s. 94 of the Criminal Procedure Code, 1898.

One Abdoolabhoy Lalji (father of Hussenbhoy, accused No. 1) executed a trust deed whereby he settled War Bonds of the face value of Rs. 1,00,000 upon certain charitable trusts. Accused No. 1 was one of the trustees under the deed.

\* Criminal Application for Revision No. 490 of 1940, against an order passed by R. Mathalone, Presidency

Magistrate, 2nd Additional Court, Mazagaon, Bombay.

<sup>1</sup> (1937) 39 Bom. L. R. 1187.

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The complainant Rashid Vershi alleged that some time between April 1, 1935, and March 31, 1936, accused Nos. 1 and 2 sold off six-and-a-half per cent. treasury bonds of 1935 of the face value of Rs. 50,000 and four-and-a-half per cent. Government loan of 1955-60 of the face value of Rs. 55,000; that between April 1, 1936, and March 31, 1937, the accused sold off four-and-a-half per cent. Government loan 1955-60 of the face value of Rs. 10,200; and that the accused used the said money in their own business carried on under the name and style of Abdullahhoy Lalji & Co. He, therefore, filed on September 23, 1940, a complaint charging the accused with criminal breach of trust in respect of the above trust money, an offence made punishable under s. 406 of the Indian Penal Code, 1860.

At the same time, the complainant also applied for a summons against the accused, under s. 94 of the Criminal Procedure Code, for production of the books of account of the Trust for the years 1933 to date, as also the account books (i.e. ledgers, rojmelis, and nondh-books) of Abdullahhoy Lalji & Co. for the years 1935-1939. The Magistrate issued the summons as also a search warrant which was prayed for.

In execution of the search-warrant about thirty-six books of account and other books of Abdullahhoy Lalji & Co. were produced and taken charge of by the police.

On an application made by the accused, the Magistrate made an order, on October 2, 1940, ordering return to them of the account books of the charity and the accused's firm for the years 1939-40 and 1940-41, and directing that "the remaining books seized under the search-warrant remain in Court until the complainant has taken inspection of the relevant entries." on the following day the complainant's advocate gave a list of account books of which he needed inspection.

When the complainant sought inspection of the books of account detained in Court, the accused again raised objection to the inspection. The Magistrate in disposing of the objection stated as follows :—

"The complainant's advocate has urged that it is impossible to point out any particular entry until he has inspected the books which have been written by the accused and have always been under their control. He has further urged that the complainant has reasonable grounds for apprehending that the money belonging to the charity funds have been credited and debited in various accounts in the books of the accused's firm with a view to misappropriation and unless he takes inspection of the books it will be impossible for him to trace the charity moneys and to bring the charge home to the accused. He has also argued that this Court is bound by a decision of a divisional bench of the Bombay High Court reported in 39 Bom. L. R. 1187, at p. 1192, to the effect that the prosecution is entitled to inspection of all documents produced under a summons issued under s. 94 of the Criminal Procedure Code. The documents in that case were produced by a third party, namely the Central Bank of India under a summons to produce issued by the learned Magistrate of the 6th Court under s. 94 of the Criminal Procedure Code. The judgment of the divisional Court was delivered by Broomfield J., who held that an order for production of documents confers by implication a right on the part of the complainant to inspect the documents produced under the order. It is conceded by the learned counsel on both sides that there is no difference in the law relating to the inspection of documents produced under a summons issued under s. 94 or seized under a search-warrant issued under s. 96. In consequence of the said judgment of Broomfield J. the learned Magistrate passed an order in favour of the complainant in that case

for inspection of the Bank's books. The Bank appealed from that order and the matter was again considered by a Special Bench of the High Court. The judgment of the Special Bench was delivered by the learned Chief Justice who held that the case did not arise under s. 94 of the Criminal Procedure Code but under the Banker's Books Evidence Act. In the course of his judgment, however, the learned Chief Justice disagreed with the decision of Broomfield J. that the complainant has a right to inspection of documents produced under s. 94...

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I would like to state very respectfully that I am in complete agreement with the opinion of the learned Chief Justice. The issue of a search warrant is a procedure which is intended by its very nature to be swift and sudden so as to render it impossible in the case of documents for the party who possesses them to conceal or tamper with them before they are produced. In most cases a search-warrant is issued on an *ex parte* application, and in many cases it is difficult for a Court to decide irrevocably on the relevancy, or the necessity of giving inspection, of documents without hearing the party to whom the documents belong. Such a law, as envisaged by the learned Chief Justice, may, in certain circumstances, cause incalculable damage to the mercantile community....

A consideration of the effect of s. 94 was not necessary for the determination of the case decided by the Special Bench. The case was actually decided under the provisions of the Banker's Books Evidence Act. The result in my opinion is that although the authority of the judgment of the Division Bench has been considerably undermined by the judgment of the Special Bench it has not been overruled by it. In fact it is not denied as a matter of law that a decision of the Appeal Court of the Bombay High Court cannot be overruled or set aside except by a full bench or by the Privy Council. I am therefore bound by the judgment of the Divisional Bench, and, in my opinion, I have no power to refuse inspection to the complainant of the accused's books seized under the search-warrant issued on September 23, 1940."

The accused applied against the order to the High Court under its revision jurisdiction.

The bench in issuing a rule observed that "this case will require a Full Bench."

On February 3, 1941, when the case was placed before a bench consisting of Beaumont C. J. and Macklin J., their Lordships ordered that it should be heard by a full bench.

Accordingly, the case was heard by a full bench consisting of Beaumont C. J., and Divatia and Macklin JJ. on February 7, 1941.

*Sir Jamshedji Kanga* and *G. N. Thakor*, with *B. G. Thakor*, instructed by *Mulla & Mulla*, for the applicant.

*P. L. Thacker*, with *P. A. Dhruva*, for the complainant.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

*Sir Jamshedji Kanga*. The question that arises here is, whether a Magistrate after he issues a search-warrant under s. 96 of the Criminal Procedure Code and the books are produced in his Court, has any right to control their inspection by the other side. The Magistrate has held, following the judgment of Broomfield J. reported in *Central Bank of India, Limited v. Shamdassani*,<sup>1</sup> that as soon as documents or books of account are produced in Court, the Magistrate has no option but to allow inspection of them by the other side.

There is no provision in the Criminal Procedure Code for discovery and inspection; but by reason of sub-s. (3) of s. 94 the Judges have held that

1 (1937) 39 Bom. L. R. 1187, 1192, S.B.

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even in a criminal case inspection can be given. Section 96 of the Code is in effect the same as s. 94. The word "inspection" in s. 96 has been held to mean inspection of premises or locality : *Mahomed Jackariah & Co. v. Ahmed Mahomed*.<sup>1</sup>

I submit that when you invoke the assistance of the Court for inspection of documents the Court has control over the inspection. Here, the other side desires to have inspection of our books of account which have no bearing on the subject-matter of complaint. There is a suit pending between the accused and his nephew in the High Court as regards the Indo-Aden Salt Works, and inspection of account-books of these Works is sought probably for the ends of the suit in the High Court. In the matter of the present complaint there is very little to be done by inspection. We admit that we have sold the war bonds of the value of Rs. 1 lac which were purchased for investing charity funds and that the proceeds of the bonds are credited to the accounts of the firm. The prosecution will gain nothing by inspection of our books.

The judgment of Broomfield J. if properly considered amounts to *obiter*. The learned Judge said that s. 94 of the Criminal Procedure Code was not controlled by s. 6 of the Bankers' Books Evidence Act, 1891. The observations of the Chief Justice in that case are also *obiter*. I submit that there is no warrant for the proposition that the prosecution has the right to inspect the books of the accused as soon as they are produced in Court under a search-warrant.

In *In re Lakshmidas*<sup>2</sup> the Court said (p. 982): "The question whether the production of a particular document or book is necessary or desirable for the purposes of any trial is one which must be decided by the Magistrate before he orders the production and in determining that question he has to exercise his discretion judicially in the sense that he must satisfy himself that the document or book has a bearing upon and is relevant to the case. When he has so satisfied himself, his jurisdiction to order its production comes into play and that carries with it the jurisdiction to allow the prosecution the right of inspection." The Court there relied upon *Mahomed Jackariah & Co. v. Ahmed Mahomed*,<sup>3</sup> the main argument in which was that the Criminal Procedure Code gave no right of discovery. All that the case says is that the Magistrate has power to give inspection of documents and books brought into Court under a search-warrant. It stands to reason that when a party invokes the assistance of the Court to produce books into Court and the books are so produced, the Magistrate must also have the power to control inspection of the books.

I submit that the judgment of the special bench in *Central Bank of India v. Shamdasani* is correct, and that the Magistrate has the right to consider of what documents he would allow inspection.

*P. L. Thacker.* It is not correct to say that I want inspection of all books belonging to the accused. What I ask for is the inspection of a few accounts in the books of account for the years 1934 to 1939 of the firm of Hussein-

1 (1887) I. L. R. 15 Cal. 109.

2 (1903) 5 Bom. L. R. 980.

3 (1887) I. L. R. 15 Cal. 109.

bhoy Lalji & Co. My case is that the trustees have misappropriated the charity money. This will appear from the entries in the rojmel, how these entries are posted in the ledger, and how they are dealt with in the moudh. Altogether I require inspection of about six or seven accounts. In the trial Court, I have already given a list of relevant accounts. I am not in a position to give a list of relevant entries, but I can only specify relevant accounts. The Magistrate has already heard arguments as to the relevancy of these accounts before he passed the final order.

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Our case is that the charity money was misapplied in the years 1935-36 and 1936-37. These are wide dates. The above-mentioned accounts therefore become relevant to show when exactly the misappropriation took place. The inspection of the accounts will show how the charity money was ultimately utilised. The Magistrate has allowed inspection of only those documents mentioned in the letter of the complainant's advocate, dated October 3, 1940.

Regarding the case of *Central Bank of India, Limited v. Shamdasani*,<sup>1</sup> the other side has admitted that the remarks of the special bench in that case as regards s. 94 of the Criminal Procedure Code are *obiter*.

Three things are requisite under s. 94. First, the documents of which production is sought must be distinctly specified. Secondly, such documents must have reference to the inquiry or trial. Thirdly, before the Magistrate issues a summons or a search-warrant he must exercise judicial discretion in the matter. In the present case, all the three conditions are fulfilled.

In *Mahomed Jackariah & Co. v. Ahmed*<sup>2</sup> the Magistrate had ordered inspection of books produced, and the inspection was taken. The High Court upheld the order for inspection. The case says that the moment the books are produced a private prosecutor is in the same position as the prosecuting police. The police may then call for the books or seize them under the powers given to them by the Criminal Procedure Code or the Bombay City Police Act, 1902. There is no section in the Criminal Procedure Code or in the Bombay City Police Act to say that the books of account once produced are not to be inspected by the police. To say that I must specify the entries in the accounts before I can inspect the accounts would be putting the cart before the horse.

In *In re Lakshmidas*<sup>3</sup> the Court remarked (p. 982): "Further, if the Legislature did not intend by s. 94 that the right to inspection should follow as a necessary consequence of the production ordered under it, the production of such document or book before the Court at any trial must cease to have any value." This remark means that when once the books are produced the inspection of relevant accounts should be given. First of all, the Magistrate considers the relevancy of books to be produced before an order is made, and, secondly, after the books are produced, he may hear both the parties before inspection is given.

As distinguished from the case of *Central Bank of India v. Shamdasani*, in the present case no third party—and that a bank—is involved. The books belonging to the accused alone are produced. The object of the prosecution is to protect charity.

1 (1937) 39 Bom. L. R. 1187,  
1208, S.B.

2 (1887) I. L. R. 15 Cal. 109.

3 (1903) 5 Bom. L. R. 980.

F. B. Sir Jamshedji Kanga was not heard in reply.  
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BEAUMONT C. J. This is an application in revision against an order made by the Presidency Magistrate, 2nd Additional Court, Mazagaon, granting inspection of documents.

The case is one in which the accused are charged with criminal breach of trust in relation to certain charitable funds, which it is alleged that they have improperly applied in their business. We are not in any way concerned with the merits of the prosecution case. On September 23, 1940, the learned Magistrate issued a search warrant, and also issued a summons for production of documents, which were specified in the complainant's application and include various accounts relating to this charity and also the books of account, that is to say ledgers, rojmelis and nondh books, for five years of the firm of Abdullabhoy Lalji & Co., which is the accused firm. Subsequently, the complainant wrote to the accused's attorneys claiming inspection of a large number of these documents, and an application was then made to the learned Magistrate asking him to order that the complainant has a right to such inspection.

The learned Magistrate took the view that he was bound by a decision of this Court in a revision application on a complaint filed by Shamdasani against the auditors of the Central Bank reported under *Central Bank of India, Limited v. Shamdasani*<sup>1</sup> to give such inspection without considering the relevance of the particular documents. The learned Magistrate considered that in that case this Court had held that, where an order for production of documents is made under s. 94 of the Criminal Procedure Code, the complainant, whether the Crown or a private complainant, is entitled as of right to inspect those documents, and that the order of the Court for production involves allowing inspection. The learned Magistrate, against his own view of the law, considered that he was bound to follow that decision. That decision was discussed by a special bench of this Court on an application made in the same matter by the Central Bank, who had not been a party to the prior application, and the special bench undoubtedly expressed a view opposed to that which had been taken by the earlier bench; but, as the learned Magistrate rightly points out, the views of the special bench were *obiter dicta* because the decision turned on the Banker's Books Evidence Act, and not on the Criminal Procedure Code. In our view, assuming that this Court in the earlier case did hold that an order for production made under s. 94 of the Code involves as a necessary consequence a right on the part of the complainant to inspect all the books produced, the decision goes too far, much further than the decision of this Court in *In re Lakhmidas*,<sup>2</sup> which the Court purported to follow.

We think the true view is that, when an application is made to a Court, or to a police-officer in the mofussil, under s. 94 for production of documents, the Court is bound to consider whether there is a *prima facie* case for supposing that the documents are relevant. Obviously, if the accused is charged with a crime of violence, it is very unlikely that his business books will have any relevance on the matter. On the other hand, if he is charged with criminal

1 (1937) 39 Bom. L. R. 1187, s. B.

2 (1903) 5 Bom. L. R. 980.



breach of trust in matters relating to his business, it is probable that a considerable number of his business books will be relevant. But all that the Magistrate or the police-officer can do, when an application for production of books is made, which is usually *ex parte*, is to consider whether books of a particular type are likely to have a bearing on the matter. If he thinks they are, then he can order production; and, of course, his decision may be influenced by a desire to prevent the books being taken away or tampered with. But I am quite unable to agree that such an order for production involves an obligation on the Court to give inspection of all the books produced to the complainant, though I do not doubt that the Court has power to order such inspection. The Magistrate must consider that question at a later stage of the proceeding, either at the trial or inquiry, or on a special application, at which he can hear the accused as well as the complainant, and he should only order inspection of those books which the complainant satisfies him are really relevant.

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The learned Magistrate, therefore, in this case should have applied his mind to the question whether the inspection of these documents is relevant to the complainant's case. He has not done so, because he considered the decision of this Court precluded him from doing so. We think the decision of this Court, in the case of Shamdasani against the auditors of the Central Bank above referred to if it went so far as that, was wrong and must be overruled. The learned Magistrate must apply his mind to the question whether the documents, of which inspection is sought, are relevant or not.

*Order accordingly.*

### CRIMINAL REVISION.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

J. D. BOYWALLA

*v.*

SORAB RUSTOMJI ENGINEER.\*

1941

January 31.

*Criminal Procedure Code (Act V of 1898), Sec. 195 (b)—Complaint, lodging of, by Magistrate—Taking cognizance of case by Magistrate—Indian Penal Code (Act XLV of 1860), Secs. 211, 420.*

The applicant made a complaint to the police against the opponent for an offence under s. 420 of the Indian Penal Code, 1860, on which the police started investigation, arrested the opponent, and released him on bail. Subsequently, the police applied to a Magistrate to have the bail enlarged, which was done. After further investigation into the matter the police reported to the Magistrate that no offence was disclosed against the opponent, whereupon the Magistrate discharged the opponent and cancelled his bail-bond. The opponent then filed a

\* Criminal Application for Revision No. 515 of 1940, from an order passed by D. S. Babrekar, Presidency Magis-

trate, 3rd Additional Court, Girgaum, Bombay.

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case against the applicant for an offence under s. 211 of the Indian Penal Code :—

*Held*, that in doing what he had done the Magistrate had taken cognizance of the case under s. 420 of the Indian Penal Code, and that, therefore, under the provisions of s. 195 (b) of the Criminal Procedure Code, 1898, it was that Magistrate alone who could lodge the complaint for an offence punishable under s. 211 of the Indian Penal Code.

#### COMPLAINT of false charge.

On May 14, 1940, the applicant J. D. Boywalla lodged a complaint against the opponent Sorabji Rustomji Engineer, for an offence punishable under s. 420 of the Indian Penal Code, 1860, before the Sub-Inspector of Police in the Lamington Road Police Station.

The Sub-Inspector entertained the complaint, arrested the opponent and released him on bail. On May 16, 1940, the police put up the opponent before the Presidency Magistrate, Third Additional Court, Girgaum, for extension of bail, which was granted. The police again put up the accused on May 29, 1940, before the Magistrate on a report, which was accepted by the Magistrate. The Magistrate discharged the opponent and cancelled the bail-bond.

On June 24, 1940, the opponent filed a complaint before the same Magistrate against the applicant, charging him with an offence punishable under s. 211 of the Indian Penal Code, for filing a false complaint against him under s. 420 of the Code. A summons was served on the applicant on October 12, 1940. The prosecution led preliminary evidence, and the Magistrate framed a charge against the applicant on November 21, 1940.

On November 28, 1940, the applicant filed another complaint before the same Magistrate charging the opponent with an offence under s. 420 of the Indian Penal Code, on the same facts as before. The Magistrate ordered notice to be issued to the opponent.

On December 3, 1940, the applicant applied to the Magistrate for a stay of the case against him under s. 211, but the application was rejected by the Magistrate.

The applicant then applied to the High Court for an order quashing the proceedings against him.

*T. S. Vyas*, with *A. B. Acharya*, for the accused.

*H. R. Pardiwalla*, with *M. B. Sakhalakar*, for the complainant.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

BEAUMONT C. J. This is an application in revision made by one J. D. Boywalla, who asks us to quash a complaint lodged against him under s. 211 of the Indian Penal Code. The case is a good illustration of the way in which the time of the criminal Courts and of the police in Bombay is wasted by the foolish behaviour of some of its citizens.

The facts are that Mr. Boywalla had got a motor car, as I understand, for the first time in his life, and he took the motor car to a garage, which belonged to the opponent, either alone or with partners, in order to have it painted and repaired. His case is that when he went to get his car back from the garage, the opponent told him that the battery had not been properly charged, although Mr. Boywalla says that he had recently had it charged. However, the oppo-

nent said that the battery required to be recharged, and that it had been recharged by him, for which a sum of Rs. 3 was payable, and Mr. Boywalla paid the three rupees. But then he found that his car would not start. The opponent in the meantime had gone out and was not available. So, after waiting for about an hour, Mr. Boywalla jumped to the conclusion that he had been cheated by the opponent in respect of the three rupees. He assumed that because the car would not start, the battery had not been charged as the opponent alleged, though any practical motorist knows that there are many other reasons which may account for a motor refusing to start. So Mr. Boywalla rushed off to the police and lodged a complaint against the opponent of cheating in respect of these three rupees, his case being that he had been induced to part with the money by the opponent's fraudulent and false statement that the battery had been charged. The police authorities, instead of telling him to go away and not to be silly, started investigation and arrested the opponent and released him on bail, and subsequently applied to the learned Magistrate of the Girgaon Police Court to have the bail enlarged, and an order to that effect was made. The police then investigated further into the matter, and eventually on May 29 the Police Sub-Inspector made a report to the learned Magistrate saying :

" I beg to place before Your Worship the marginally noted accused person who was arrested by the Police on 8-5-40 at about 2-0 P.M. u/s 420 of I. P. Code. He was released on bail the same day and his bail period was extended till to-day. As however no offence has been disclosed against him it is requested that he be discharged and his bail bond cancelled."

On that the learned Magistrate passed an order :

" Accused discharged. Bail bond cancelled. Deposit to be returned."

Subsequently the opponent filed a case against Mr. Boywalla under s. 211 of the Indian Penal Code, which provides that whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished. Obviously it may be difficult to prove that Mr. Boywalla knew that there was no just or lawful ground for his proceeding. I very much doubt whether he had the slightest idea as to what was necessary in order to secure a conviction for cheating under s. 420 of the Indian Penal Code. His conduct in lodging the complaint was, I think, most irresponsible, but whether an offence could be proved under s. 211 is problematical.

However, the point of law taken on behalf of Mr. Boywalla is that it is the Magistrate who must lodge the complaint under the provisions of s. 195 (b) of the Criminal Procedure Code. That section provides, so far as material, that no Court shall take cognizance of any offence punishable under s. 211 of the Indian Penal Code, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court. The complaint here is not lodged by the learned Magistrate, and I should think it very unlikely that the learned Magistrate would consent to lodge a complaint in such a trivial matter.

The question, however, is whether the making of this alleged false charge

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was committed in, or in relation to, a proceeding in Court. It is contended on behalf of the opponent that the order made by the learned Magistrate extending bail, and subsequently discharging the accused and cancelling his bail bond, was an administrative order, and not a judicial order, since the Magistrate never considered the merits of the case. I am quite unable to accept that argument. Indeed, it is a novelty to me to hear it suggested that there is any authority which can make an administrative order discharging an arrested person from judicial custody. This man had been arrested, and released on bail, and, in my opinion, the only authority which could release him from custody, or from being on bail, was a Magistrate or Judge acting judicially, and I have no doubt whatever that the learned Magistrate acted, and intended to act, as a Magistrate in a judicial capacity.

But then it is contended both by the opponent and by the learned Government Pleader that there is no power under the Criminal Procedure Code for a Magistrate to discharge an arrested person, without having taken cognizance of the case, or a mere report of a police-officer, and it is said that here the learned Magistrate had not taken cognizance of the case. The logical result of that argument, if it were to prevail, would be, not that the order of discharge was an administrative order, but that it was an invalid order, and the accused still remained on bail. In my opinion, however, there is no force in the argument.

Under s. 190 of the Criminal Procedure Code a Presidency Magistrate may take cognizance of any offence upon receiving a complaint of facts which constitute such offence, or upon a report in writing of such facts made by a police-officer, or upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed. Section 204 of the Criminal Procedure Code provides that if, in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then he can proceed either by summons or warrant as therein mentioned. The wording of that section seems to suggest that there may be a case in which the Magistrate has taken cognizance, but in which, in his opinion, there is no sufficient ground for proceeding; and it is quite true that the Criminal Procedure Code does not provide what is to happen in that case. But it seems to me to follow by necessary implication that the Magistrate must in such a case discharge the accused. If he is not prepared to proceed further, and the accused is under arrest and before him, he must necessarily discharge him. There is no other course open to the Magistrate; the accused cannot be left indefinitely in custody or on bail. There is nothing that I know of in the Procedure Code which suggests that such a course is not legal. When, in the case of a man who has been arrested and released on bail the police-officer reports that there appears to be no case, and invites the Magistrate to discharge the man, the Magistrate is not bound to act upon the police view. He can undoubtedly say: "I will have a further inquiry in this matter. I think the police are wrong in suggesting that the accused should be discharged." And he may direct further investigation. On the other hand, I have no doubt that he may say: "I have no reason for thinking that the report of this police-officer, who is a responsible person, is wrong, and if he tells me that after investigation he thinks there is no case, I will do as he suggests

and discharge the accused." But in either case the Magistrate is taking cognizance of the case. He cannot discharge the accused, or direct a further investigation, unless he first takes cognizance. The learned Magistrate in discharging the accused is making an order similar in character to the order which he can make under s. 203 of the Criminal Procedure Code, where he acts on a report of the police or an investigation undertaken at his request. If after considering the report he thinks that there is no sufficient ground for proceeding, he may discharge the accused. Although the Code does not expressly so provide, I have no doubt that a Magistrate can act upon the report of a police-officer as to the result of a police inquiry undertaken under the Code in accordance with the powers conferred upon the police, and can discharge an accused person without further inquiry. But in such a case the order of the Magistrate is a judicial order, which would be open to review by this Court.

In my opinion, therefore, the alleged false charge in this case was made in, or in relation to, a proceeding in Court. It resulted in the man being actually arrested and brought before the Magistrate and dealt with by the Magistrate. Therefore, the complaint must be that of the Magistrate, and as there is no such complaint, the proceedings must be quashed.

MACKLIN J. I agree.

*Proceedings quashed.*

#### APPELLATE CIVIL.

*Before Mr. Justice Wassoodew.*

SORABJI HORMASJI LAKDAVALA

*v.*

THE BROACH BOROUGH MUNICIPALITY.\*

1940

November 20.

*Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Secs. 58 (j), 61, 90 (1), and 186(1)—License fee—Rule for imposing such fee—By-law for taking license necessary pre-requisite before imposition of fee—Storage of fire-wood, coal and charcoal—Manufacture and sale of sweetmeats.*

The Borough Municipality of Broach framed by-laws under s. 61 of the Bombay Municipal Boroughs Act, 1925, one of which made it compulsory for traders in fire-wood and charcoal to obtain licenses for carrying on their trade, but prescribed no fee for the grant of such licenses. Subsequently the Municipality, with the sanction of Government, framed, in the exercise of the power given to it by the provisions of s. 58 (j) of the Act, a new rule (r. 208 (a)), under which it levied a yearly license fee, not only in respect of storing wood,

\* Second Appeal No. 33 of 1939 (with Second Appeal No. 34 of 1939), from the decision of A. A. Khan, District Judge of Broach and Panchmahals at Broach, in Regular

Appeal No. 52 of 1936, confirming the decree passed by P. C. Divanji, First Class Subordinate Judge at Broach in Regular Civil Suit No. 330 of 1934.

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coal and charcoal, but also for the manufacture and sale of sweetmeats, the object of the levy being to enable the Municipality to meet educational expenses.

The plaintiffs, who respectively were traders in fire-wood and charcoal and manufacturers and sellers of sweetmeats and confectionary, and carried on their business within the municipal limits of Broach, sued for a declaration that the Municipality had no right to recover from them any sum under the pretext of license fees. The lower Courts having held that the levy was legal, the plaintiffs appealed :—

*Held*, (1) that, under s. 90 (1) of the Bombay Municipal Boroughs Act, the question of charging license fees would arise when a license was granted, and a license could only be granted if the law required a license to be granted ;

(2) that there was no provision in the Act requiring persons carrying on the trades enumerated in its s. 186 (1) to apply for and obtain a license, that under the scheme of the Act it was left to the discretion of the Municipality to so require them, that the Municipality might, by framing the necessary by-laws, require any trade to be carried on under a license, and that the section therefore provided a penalty for using a place for a trade without a license only when the by-laws provided for obtaining a license ;

(3) that the object for which a fee or tax was levied by a public body did not serve necessarily as a guide for saying whether an imposition was a " fee " or " tax " ;

(4) that merely because the Municipality before making the rule had in a public notification indicated the object for which it was to be applied (viz., to meet educational expenses), that would not render the formality observed in passing the rule unsuitable or unauthorised ;

(5) that inasmuch as the by-laws provided for a license to be taken in the case of storage of fire-wood and charcoal, the Municipality was competent to make rules prescribing the fee to be charged for such license ;

(6) but that as regards the manufacture and sale of sweetmeats the Municipality not having first made a by-law insisting upon a license and then framed a rule prescribing a fee under s. 58 (j) of the Act, the levy of fees upon the manufacturers and sellers of sweetmeats was not in accordance with law.

#### SUITS for declaration and injunction.

These were two suits against the Broach Borough Municipality. Sorabji and another, the plaintiffs in one suit, were dealers in fire-wood and charcoal : the plaintiffs in the other suit were manufacturers and sellers of sweetmeats. Both sets of plaintiffs carried on their business within the municipal limits of Broach.

The Municipality, under the powers given to it by s. 61 of the Bombay Municipal Boroughs Act, 1925, framed by-laws, one of which made it compulsory for traders in fire-wood and charcoal to take out a license for carrying on their trade within the municipal limits. There was no by-law laying a like obligation on manufacturers and sellers of sweetmeats.

On February 7, 1933, the Municipality issued a public notice to the effect that it intended to add a new rule (viz., r. 208A) and to impose under it an annual license fee with respect to certain trades in order to make up the enhanced expenditure on education. Objections were invited to the levy of the fees, and the plaintiffs offered their objections to the levy. On May 13, 1933, the Municipality resolved to enact the proposed rule ; and obtained

sanction of Government to it on July 2, 1933. The Municipality thereupon passed a resolution on August 6, 1934, for recovering license fee at the rate of Rs. 12 a year from traders in fire-wood and charcoal, and a fee of Rs. 25 per year from the manufacturers and sellers of sweetmeats, with effect from October 1, 1934.

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On September 29, 1934, the plaintiffs filed two suits against the Municipality to obtain a declaration that the Municipality was not entitled to recover license fee from them, and for an injunction restraining it from recovering the fee. They alleged that it was the declared object of the Municipality to impose a tax for meeting its expenditure in other departments and not simply to raise money for meeting the costs of the supervision of the trades on which the fee was sought to be levied; that it had no power to levy it without observing the formalities prescribed by law for imposing a new tax; and that it had not observed all the formalities which were required by law before levying such a fee.

The Municipality contended *inter alia* that the resolution passed by it for levying the license-fee was legal and it had authority to pass it; that it had duly obtained the sanction of Government required for it; that the distinction sought to be drawn between a license-fee and a tax was against law; that the Municipality had the right to make use of the taxes or fees which it recovered; that a license fee was also a kind of tax and was included in the term tax; and that the fees sought to be imposed on the plaintiffs' trade were inadequate and nominal.

The trial Judge held that the Municipality had a legal right to levy the fees in question, and dismissed the suits.

On appeal, the District Judge came to the same conclusion and held that the amounts in dispute were levied as a fee and not as a tax, that the Municipality had a legal right to levy it and it had followed the necessary formalities prescribed by law in respect of it; and that the amount levied was neither unreasonable nor *ultra vires*.

The plaintiffs appealed to the High Court.

R. J. Thakor, with Pochaji Jamshedji, for the appellants (fire-wood merchants).

M. B. Dave, with Pochaji Jamshedji, for the appellants (sweetmeat sellers).

S. M. Shah, with V. T. Gambhirwalla, for the respondent.

WASSOODU J. These two appeals arise from the judgments of the District Judge of Broach. The dispute relates to the legality of the levy of license fees from the appellants under a rule which is No. 208 (a) passed by the Broach City Municipality and sanctioned by Government on July 2, 1934. The plaintiffs, in the two suits Nos. 330 and 331 of 1934, from which these appeals arise, are respectively traders in fire-wood and charcoal, and manufacturers and sellers of sweetmeats and confectionary, and carry on their business within the Broach Borough Municipal limits. They alleged that the Municipality proposed to levy yearly a license fee according to the new rule upon their trade and claimed a declaration that the Municipality had no right to recover any sum whatever from them under the pretext of license fees particularly when the avowed object of the levy was to enable

A. C. J. the Municipality to meet educational expenses. They also claimed injunction  
 1940. against the Municipality preventing that body from recovering those fees.  
 — The Courts below have held that the levy was legal, and in consequence the  
 SORABJI suits were dismissed with costs. Against those decrees the plaintiffs have  
 LAKDAVALA brought these two appeals.  
 v.  
 BROACH MU- It seems to me that the case of the plaintiffs who are dealers in fire-wood  
 NICIPALITY and charcoal can be distinguished from the other case in which the plaintiffs  
 — are manufacturers and sellers of sweetmeats and confectionary. It will be  
 Wassoodew J. convenient to deal with the case of the former plaintiffs first.

It is common ground that under the by-laws framed by the Municipality under s. 61 of the Bombay Municipal Boroughs Act (Bom. XVIII of 1925), it is necessary, only for traders in fire-wood and charcoal to obtain licenses for carrying on their trade. No fee was prescribed for the grant of such licenses until the new rule, which is distinct from a by-law, was framed in 1934. That rule which is rule No. 208 (a) of the Broach City Municipality provides as follows :—

\* \* \* \* \*

“License fees shall be chargeable per year for every license issued for—

\* \* \* \* \*

(9) Storing wood, coal, charcoal.

\* \* \* \* \*

(11) Manufacture and sale of sweetmeats.”

Against each item the amount of annual license fee is given in the column of the fees prescribed. For the one in serial No. 9 above the annual fee is Rs. 12 and for serial No. 11, Rs. 25. Now, that rule is made in the exercise of the power given to the Municipality by the provisions of s. 58 (j) of the Bombay Municipal Boroughs Act. That section authorises the Municipality to make rules not inconsistent with the Act prescribing the taxes to be levied in the municipal borough for municipal purposes, and the fees to be charged for licenses or permissions granted under s. 90. Section 90 (1) provides as follows :—

“When any license is granted under this Act, or when permission is given thereunder for making any temporary erection or for putting up any projection, or for the temporary occupation of any public street or other land vested in the municipality, the authority granting or giving such license or permission may charge a fee for the same.”

That seems to be the only provision in the Act authorising the Municipality to charge license fees. Obviously the question of charging fees must arise when a license is granted. And a license could only be granted if the law requires a license to be granted. It is not claimed that all trades must be carried on under a municipal license. That is also made clear in the penal provisions of the statute. Section 186, sub-s. (4), provides as follows :—

“Whoever uses without a license or during the suspension or after the withdrawal of a license, any place for any purpose mentioned in sub-section (1) in any municipal borough in which by-laws are for the time being in force prescribing the conditions on or subject to which, the circumstances in which, and the areas or localities in respect of which, licenses for such use may be granted, refused, suspended or withdrawn, shall be punished with fine.” ...



In sub-s. (1) of that section the following provision occurs :—

"If it be shown to the satisfaction of the standing committee that any building or place used or intended by any person to be used—

- \* \* \* \* \*
- (n) for storing hay, straw, fodder, wood, coal or other combustible material,
- \* \* \* \* \*
- (p) for the manufacture or sale of sweetmeats,
- \* \* \* \* \*

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- the standing committee may by written notice require the owner or occupier—
- (i) at once to discontinue the use of, or at once to desist from carrying out or allowing to be carried out the intention so to use, such building or place, or
- (ii) to use it in such manner or after such structural alterations as the standing committee in such notice prescribes, so that it may not become, or may be no longer, a nuisance or dangerous."

There is no provision in the Act requiring the persons carrying on the above trades to apply for and obtain a license. Whether they should be so required is left to the discretion of the Municipality under the scheme of the Act; and the Municipality may by framing the necessary by-laws require any trade to be carried on under a license. Accordingly a penalty is provided for using a place for a trade without a license when the by-laws provide for obtaining a license. In the case of the fire-wood dealer the by-laws, as I have said, provide that a license should be taken. If so, the Municipality was competent to make rules prescribing the fee to be charged for such license. *Prima facie*, therefore, the action of the Municipality would be justified.

But it is urged that the action of the Municipality was irregular, if not illegal, because they could not raise revenue for general purposes under the guise of imposing license fees, for it is said that different formalities are laid down for levying a tax and a license fee, and as the avowed object of the Municipality was to supplement the income for educational purposes, this imposition was no other than a tax. That argument, in my opinion, is not altogether well founded. Counsel has relied upon *Emperor v. Brij Mohan Lal*<sup>1</sup> for the view that license fees are quite distinct from taxes and the one cannot be levied in the name of the other for they are distinguishable and the levy of each must be preceded by the requisite formalities. That case would not serve as authority for the obvious reason that the Court was dealing with an entirely different enactment. I readily concede that the law regulating the procedure and formality for the imposition of either a fee or a tax must be strictly observed before the levy can be regularized or rendered legal. It is evident that the procedure in regard to the levy of a fee is intended by the Act to be different from the procedure in regard to the levy of a tax (*see* ss. 58 and 75). "Tax" is defined in s. 3 (20) of the Act as—the definition is not exhaustive—meaning "any toll, rate, cess, fee or other impost leviable under this Act and shall include a water rate." Apart from the procedural difference there is a very subtle distinction if any between "tax" and "fee" as used in the ordinary sense. When imposed by the legislature or local bodies both are burdens or charges upon persons and property, and the object of both is to raise money for a public purpose or to

<sup>1</sup> (1933) I. L. R. 56 All. 743.

A. C. J. . serve some public object. So then, the object for which a fee or tax is levied  
1940 by a public body would not serve necessarily as a guide for saying whether  
an imposition is a "fee" or "tax."

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As I have pointed out above, the levy of license fee is the subject of special procedure in the statute and it is sufficient to say that the formalities prescribed have been gone through in making the rule. Merely because the Municipality before making the rule had in a public notification indicated the object for which it was to be applied—here it was said "to cope with the increased expenditure of the education department"—it would not in my opinion render the formality observed unsuitable or unauthorised. That the object of the application of a fee or tax does not determine the procedure is evident from the definition of "Municipal fund" in s. 65 of the Act and particularly proviso (b) thereof. Under the term "Municipal fund" is included all taxes, fines and penalties paid or levied under the Act. The definition is comprehensive enough to include fees, for the proceeds of all impositions levied constitute municipal fund. The Municipality is also given power in proviso (b); to set apart any portion of the municipal fund for a particular purpose, such as for schools or dispensaries, subject to the Commissioner's approval, and to apply any sums properly so credited exclusively to the special purposes for which such sums were received or set apart. Therefore the object is not the determinative factor in observing the formality for the levy.

It is argued that as a tax for educational requirements will fall under the special head under s. 73 (xiii) of the Act, namely, "special educational tax", any imposition intended to be applied for education must be imposed in the manner in which a tax is imposed and the procedure in s. 75 of the Act should have been followed. Section 73 does not say that the liability of the Municipality for education must be met wholly out of the special education tax. I therefore do not think there is any substance in that objection. If the by-laws of the Municipality require a license to carry on a particular trade or business and the Municipality frames a rule prescribing a fee for granting such a license, and it is not proved that it is unreasonable, the levy in the case of the traders in fire-wood and charcoal would be legitimate and must be upheld notwithstanding the fact that it may happen that the incidence may affect particular trades or professions. Accordingly Second Appeal No. 33 of 1939 must be dismissed with costs.

Turning then to the case of the appellants who are manufacturers and sellers of sweetmeats, it appears that prior to r. 208 (a) no license was issued to such sellers. It also appears that no by-law was ever framed by the Municipality requiring a seller or manufacturer of sweetmeats to obtain a license. Undoubtedly the Municipality has power to frame within its discretion such a by-law under s. 61. That section provides as follows :—

"(1) A municipality may from time to time, with the previous sanction of the Provincial Government, make, alter or rescind by-laws not inconsistent with this Act—

\* \* \* \* \*

(b) prescribing the conditions on or subject to which and the circumstances in which and the areas or localities in respect of which, licenses may be granted,

refused, suspended or withdrawn for the use of any place not belonging to the municipality—

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- (ii) for the manufacture, preparation, storing, sale or supply for the purpose of trade of any article or thing intended for human food or drink, whether such food or drink is to be consumed in such place or not ;
- (iii) for any of the purposes mentioned in sub-section (1) of section 186 (to which reference is already made); ...”

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As I have pointed out s. 186 (1) provides for regulating the storing of fire-wood and other combustible material and for the manufacture or sale of sweetmeats. In the absence of any by-law in that respect, there would be no obligation to take out a license. The Municipality in order to fortify its right to levy a fee from the sweetmeat seller has first to make a by-law insisting upon a license and then frame a rule prescribing a fee under s. 58 (j) of the Act. It will not be sufficient to rely upon s. 90 in the absence of a by-law, for obviously the party need not take out a license, and there would be no power in the Municipality to punish him for that omission. Therefore Second Appeal No. 34 of 1939 filed by the plaintiffs-sweetmeat sellers must be allowed and the lower Courts' decrees set aside. There shall be a decree in the plaintiffs' favour in terms of the prayer in the plaint with costs throughout.

Wassoodew J.

*Decree varied.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

KRISHNAJI DATTAMBHAT JOSHI

v.

PARAPPA DATTO PATIL.\*

1941

January 13.

*Joshi watan land—Inalienability of such land—Hindu law—Joint family—Manager—Alienation of Joshi watan lands.*

Joshi service watan land, held under a sanad in the ordinary form used for grants of land given in return for services to be rendered to a village community, are inalienable and not liable to be sold in execution of a decree against the holder of the lands.

The manager of a joint Hindu family cannot bind other members of the family by an alienation of coparcenary land which is not alienable.

SUIT for declaration.

Krishnaji (plaintiff) was the son of Dattambhat (defendant No. 2). They were undivided, and held certain lands, one of which (survey No. 207, plot No. 1) was Joshi service watan land, which was granted by a sanad for the performance of Joshi (priestly) services in the village of Nainglaj.

\* Second Appeal No. 741 of 1938, from the decision of T. B. Shanbhag, Assistant Judge at Belgaum, in Appeal No. 244 of 1937, confirming the decree

passed by B. V. Manjeshwar, Second Class Subordinate Judge at Chikodi, in Regular Civil Suit No. 165 of 1935.

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In 1922 defendant No. 2 mortgaged the watan land to Datto (defendant No. 1).

In 1928 defendant No. 1 sued (Suit No. 753 of 1928) defendant No. 2 on the mortgage, and obtained a decree for realisation of the money by sale of the land. In 1933, defendant No. 1 applied to execute his decree (darkhast No. 253 of 1933). Defendant No. 2 put in an objection in the darkhast that the lands being watan lands could not be sold in execution; but the objection was overruled.

On March 30, 1935, the plaintiff sued for a declaration that the suit land being Joshi watan land was not liable to be sold in execution of a decree.

The trial Judge held that the present suit was barred by *res judicata* under s. 11, expln. iv, of the Civil Procedure Code, by reason of the omission of defendant No. 2 to plead the alienability of the land in the first suit so far as regards the share of defendant No. 2 in the land was concerned, that the land was non-transferable and inalienable, that the debt in suit was contracted by defendant No. 2 for legal necessity, and that the share of defendant No. 2 in the watan land was liable to be sold in execution of the mortgage decree. Defendant No. 1 died during the pendency of the suit.

On appeal, the Assistant Judge held that it was not open to the plaintiff to contend that the watan property was not alienable, that it was not proved that the property was not alienable, and that it was open to the representatives of defendant No. 1 to proceed against the property. The suit was therefore dismissed.

The plaintiff appealed to the High Court.

R. A. *Jahagirdar*, Government Pleader, for the appellant.

B. D. *Belvi*, for respondents Nos. 1 and 2.

BEAUMONT C. J. This is an appeal from a decision of the Assistant Judge of Belgaum. The material facts are that defendant No. 2 and the plaintiff are father and son, members of a joint family, and part of the coparcenary property consists of some Joshi service inam land. In the year 1922 defendant No. 2, as manager of the family, mortgaged this Joshi service inam land to defendant No. 1 for Rs. 300. In 1928 defendant No. 1 obtained a mortgage decree against defendant No. 2, and in 1933 defendant No. 1 issued a darkhast and obtained an order for sale of this property. In March, 1935, the plaintiff filed the present suit asking for a declaration that the Joshi service inam land is inalienable and not liable to be sold in execution of the decree of defendant No. 1, and he asked for an injunction restraining defendant No. 1 from selling any portion of the land in execution of the decree. The learned trial Judge held that the land was inalienable but that defendant No. 2 was estopped from raising the point by virtue of the decree which had been obtained against him, and accordingly the learned Judge made a declaration that the plaintiff's joint half share in the suit land was not liable to sale in execution of the decree and that defendant No. 2's joint half share in the suit land was liable for sale. What exactly that order amounts to, I am not sure. The property being joint, all that sale of defendant No. 2's interest would amount to ultimately would be a right to the purchaser to apply for partition of the property, and having got partition, he could then sell defend-

ant No. 2's share. In appeal the learned Assistant Judge held that the property was not inalienable and also that the plaintiff was bound by the decree obtained against defendant No. 2, the manager of the property, and he dismissed the plaintiff's suit. From that order this appeal is brought.

On the first question as to whether this land is alienable or not, it seems to me clear that under the sanad, by which Government granted the land, it is made inalienable. The sanad is in the ordinary form used for grants of land given in return for services to be rendered to a village community, and such lands are normally rendered inalienable. This Court in an unreported case, *Narayanbhat Gundbhat Joshi v. Vishnu Abarao Mahajan*,<sup>1</sup> dealing with a sanad in the same terms as the present sanad, held that the land was inalienable, and I feel no doubt that that decision is right. Act XV of 1895, to which the learned Government Pleader referred, saves restrictions on alienation in grants by Government, from any objection under the Transfer of Property Act. I think, therefore, that the suit land is in fact inalienable.

The question then arises to what extent the plaintiff is bound by the alienation effected by defendant No. 2 and by the decree obtained against defendant No. 2. It was held by both the lower Courts that the alienation by defendant No. 2 was made by him as manager for the purpose of legal necessity, and, therefore, if the land were alienable in the ordinary way, there can be no doubt that the plaintiff would be bound by the alienation, although he was no party to it. But I know of no authority for the proposition that a manager of a joint Hindu family can bind other members of the family by an alienation of coparcenary land which is not alienable. It seems to me obvious that if the land is not alienable, the manager of the family cannot alienate it as against other members of the joint family. In my opinion, therefore, the plaintiff is not bound by the alienation made by defendant No. 2 or by the decree obtained against defendant No. 2. We are not concerned with the rights of defendant No. 1 and defendant No. 2 *inter se*. I think all that we can do is to make a declaration that the suit property is inalienable, and not liable to sale as against the plaintiff in execution of the decree of 1933, and grant an injunction against defendant No. 1 executing the decree to the prejudice of the plaintiff.

The appeal will have to be allowed with costs throughout.

SEN. J. I agree. On the question whether the property in suit is alienable, the Assistant Judge in my opinion was clearly wrong in holding that in spite of the terms of the sanad the subsequent resolutions of Government have enlarged the right of the grantee rendering the inalienability "a thing of the past." The sanad in this case is similar in terms to that which this Court had to deal with in *Sattappa v. Mahomedsaheb*,<sup>2</sup> though the land there was a Kazi inam land. Section 8 of Schedule B to Act XI of 1852 places the Joshi and the Kazi inam lands on the same footing, and in *Narayanbhat Gundbhat Joshi v. Vishnu Abarao Mahajan*<sup>3</sup> it was expressly held that the Joshi inam land of the kind we are dealing with was not alienable.

1 (1936) S. A. No. 800 of 1932, decided by N. J. Wadia and Sen JJ., on August 19, 1936, (unrep.).

2 (1935) 38 Bom. L. R. 221.

3 (1936) S. A. No. 800 of 1932, decided by N. J. Wadia and Sen JJ., on August 19, 1936, (unrep.).

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The lower Courts have held that defendant No. 2 is now estopped from repudiating his alienation and, therefore, from challenging the sale in execution. But it has to be remembered that in this suit it is not defendant No. 2 but the plaintiff who is challenging the sale of the land, and the fact that defendant No. 2 might be estopped from challenging the sale in execution is not strictly relevant in this suit as we are not concerned with the rights of defendant No. 1 and defendant No. 2 *inter se*. Even granting that defendant No. 2 may be estopped from challenging the sale, what we are concerned with is what effect that has on the contentions of the plaintiff and on the reliefs that he has asked for.

It seems to me that the rule of estoppel or of *res judicata* will not apply against the plaintiff's suit. Such a rule would no doubt apply to the son where the father as manager was competent to alienate the property on behalf of the son, but in this case obviously he was not so competent. The father can represent the son only where he is competent to sell or enter into any transaction in respect of the family property.

It also seems to me that the rule as to the pious obligation of the son would also not apply, although that rule would apply during the lifetime of the father, and although a debt incurred for family necessity but by acting in a manner contrary to the terms of the grant may not be strictly what is known as "avyavaharika." It is obvious that the pious obligation must be confined to the question of the payment of the father's debt and that it cannot be allowed to override the provisions of a grant that the land was not to be alienated at all. The plaintiff, therefore, is not precluded from contending that the payment of his father's debt should not take a form which is prohibited by his sanad.

The effect of the foregoing discussion seems to be that neither the principle of *res judicata* nor the son's liability for his father's debt nor the son's pious obligation can be allowed to encroach on the inalienability of the land, and the plaintiff is therefore clearly entitled to the declaration he seeks. As to his prayer for an injunction, I agree that it should take the form proposed by my Lord the Chief Justice.

*Appeal allowed.*

## ORIGINAL CIVIL.

*Before Mr. Justice Blackwell.*

MANCHERJI PALLONJI CONTRACTOR

v.

DINBAI NUSSERWANJI GOAWALLA.\*

1940

November 26.

*Lease—Construction—“Rates taxes or dues of whatsoever kind”, meaning of—Whether Urban Immoveable Property Tax comes within these words—“Dues,” meaning of.*

The terms of a clause in a lease were—“That the lessees shall pay the following Municipal taxes, viz., general tax, halalkhore tax and License Fees, the water tax by meter...and riot taxes and all other existing and future rates taxes or dues of whatsoever kind or nature for the time being payable either by the landlord or tenant in respect of the demised premises or any part thereof and the lessees shall pay to the lessors the amount of such taxes or dues when demanded.” On a question having arisen whether the lessees were bound to pay to the lessor the Urban Immoveable Property Tax imposed subsequent to the date of the lease, the lessees contended that under the above clause the only taxes payable by them were municipal taxes :—

*Held*, that on the true construction of the clause the lessees were bound to pay the Urban Immoveable Property Tax which was both a tax and a due in respect of the demised premises and that the liability of the lessees was not confined to municipal taxes.

As the word “dues” follows the words “riot taxes”, it is not restricted to municipal taxes, and has a wider import than the word “rates” or “taxes”.

THE plaintiffs, Mancherji and others, leased their milch cattle stables to defendant No. 1, Nusserwanji, and defendant No. 2, Shawaksha, at a monthly rent of Rs. 1,501 from January 1, 1938. They also leased to defendants Nos. 1 and 2 their dairy chawl and godown at a monthly rent of Rs. 199. The material portion of cl. 9 of the lease was in the following terms.—

“9. That the lessees shall pay the following Municipal taxes, viz., general tax, halalkhore tax and License Fees, the water tax by meter in respect of the water that may be required for drinking and washing purposes of the cattle and riot taxes and all other existing and future rates taxes or dues of whatsoever kind or nature for the time being payable either by the landlord or tenant in respect of the demised premises or any part thereof and the lessees shall pay to the lessors the amount of such taxes or dues when demanded.”

The plaintiffs alleged that defendants Nos. 1 and 2 failed to pay the rents for the months of March and April, 1940, amounting to Rs. 3,400, and the sum of Rs. 3,357-1-0 in respect of municipal and other taxes in spite of their repeated demands.

Defendant No. 1 having died his legal representatives were brought on the record. But they did not defend the suit.

Defendant No. 2 in his written statement contended *inter alia* that on the true construction of cl. 9 of the lease the defendants were only bound to pay

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the municipal taxes mentioned in the clause and were under no obligation to pay the Urban Immoveable Property Tax which was a Government tax and not a municipal tax.

*K. A. Somjee*, for the plaintiffs.

*J. S. Khergamwala*, for defendant No. 2.

BLACKWELL J. The plaintiffs bring this suit to recover rents in respect of the properties covered by a lease, exhibit A, which is admitted, and in respect of certain other properties let to the defendants for the months of March and April, 1940, amounting to Rs. 3,400 and also to recover a sum of Rs. 3,357-1-0 alleged to be payable by the defendants to the plaintiffs in respect of certain municipal and other taxes in accordance with the provisions of the lease.

In paragraph 3 of the written statement of defendant No. 2, who alone appears to defend the suit, an agreement alleged to have been come to between the plaintiffs and the original defendant No. 1 and defendant No. 2 on March 12, 1940, at the office of the plaintiffs' attorneys is set out, under which it is alleged that the time for payment of the amounts claimed in this suit was postponed, and that this suit is premature.

Defendant No. 2 also alleges in paragraph 1 of his written statement that on a true construction of cl. (9) of the lease the defendants are only bound to pay the municipal taxes mentioned in the clause, and are under no obligation to pay the property tax, which is part of the amount claimed, and which defendant No. 2 submits is a Government tax and not a municipal tax, and is not covered by cl. (9) of the lease.

Defendant No. 2 raised three issues which are as follows :—

(1) Whether the defendants are bound to pay to the plaintiffs the Urban Immoveable Property Tax under cl. (9) of the lease?

(2) Whether the plaintiffs agreed to the arrangement set out in paragraph 3 of the written statement?

(3) What sum, if any, is the plaintiff entitled to recover?

After defendant No. 2 had given evidence for a short time, Mr. Khergamwala abandoned the second issue and relied solely upon issue 1. This issue involves a question of construction of cl. (9) of the lease. That clause is set out in paragraph 3 of the plaint and is in the following terms :—

"9. That the lessees shall pay the following Municipal taxes, viz., general tax, halalkhore tax and License Fees, the water tax by meter in respect of the water that may be required for drinking and washing purposes of the cattle and riot taxes and all other existing and future rates taxes or dues of whatsoever kind or nature for the time being payable either by the landlord or tenant in respect of the demised premises or any part thereof and the lessees shall pay to the lessors the amount of such taxes or dues when demanded."

The question arising for determination is whether the Urban Immoveable Property Tax falls within that clause.

The date of the lease is January 27, 1938. The Urban Immoveable Property Tax first came into operation in Bombay on March 30, 1939, by reason of Part VI of Bombay Act IV of 1939 which amended the Bombay Finance Act of 1932. Section 22 of the Amending Act of 1939 provides as follows :—



"There shall, subject to the provisions of section 23, be levied and paid to the Provincial Government a tax on buildings and lands, hereinafter called the 'Urban Immoveable Property Tax' at ten per cent. of the annual letting value of such buildings or lands."

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Section 24(I), sub-s. (a), provides that this tax shall be collected in the areas within the limits of a Municipality to which this part extends under s. 20 by the Municipality concerned notwithstanding any law under which such Municipality is constituted. Bombay Act I of 1940, s. 6, introduced after s. 24A of Act XVII of 1939, which provides for a penalty in default of payment, a new s. 24AA which enacts that the collection of the tax under s. 24 and the recovery of the penalty under s. 24A on behalf of any Municipality shall be made by the appropriate municipal authority appointed to collect the property tax on behalf of such Municipality under the law under which such Municipality is constituted.

Mr. Khergamvala for defendant No. 2 argued that the only taxes payable by the lessees under cl. (9) of the lease were municipal taxes. He submitted that the Urban Immoveable Property Tax was not a municipal tax but a Government tax, and that although it was collected through the machinery of the Municipality it could not be regarded as a municipal tax, and did not fall within cl. (9) of the lease.

In my opinion on the true construction of cl. (9) of the lease the liability of the lessees is not confined to municipal taxes in the sense contended for by Mr. Khergamvala, viz., taxes the benefit of which is had by the Municipality. Mr. Khergamvala argued that the words in the clause "all other existing and future rates taxes or dues of whatsoever kind or nature for the time being payable either by the landlord or tenant in respect of the demised premises" must be regarded as *ejusdem generis* with municipal taxes with which that clause begins. I cannot accept this argument. After enumerating a number of municipal taxes the clause goes on to refer to riot tax. The riot tax is a police tax. Section 45 of the Bombay City Police Act, 1902, deals with the provision of compensation recoverable for injury or damage caused by an unlawful assembly and requires the Municipal Commissioner to recover the amount of compensation fixed by the Chief Presidency Magistrate by an addition to the general tax. Mr. Khergamvala admitted that the Municipality did not have the benefit of the amount so recovered, and that it had to be paid into the Court of the Chief Presidency Magistrate for distribution by him among the persons entitled. It is plain, therefore, that cl. (9) cannot be confined to municipal taxes in the sense contended for by Mr. Khergamvala, viz., taxes the benefit of which is retained by the Municipality. Consequently, I have to construe the words "all other existing and future rates taxes or dues" as following upon the words "riot taxes," which I hold are not municipal taxes in the sense for which Mr. Khergamvala contends. Moreover, a further difficulty in the way of Mr. Khergamvala's argument, in my opinion, consists in the use of the words "or dues". Mr. Khergamvala submitted that the word "dues" must be restricted to municipal dues. I do not agree with him. Those words follow upon the words "riot taxes," which I hold are not municipal taxes. The word "dues" has a wider import than the word "rates" or "taxes".

O. C. J. In my opinion the intention of cl. (9) was that the lessors should receive a monthly rent of Rs. 1,501 clear of all municipal taxes, riot taxes, and all other existing and future rates taxes or dues of whatsoever kind, and these later words, following, as they do, the words "riot taxes" cannot be restricted as meaning municipal taxes in the sense for which Mr. Khergamvala contends. It is in my opinion clear that the Urban Immoveable Property Tax is both a tax and a due in respect of the demised premises. I think that on the true construction of cl. (9) the lessees are bound to pay those taxes.

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GOAWALLA  
Blackwell J.

Accordingly I answer the first issue in the affirmative.

The first issue having been thus answered the plaintiffs proceeded to prove their case strictly against defendants Nos. 1A, 1B and 1C, who did not appear. After proving the claim the witness Kesardas Kamalsey stated that since the filing of the suit the plaintiffs had been paid a sum of Rs. 3,500 by all the defendants in the suit. In addition to this defendant No. 2 had paid into Court a sum of Rs. 1,204-1-0 with his written statement and that money has been withdrawn by the plaintiffs in part satisfaction of their claim. The witness accordingly said that the amount now due by all the defendants to the plaintiffs is Rs. 2,053. The plaintiffs' counsel informs me that the plaintiffs are willing to give up their claim for interest and will be content with interest on the decretal amount. Counsel for defendant No. 2 agrees that the figure of Rs. 2,053 is the correct amount.

Accordingly I pass a decree in favour of the plaintiffs against all the defendants for Rs. 2,053 with costs and interest on judgment at six per cent. The decree as against defendants Nos. 1A, 1B and 1C will be restricted to the extent of the assets of the original defendant No. 1 come to their hands.

*Suit decreed.*

Attorneys for plaintiffs : *Ardeshir, Hormusji, Dinsha & Co.*

Attorneys for defendant No. 2 : *Surveyor & Co.*

*Before Mr. Justice B. J. Wadia.*

1940

HAJI NASIRUDDIN KARIM MAHOMED

v.

December 19.

PATEL HAJI UMERJI ADAM & CO.\*

*Wrongful distress—Suit to recover damages for abuse of legal process—Essentials for such suit—Termination of proceedings in plaintiff's favour—Presidency Small Cause Courts Act (XV of 1882), Secs. 53, 60—Distress warrant—Distraint of tenant's property—Release of distraint on payment of rent—Termination of proceedings, not in tenant's favour.*

To succeed in an action to recover damages for the abuse of civil proceedings e.g. the wrongful issue of a distress warrant, the plaintiff has to allege and prove that the defendant acted without reasonable and probable cause and maliciously. In certain classes of cases the plaintiff has also to prove that the

\* O. C. J. Suit No. 524 of 1939.

proceedings have come to a proper or legal end, that is, terminated in his favour. This is not necessary if from the nature of the proceedings they are incapable of so terminating.

Hence where a landlord distrains property belonging to his tenant for non-payment of rent due under a distress warrant duly issued under the provisions of the Presidency Small Cause Courts Act, 1882, and afterwards releases the distrained property on payment of the rent due, but the tenant has taken no steps to have the warrant discharged by the Court from which it issued, the proceedings cannot be regarded as having terminated in his favour so as to sustain an action for damages against the landlord.

Under s. 53 of the Presidency Small Cause Courts Act, 1882, it is competent to the landlord to apply for the issue of a distress warrant even if the rent in arrears is for one month only.

An application to discharge or suspend a distress warrant, under s. 60 of the Act, is generally made on the ground, (1) that the debtor is not justly indebted for the rent claimed from him, or (2) that the rent claimed is excessive, or (3) that it has not become due or payable, or (4) that it is not due and payable for the period for which it is claimed.

There can be no cause of action in respect of the doing of a legal act even if it is done with malice and without reasonable and probable cause.

SUIT to recover damages for levy of wrongful distress.

The plaintiffs, Haji Nasiruddin Karim Mahomed and four others, carried on business as milk merchants, and owned about one hundred buffaloes which they housed in stables belonging to Sir Mahomed Yusuf. The defendants, Patel Haji Umerji Adam Rokad and others, were rent-farming contractors of the stables, and the plaintiffs had attorned tenants to them as from December 1, 1938.

The rent of the stables for the month of January, 1939, became due from the plaintiffs. It was not paid at the end of the month.

On February 15, 1939, the defendants took steps to recover the rent due, and obtained from the Small Cause Court in Bombay distress warrants against all the plaintiffs. In execution of the warrants they took into custody buffaloes belonging to the plaintiffs on February 16. On February 18, the plaintiffs paid the rent due and had the distraint removed.

On February 18, 1939, the plaintiffs demanded a sum of Rs. 30,000 from the defendants as damages for levying wrongful distress against them.

On April 11, 1939, the plaintiffs filed a suit to recover the sum of Rs. 30,000 from the defendants as damages for taking out wrongful distress warrants and executing them.

The defendants contended *inter alia* that the plaint disclosed no cause of action, that as the plaintiffs had failed to pay the rent due by them for the month of January, 1939, the defendants were entitled in law to obtain distress warrants to recover the rent due, that the defendants did not act falsely and maliciously and without any reasonable and probable cause, and that they were not guilty of the abuse of the process of the Court.

Among the issues raised at the trial, issue No. 1, viz., whether the plaint discloses any cause of action, was tried first.

C. K. Daphlary, with N. H. Bhagwati, for the plaintiffs.

Sir Jamshedji Kanga, with M. L. Maneksha, for the defendants.

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NASIRUDDIN  
KARIM  
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v.  
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ADAM & Co.

O. C. J. B. J. WADIA J. The plaintiffs carry on business as milk merchants in the  
 1940 firm name and style of Haji Nasiruddin Karim Mahomed & Co. at Joge-  
 NASIRUDDIN shwari, outside the Fort of Bombay, and own a large number of buffaloes  
 KARIM which were housed in the stables belonging to Sir Mahomed Yusuf, situate  
 MAHOMED at Lamington Road. The defendants are the rent farming contractors of  
 v. the stables, and the plaintiffs had attorned tenants to them as from Decem-  
 UMERJI ber 1, 1938. There were really five different tenancies taken in the names  
 ADAM & Co. of the five plaintiffs separately. This suit is to recover a sum of Rs. 30,000  
 as damages from the defendants for having executed certain distress warrants  
 obtained from the Small Cause Court, Bombay, on an application made on  
 behalf of the defendants on February 15, 1939, for the rent due to them from  
 the plaintiffs for the month of January, 1939. The distress warrants were  
 executed on February 16 and the buffaloes were attached, but the plaintiffs  
 paid the amount of the rent due to the defendants on February 18, and the  
 distraint was removed and the attachment raised. Plaintiffs say that the  
 distress warrants were obtained falsely and maliciously and without any  
 reasonable and probable cause and that in executing the same the defendants  
 were guilty of the abuse of the process of the Court. The defendants contend  
 that the plaint does not disclose any cause of action. They deny that they  
 acted maliciously and without reasonable and probable cause and also deny  
 all liability for damages.

Several issues were raised in the suit on behalf of the defendants. The first issue is whether the plaint discloses any cause of action, and that issue has been taken up first before proceeding with the others. The onus is on the defendants to show that the plaint discloses no cause of action. Their contention is two-fold, viz., (1) assuming that the facts in the plaint are true for the sake of argument, the distress levied by the defendants was neither illegal nor wrong and therefore the plaintiffs have no cause of action; (2) even assuming for the sake of argument that the distress was illegal and wrongful, the distress proceedings not having terminated in the plaintiffs' favour, the plaintiffs have no cause of action. I will take these two separately.

It is not in dispute that the rent for January, 1939, was due at the date of the applications for the distress warrants. The tenancy of the stables was monthly, and the rent for January became due at the end of that month, i.e. on February 1, 1939. Under s. 108 (1) of the Transfer of Property Act a lessee is bound, in the absence of a contract or local usage to the contrary, to tender the rent to the lessor or his agent in that behalf at the proper time and place. There is nothing in that section to require the lessor to make a demand for the rent. The rent was not paid on February 1 and thereafter, and defendants applied on February 15 on the affidavits of one of their partners for levying distress warrants for the rent of the month of January. In England distress is a very ancient right which landlords exercised without legal process in order to recover their dues from defaulting tenants. It was once a purely private form of self-help, but it has still survived as a part of the customary law of real property in England, though considerably modified by statute. In India the rights of landholders to attach the holdings and moveables of ryots for arrears of rent are governed by statute law in

various Provinces, and the right of distress depends upon the observance of the statutory formalities, the right being only conferred by statute and on the conditions mentioned in it. Before the Presidency Small Cause Courts Act of 1882 was passed, the law relating to distress in the Presidency-towns was governed by the Distress Act (I of 1875). That Act was repealed, and the provisions in it relating to distress have been almost verbatim embodied in Chapter VIII of the Act of 1882. That chapter contains the law now prevalent relating to distress in the three Presidency Towns therein mentioned which include Bombay. It contains rules both of the substantive law of distress and the rules of procedure for those towns, and it appears on all important points to be exhaustive, as it is provided by s. 68 that no distress shall be levied for arrears of rent except under the provisions of Chapter VIII. Under the Act "any person claiming to be entitled to arrears of rent of any house or premises" can only set the machinery of the Court in motion by an application for a distress warrant under s. 53 which has to be supported by an affidavit, and the affidavit has to be to the effect of Form A contained in sch. III of the Act, according to which the landlord or his duly constituted attorney on his behalf has to swear or affirm before the Judge or Registrar of the Small Cause Court that a particular tenant is "justly indebted" in a particular sum for the arrears of rent specified. Under s. 54 the distress warrant is issued by the Judge or Registrar under his hand and seal according to the Form B in the same schedule. The section further provides that the Judge or Registrar may at his discretion decline to issue the distress warrant. In accordance with the procedure thus laid down in the Act the defendants through their partner made an application to the Small Cause Court which was supported by five different affidavits in the same form in respect of the five tenancies of the five plaintiffs on February 15, 1939. It was argued that defendants who were the plaintiffs in those applications to the Small Cause Court were not entitled to apply for a distress warrant in respect of one month's rent only, and that a distraint for the rent of the month of January, 1939, only was wrongful and illegal. There is however no averment to that effect in the plaint. Five other affidavits were made, in the same form, on the same day by the same partner of the defendants, alleging that the defendants to those applications who are plaintiffs in this suit might remove the buffaloes to Jogeshwari in a few days which is without the jurisdiction of this Court and that it would therefore be well-nigh impossible for the plaintiffs to recover their just dues. Why the second affidavit was made is not clear. Plaintiffs allege in paragraphs 7 and 8 of the plaint that these allegations were false to the knowledge of the defendants, that the plaintiffs were landed proprietors, and that the defendants have in applying for and obtaining and executing the distress warrants acted falsely, maliciously, without any reasonable and probable cause, and abused the process of the Court. Plaintiff's counsel relies on the word "months" used in Form A which is in the plural. It is not quite clear whether the word "month" in Form C is used in the plural or in the singular. Counsel argued that the word used in the plural in Form A shows that the rent for which distress can be levied must be in arrears at least for two months, as Form A is referred to in the section itself. In the first place the words in the section are that the application shall

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be supported by an affidavit or affirmation "to the effect of the Form marked A", meaning that the affidavit or affirmation shall be substantially in that form. \* Secondly, the words used in the beginning of the section are "arrears of rent of any house or premises". No particular period of arrears is there referred to. It would, in my opinion, be very strange for the Legislature to leave the minimum period, if any, for levying distress to be inferred from the Form in the Schedule attached to the Act, if its intention was to make any minimum period part of the substantive law. Plaintiffs' counsel at the close of his address applied to the Court to call the Registrar of the Small Cause Court to prove that the practice of the Small Cause Court at the time, i.e. in or about February, 1939, was not to levy distress for arrears of rent for less than two months unless special cause was shown. Any such practice that may have been followed cannot in my opinion render illegal that which is not clearly made illegal by the provisions of the statute itself. It is quite possible that, distraint for rent being a drastic remedy, the landlord does not apply for a distress warrant unless more than a month's rent at least is due, but that in itself cannot make the distress for a month's rent illegal. The alleged practice is in my opinion irrelevant to the issue I have to determine.

Defendants secondly contend that it is an essential part of the cause of action in a suit for damages for the abuse of civil proceedings that the proceedings in which the process complained of is taken out shall have terminated in favour of the plaintiffs or that the particular process complained of has been superseded or discharged, unless the proceedings are incapable of so terminating or of being superseded or discharged. As pointed out by Halsbury, Vol. XXII, Hailsham's Edn., paragraph 42, page 27, the plaintiff in an action for the abuse of civil proceedings has to allege and prove a case similar, *mutatis mutandis*, to that of a plaintiff in an action for malicious prosecution. In an action for malicious prosecution it is well-known that the plaintiff in order to sustain his action for damages must first prove that the prosecution has terminated in his favour. It is an actionable wrong to institute certain kinds of proceedings against some one's person or against his property; but in order to succeed the plaintiff has to prove that the proceedings were instituted by the defendant, that the defendant acted without reasonable and probable cause, that the defendant also acted maliciously, and that in certain classes of cases the proceedings have come to a proper or legal end, i.e. terminated, in the plaintiff's favour. No action lies for instance for maliciously procuring the plaintiff to be adjudicated a bankrupt, unless and until the adjudication order is set aside or annulled: see *Metropolitan Bank v. Pooley*.<sup>1</sup> It is pointed out at p. 217 by the Earl of Selborne L. C. that the rule is founded upon public policy. Otherwise, as he observed, the most solemn proceedings of all our Courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind. He further stated that the fact of the adjudication standing would be a suffi-

cient answer to the alleged cause of action. In *Raj Chunder Roy v. Shama Soondari Debi*<sup>1</sup> it was not disputed that an action for damages for arrest in execution of an *ex parte* decree will not lie until after the decree is set aside. As a matter of fact the *ex parte* decree in that case was set aside, but it was held that the plaintiff was not entitled to damages, because it was not found that the defendant had acted without reasonable and probable cause. In *Kedarnath Tulsidas v. Beharimal Jagarmal*<sup>2</sup> Taraporewala J., as he then was, held that it was an essential part of the cause of action in a suit for damages for wrongful attachment before judgment that the proceedings in which the process complained of was taken out should have terminated in favour of the plaintiff or that the particular process complained of had been superseded or discharged. The order of the Court is valid until it is set aside, and ordinarily there can be no cause of action for damages on the allegation that the order of the Court was wrongfully obtained so long as the order of that Court stands. An arrest of a judgment-debtor or attachment of his property in execution of a decree of a civil Court is the act of the Court executing the decree; so also is an order for arrest or attachment before judgment. In *Less v. Patterson*<sup>3</sup> the writ of *ne exeat regno* issued by the defendant was not set aside, and it was held that as the defendant had not moved to discharge the writ, it must be taken to have been properly issued and defendant could not set-off any claim for damages in that behalf against a plaintiff in a partnership action. At p. 870 Fry J. observes as follows :—

"The writs of *ne exeat* were granted upon affidavits which satisfied the Court of the propriety of granting them, and *Patterson* has submitted to them instead of moving to discharge them. I must, therefore, take it now that the writs were properly issued."

It is provided by s. 60 of the Presidency Small Cause Courts Act of 1882 that the debtor or any other person alleging himself to be the owner of any property seized under this chapter, i.e. Chapter VIII, or the duly constituted attorney of such debtor or other person, may, at any time within five days from such seizure, apply to any Judge of the said Court to discharge or suspend the warrant, or to release a distrained article, and such Judge may discharge or suspend such warrant or release such article accordingly, upon such terms as he thinks just. It is not in dispute that no such application was made by the plaintiffs to the Small Cause Court Judge. There is also no averment in the plaint that the proceedings had terminated in the plaintiffs' favour. Plaintiffs' counsel argued that their cause of action was for damages on the ground that the distress warrants were obtained and executed maliciously and without reasonable and probable cause, that the plaintiffs could not have applied under s. 60 to set aside the distress warrants on those grounds, and that therefore any proceedings which could have or might have been taken by the plaintiffs were incapable of terminating in their favour. Applications under s. 60 are generally made on the ground that the debtor is not justly indebted for the rent claimed from him, or that the rent claimed is excessive, or that it has not become due and payable,

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1 (1879) I. L. R. 4 Cal. 583.

s. c. 27 Bom. L. R. 525.

2 (1924) I. L. R. 49 Bom. 629,

3 (1878) 7 Ch. D. 866.

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or that it was not payable for the period for which it was claimed. Under s. 62 it is provided *inter alia* that in any case under s. 60 the Judge may award such compensation by way of damages to the applicant as the Judge thinks fit, and the Judge must for that purpose make any enquiry that he thinks necessary; if the Judge awards or refuses such compensation, his order shall bar any suit for the recovery or compensation or damages caused by the distress. The plaintiffs, however, cannot be heard to say that in respect of the execution of a distress warrant under an order of the Court, which is binding until it is set aside, they have a cause of action for damages on the ground that the defendants acted maliciously and without reasonable and probable cause as alleged. Any exercise of malice or improper motive not in itself illegal will not convert a legal act done with such motive into a civil wrong for which reparation is due: see *Allen v. Flood*.<sup>1</sup> In England no jury is at liberty to find a verdict for a plaintiff because the defendant in doing an otherwise lawful act was inspired by an improper motive. If a person has done what he was justified in doing according to the law, the law will not permit an enquiry into his motive. No action can therefore lie if an execution creditor acting under an order of the Court or a creditor executing a distress warrant under an order of the Court acts with malice or improper motive, unless the order of the Court is first vacated. There is no cause of action in respect of the doing of a legal act, even if it is done with malice and without reasonable and probable cause.

It was next argued by plaintiffs' counsel, with some ingenuity, that the proceedings must be deemed to have terminated in the plaintiffs' favour, because in terms of s. 60 the distrained articles, viz., the buffaloes, were released on February 18. It is, however, necessary that the proceedings must not have merely terminated, but terminated in favour of the party claiming damages. The buffaloes were released on payment, and not without payment. So that if at all the proceedings terminated, they terminated in favour of the defendants when they got payment of the rent for which the distress warrants were levied.

It is true that in some cases of action for damages for abuse of civil proceedings it is not necessary that the proceedings should have terminated in the plaintiff's favour, if from their nature they are incapable of so terminating, e.g. if the defendants cause further proceedings to be dropped as in *Nicholas v. Sivarama Ayyar*.<sup>2</sup> The creditor may abandon the proceedings in consequence of any payment made by the debtor to obtain release as in *Gidding v. Eyre*.<sup>3</sup> Where the arrest or other proceeding complained of is an abuse of the process of the law to effect an object which is not within the scope of the process, it is not necessary that the proceedings should have terminated in plaintiff's favour: see *Grainger v. Hill*.<sup>4</sup> In such a case the process of the Court is employed to oppress or injure the debtor, and to compel him to do something which he is not bound to do under the process. The remedy of the aggrieved party is for the unfair user of the process, which user is not within its scope. That is not the case before me. The

1 [1898] A. C. 1.

2 (1922) I. L. R. 45 Mad. 527.

3 (1861) 10 C. B. (N.S.) 592.

4. (1838) 4 Bing. (N.C.) 212, 221.



distress proceedings were capable of terminating in the plaintiffs' favour, if an application under s. 53 could be sustained. The plaintiffs have not moved the Court under the section, and one essential requirement to give them their cause of action is wanting. If an application cannot be sustained under s. 53, then the order of the Court stands, and the distress having been levied according to the law, the plaintiffs have no cause of action on the grounds merely of alleged malice and want of reasonable and probable cause.

I would therefore answer issue No. 1 in the negative. In view of my finding on issue No. 1, it is not necessary for me to determine the other issues that have been raised on behalf of the defendants. The suit must, therefore, be dismissed with costs.

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*Suit dismissed.*

Attorneys for plaintiffs : *Nagindas Hooseinally & Co.*

Attorneys for defendants : *Payne & Co.*

*Before Mr. Justice B. J. Wadia.*

BABAMIYA MOHIDIN SHAKKAR

v.

JEHANGIR DINSHAW BELGAUMWALLA.\*

1940

November 12.

*Mortgage—Power of sale of mortgagee—Whether power can be restrained if exercised in wrong and improper manner—Injunction to restrain power of sale—Repayment of mortgage moneys—Mortgagee's option for acceleration of repayment—Intimation of exercise of option whether necessary—Advertisement of sale of mortgaged property whether sufficient intimation—Notice of demand or filing of suit whether sufficient—Transfer of Property Act (IV of 1882), Sec. 69(2) (a)—Notice in writing imperative—Curtailement of three months' period by act of parties whether permissible.*

A mortgagee cannot be restrained from exercising his power of sale merely by reason of the mortgagor filing a suit for redemption, unless he pays the mortgage amount to the mortgagee or tenders the same.

A mortgagor is entitled to file a suit to restrain the mortgagee by an order and injunction of the Court from exercising his power of sale, if the power is exercised in a wrong and improper manner, or contrary to the terms of the contract.

*Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar*<sup>1</sup> and *Jerup Teja & Co. v. Peerbhoy*,<sup>2</sup> referred to.

The equitable relief by way of injunction is not to be refused because the mortgagor was unable to pay in the past and may be unable to pay in the future. The relief may be granted even if the mortgagor can come forward later and claim damages on account of an improper sale.

In order that the mortgage moneys may become immediately payable on the exercise of the mortgagee's option, there must be an act indicating to the

\* O. C. J. Suit No. 1692 of 1940.

2 (1920) 23 Bom. L. R. 1241.

1 (1877) I. L. R. 2 Bom. 252.

O. C. J.

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mortgagor the exercise of that option so as to enable the mortgagor to realise his position and save his equity of redemption if possible. An advertisement by a mortgagee for sale of the mortgaged property by public auction, without any intimation to the mortgagor, is not an appropriate action by the mortgagee to make the mortgage amount immediately payable at his option.

*Lasa Din v. Gulab Kunwar*<sup>1</sup> and *Pancham v. Ansar Hussain*,<sup>2</sup> referred to.

A notice of demand or even the filing of a suit amounts to such appropriate action.

*Raghubir Singh Raja v. Kunwar Rajendra Bahadur Singh*<sup>3</sup> and *Abdul Rahman v. Sheo Dayal*,<sup>4</sup> referred to.

The notice in writing required by s. 69(2) (a) of the Transfer of Property Act, 1882, is imperative, and the period of three months which must expire after service of such notice cannot be curtailed by agreement of parties.

*Prichard v. Wilson*<sup>5</sup> and *Muncherji Furdoonji Mehta v. Noor Mahomedbhoy Jirajbhoy Pirbhoy*,<sup>6</sup> distinguished.

SUIT for an injunction restraining the mortgagee from exercising his power of sale.

On May 31, 1935, plaintiff No. 1 (Bapamiya) and plaintiff No. 2 (Sulleman) and one Zohrabai, who were heirs of one Shakkar Chato, mortgaged an immoveable property to one Rahim Premji Parpia and Habib Rahim Parpia for Rs. 7,500.

On March 3, 1936, Zohrabai died leaving her surviving the plaintiffs as her heirs and legal representatives according to Mahomedan law.

On January 22, 1940, Rahim and Habib transferred by a deed the mortgage debt, which amounted to Rs. 11,200, to the defendant, Jehangir Dinshaw Belgaumwalla, who was to have under the deed of transfer full benefit of the covenants, power of sale and other provisions in the mortgage deed, for securing the repayment of the sum of Rs. 11,200. Under the deed of transfer of mortgage the due date for repayment was fixed for January 22, 1941, with a further option to the plaintiffs to extend the same to January 22, 1942, provided the plaintiffs paid interest regularly and otherwise observed and performed all the provisions and conditions of the mortgage deed of May 31, 1935.

On May 13, 1940, the plaintiffs paid interest, which amounted to Rs. 70 per month, for the month ending March 19, 1940.

The defendant wrote to the plaintiffs from time to time to pay off arrears of interest and the insurance premia paid by him, but the plaintiffs failed to pay.

On August 12, 1940, the defendant again wrote to the plaintiffs to pay off arrears of interest and in default threatened to enter into possession of the property mortgaged.

On August 26, 1940, the defendant advertised the sale of the mortgaged property for September 18, 1940.

The plaintiffs filed the present suit alleging that under the deeds of mortgage

1 (1932) L. R. 59 I. A. 376, 384,

s. c. 34 Bom. L. R. 1600.

2 (1926) L. R. 53 I. A. 187.

3 (1933) I. L. R. 8 Luck. 488.

4 (1933) I. L. R. 56 All. 496.

5 (1864) 10 Jur. N. S. 330.

6 (1893) I. L. R. 17 Bom. 711.

and the transfer of mortgage the defendant had power to put up the property for sale only in the following cases :—

"(1) if default is made in payment of the principal sum of Rs. 7,500 or any part thereof on the day appointed for the payment thereof and for the space of three calendar months next after a notice in writing required by section 69 of the Transfer of Property Act and requiring payment of the principal money or such part thereof as may for the time being be due, shall be served on mortgagors, . .

(2) or unless and until interest amounting at least to five hundred rupees shall be in arrears and remains unpaid for three months next after becoming due."

The mortgage deed further provided that if interest for any three months remained unpaid for three weeks, the whole of the mortgage debt should at the option of the mortgagees become immediately payable as if the due date had then elapsed.

The plaintiffs submitted that interest due amounted only to Rs. 420 ; that the defendant had not exercised his option whereby the said amount became immediately payable as if the due date had then elapsed ; that even if the defendant had exercised the option he had no right to put up the property for sale in the absence of a notice in writing required by s. 69 of the Transfer of Property Act, 1882 ; that the sale fixed for September 18, 1940, was wrongful and not in accordance with the terms of the mortgage ; that unless the defendant was restrained by an order and injunction from selling the property, the plaintiffs would be greatly prejudiced.

The defendant in his written statement contended *inter alia* that the suit was misconceived as plaintiffs had no power under the deeds of mortgage and transfer of mortgage to restrain him from exercising his power of sale ; that he was entitled to exercise his power of sale owing to the plaintiffs' breaches of conditions and covenants contained in the mortgage deed of May 31, 1935 ; that the plaintiffs committed the breaches by their failure to pay interest, to insure the property and pay the premium, and to pay the municipal taxes ; and that the plaintiffs were not entitled to any intimation as to his exercise of the option.

*N. H. Bhagwati*, with *V. K. Chhatrapati*, for the plaintiffs.

*P. B. Vachha* and *Darasha J. Vakil*, for the defendant.

B. J. WADIA J. Plaintiffs have filed this suit as mortgagors against the defendant who is the present mortgagee of an immoveable property situate at Chimna Butcher Street, Bombay, to restrain the defendant by an order and injunction of the Court from selling the property on the ground that the proposed sale which was advertised for September 18 last was wrongful and not in accordance with the terms of the mortgage. The original mortgage deed dated May 31, 1935, was made between plaintiff No. 1 as the sole executor of his father's will along with plaintiffs Nos. 1 and 2 and one Bai Zohrabai, the heirs of plaintiff No. 1's father, as mortgagors on the one hand and Rahim Premji Parpia and Habib Rahim Parpia as mortgagees to secure repayment of the sum of Rs. 7,500 lent and advanced by the mortgagees. Zohrabai died about March 3, 1936, and the plaintiffs are her only heirs and legal representatives according to the Mahomedan law. By an indenture of transfer of mortgage dated January 22, 1940, the mortgage debt, which then amounted to Rs. 11,200, was transferred by the original mortgagees to the

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defendant, who was to have under the deed of transfer the full benefit of the covenants, power of sale and other powers and provisions contained in the mortgage deed for securing the repayment of the sum of Rs. 11,200. The due date for repayment was extended under the deed of transfer to January 22, 1941, with a further option to the mortgagors to extend the same to January 22, 1942, provided they paid interest regularly and otherwise observed and performed all the provisions and conditions of the mortgage.

The rate of interest agreed upon was annas ten per cent. per month. After the deed of transfer the plaintiffs paid to the defendant Rs. 70 for interest on February 20, 1940, for the month ending February 19, and on May 13, 1940, they paid a further sum of Rs. 70 for interest for the month ending March 19, 1940. Thereafter the plaintiffs in spite of demands from the defendant failed to pay the interest agreed upon.

It is contended on behalf of the plaintiffs that the defendant was not entitled to have the property sold on two grounds : (1) that even if the due date of payment which was January 22, 1941, had been, under the circumstances contemplated by a clause in the mortgage deed which I will hereafter refer to, accelerated, the defendant had not intimated to the plaintiffs the exercise of his option to call in the mortgage amount, and (2) because no notice of sale in writing as required by s. 69(2) (a) of the Transfer of Property Act, and as also provided for in the mortgage deed, was given to the plaintiffs. Defendant on the other hand contends that the plaintiffs were not entitled to any intimation of the exercise of the option. In paragraph 13 of his written statement he further contended that he was entitled to put up the mortgaged property for sale without the notice in writing required by s. 69, but that contention was given up at the hearing by his counsel. Defendant also contends in paragraph 16 of his written statement that the plaintiffs are not entitled to claim any relief in this suit by reason of the order passed by the Court on the notice of motion for interim injunction on September 18 last.

The application for interim injunction was made in terms of prayer (b) of the plaint on September 18 before recess, but as the sale was advertised for the afternoon of the same day, I ordered that notice of the application should be given immediately to the mortgagee i.e. the defendant. After the recess both parties appeared by counsel, and a consent order was taken under which on the plaintiffs paying Rs. 500 to the defendant within two days the sale was to be adjourned for two months, but if the sum was not paid as ordered, the notice of motion was to be dismissed with costs. The words in the order "and the sale to proceed" set out in para. 15 of the written statement do not form part of the final order made by the Court on that date. They were at first written down by me after the substance of the consent order arrived at by the parties was mentioned to the Court, but a little later, either upon some discussion in Court or at the Court's own suggestion, the words which in my order ran as follows "and defendant to be at liberty to proceed with the sale" were struck out, presumably because it was not the Court's intention to decide the whole suit on an application for an interim injunction. Those words were at first written and even read out by the Court to the parties, but as I have already stated, after some discussion or at the Court's instance, they were struck out. Defendant's coun-

sel argued that even without the addition of these words the implied effect of the order of the Court was that on failure to pay Rs. 500 within two days not only the notice of motion was to stand dismissed, but that the plaintiffs also were to lose their right to apply for and claim permanent injunction. This means in others words that by the order the Court practically decided the whole suit. If that was so, there was no meaning in ordering the written statement to be filed within ten days and expediting the suit without stating in so many words that the written statement was to be filed and the suit was to be expedited only if the sum of Rs. 500 was paid within two days. There would have been no need for a written statement, nor for expediting the suit, if on the failure to pay within two days the whole suit of the plaintiffs was to go by the board.

It is alleged in para. 1 of the written statement that the plaintiffs' suit is "misconceived" on the ground that under the terms of the mortgage and transfer of mortgage the plaintiffs could not restrain the exercise of the mortgagee's power of sale. At the hearing it was further argued that the suit as framed was not maintainable, because no suit can lie only for an injunction without at the same time claiming other relief. That is nowhere alleged in the written statement, and although as a point of procedure it can be taken at any time, counsel for the defendant has not even raised an issue upon it. He argued that as soon as the mortgagee became entitled to call in his moneys by reason of the acceleration of the date of payment, the mortgagors' right to redeem accrued simultaneously to them, and as there was no prayer for redemption, the whole suit was bad. On the other hand plaintiff's counsel argued that ordinarily a mortgagor's suit for redemption could not be brought before the expiry of the stipulated period, that is, before the due date, and that if in the event of the due date being accelerated defendant as mortgagee became entitled at his option to call in the mortgage amount, he had not exercised that option by calling in the amount upon which the mortgagor's right to redeem would accrue. It has been held both in England and in India that the mortgagee cannot be restrained from exercising his power of sale merely by reason of the mortgagor filing a suit for redemption, unless he pays the mortgage amount to the mortgagee or tenders the same. There is, however, nothing to prevent a mortgagor from seeking to restrain the exercise of the mortgagee's power of sale if the power is exercised in a wrong and improper manner, contrary to the terms of the contract : see *Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar*<sup>1</sup> and *Jerup Teja & Co. v. Peerbhoy*.<sup>2</sup> No case was cited before me to show that if the right to redeem had not accrued to the mortgagor he could not bring in a suit for an injunction restraining a wrongful sale, but that his only remedy was either to pay or tender the moneys and allow the property to be sold, and then pursue his remedy in damages if any. In my opinion the plaintiffs could not at the particular stage and under the circumstances of the case have asked for any other relief except an injunction, and they could only succeed if they showed that the proposed sale was wrongful in the sense that it was against the terms of the mortgage. I do not think it can be said that in such a case a suit merely for

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1 (1877) I. L. R. 2 Bom. 252.

2 (1920) 23 Bom. L. R. 1241.

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an injunction is incompetent. Suits in passing off actions and for infringement of trade mark for instance are often filed only for injunction and costs.

It is not in dispute that under the terms of the transfer of mortgage the due date was extended to January 22, 1941, with the further option I have mentioned before. Counsel, however, referred to the clause in the mortgage deed which provides that it is agreed that in the event of any damage happening to the mortgaged property in the manner specified whereby the security was impaired, or in the event of interest for any three months being in arrears and remaining unpaid for three weeks after being due, or if the mortgagors or any of them were adjudged insolvent, or committed a breach of any one of the covenants, provisions, terms and conditions in the mortgage, then notwithstanding anything contained in the mortgage to the contrary

"the whole of the mortgage debt shall at once at the option of the mortgagees become immediately payable as if the due date had then elapsed and in such cases all such rights and remedies shall be available to the mortgagees as would be available to them under the terms of these presents or by law upon default being made in payment of the principal money and interest hereby secured."

It is not in dispute that interest was in arrears for three months and unpaid. It is also not disputed that the plaintiffs had failed to insure the mortgaged property and to pay the insurance premium. Under the circumstances the due date which was January 22, 1941, was accelerated, and the option to call in his moneys and all the rights of the mortgagee accrued to him. The mortgagee could under the terms of the mortgage deed apply for a receiver of the mortgaged property, or enter into possession, or file a suit for sale, or by exercising the option reserved to him he could proceed to realise his mortgage debt without filing a suit. It has been pointed out by the Privy Council in *Lasa Din v. Gulab Kunwar*<sup>1</sup> that a proviso or clause in the mortgage deed of the nature which I have referred to above is "exclusively for the benefit of the mortgagees" and "purports to give them an option either to enforce their security at once, or if the security is ample, to stand by their investment for the full term of the mortgage." In an earlier Privy Council case, *Pancham v. Ansar Husain*,<sup>2</sup> the question was one of limitation under art. 132 of the Limitation Act for an action by a mortgagee upon a breach of the clause which gave the mortgagee the power to enforce the mortgage by sale even if the time for repayment had not arrived. It was pointed out by Lord Blanesburgh at p. 194 that such a default on the part of the mortgagor gave to the mortgagee "a right by appropriate action to make the mortgage moneys immediately due". As pointed out by Sir Dinshah Mulla in his Commentary on the Transfer of Property Act, 2nd edn., at p. 419, such appropriate action may be by a notice of demand as in *Raghubir Singh Raja v. Kunwar Rajendra Bahadur Singh*,<sup>3</sup> or by the mere filing of a suit as in *Abdul Rahman v. Sheo Dayal*.<sup>4</sup> In order that the mortgage moneys may become immediately payable on the exercise of the mortgagee's option there must be an action indicating to the mortgagor the exercise of that option, so as to enable the mortgagor to realise his position and save his equity of

1 (1932) L. R. 59 I. A. 376, 384,  
s. c. 34 Bom. L. R. 1600.

2 (1926) L. R. 53 I. A. 187.

3 (1933) I. L. R. 8 Luck. 488.

4 (1933) I. L. R. 56 All. 496.

redemption if possible.

What was the appropriate action taken by the defendant as mortgagee? On April 25, 1940, the mortgagee called upon the mortgagors to pay up the arrears of interest failing which he threatened to take proceedings at their risk as to costs. He followed this up with a reminder on July 15 and again on July 24. As no reply was forthcoming, the mortgagee by his attorneys' letter dated August 12, 1940, intimated to the plaintiffs that the defendant had no other alternative but to enter into possession of the mortgaged property and recover the rents and profits, but that he would give the mortgagors one more chance to pay off the arrears failing which he would "exercise his rights under the mortgage herein as indicated above", meaning thereby that he would enter into possession of the mortgaged property. Thereafter the defendant seems to have changed his mind. He advertised the property for sale once in the issue of the *Bombay Samachar* of August 26 and once in the issue of the *Bombay Chronicle* of August 30, 1940. The sale was advertised for September 18, 1940. No intimation was given to the plaintiffs. The plaintiffs themselves came to know of the intended sale on September 2, 1940, as alleged by them in para. 7 of the plaint, and that is admitted by the defendant in para. 9 of his written statement. The question therefore that arises is, is an advertisement for sale by public auction without any intimation to the mortgagor an appropriate action by the mortgagee under the terms of the Privy Council judgment to make the mortgage amount immediately payable at his option? In para. 13 of his written statement the defendant alleges that the plaintiffs were "apprised" by correspondence annexed to the plaint that the defendant was proceeding to exercise his power of sale. But even that was only by way of answer to the plaintiffs' letter of September 17, in which they pointed out *inter alia* that they had not received even the notice required by s. 69 of the Transfer of Property Act. It is not alleged in the written statement that such advertisement amounted to an intimation of the mortgagee's exercise of his option. In fact the only contention taken up by the defendant in the written statement was that the plaintiffs were not entitled to any intimation at all. In my opinion the mere fact that the defendant became entitled to call in the mortgage moneys immediately is not an exercise of the option given to him under the mortgage deed. The mortgage moneys can only become due and payable as soon as the option is exercised upon an intimation on which the mortgagors could come to know their position, for unless the mortgagee calls in the moneys the mortgagor cannot know that the due date has been accelerated. He should also know which of the rights under the mortgage the mortgagee wishes to exercise.

Further, or in any event, it is admitted on behalf of the defendant that no notice was given to the mortgagors as required by s. 69(2)(a). Section 69(2) provides that the power of sale without the intervention of the Court shall not be exercised unless and until (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or (b) some interest under the mortgage amounting at least to Rs. 500 is in arrear and

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unpaid for three months after becoming due. Both these clauses seem to be based on s. 20 of the English Conveyancing Act of 1881 now corresponding to s. 103 of the Law of Property Act of 1925. This power of sale in the mortgage deed is really an authority given to the mortgagee to defeat the mortgagor's equity of redemption, but it could only be exercised on the fulfilment of either of the two conditions mentioned in s. 69(2). These conditions are also reproduced in the mortgage deed. In the case of default of payment of interest amounting at least to Rs. 500 no notice is necessary, but in the case of default of any payment of the principal notice in writing is necessary unless the mortgagor has waived it or consented to dispense with it. It is necessary because without such notice the exercise of the power of sale would be oppressive. As pointed out by the Privy Council in *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan*,<sup>1</sup> the effect of a power of sale is "to destroy the equity of redemption" and "the estate, if purchased by a stranger, passes into his hands free from all the incumbrances". The object of the notice, as pointed out by our Court in *Doolabhdas v. Chhabildas*,<sup>2</sup> is also to enable the mortgagor to collect the amount of moneys payable by him if he can, and to pay the same before the time for exercising the power of sale arrives.

Defendant's counsel admits that such notice is necessary, but he relies on the clause in the mortgage deed which provides in substance that notwithstanding any irregularity in propriety or want of necessity of a sale by the mortgagee under his power the sale will be valid and effectual and the remedy of the mortgagor shall be in damages only. The clause is a long one, but I have merely set out its substance. Counsel referred to *Prichard v. Wilson*.<sup>3</sup> In that case there was a covenant in a mortgage deed not to exercise the power of sale except after three months' notice. The covenant was followed by a proviso that the purchaser should not be affected by the absence of such notice, and that the remedy of the mortgagor should be by an action for damages. Sir J. Romilly M. R. was of opinion that the construction of the covenant appeared to him to be one of some difficulty, but upon consideration he was of opinion "that the express proviso as to the remedy of the plaintiff by action for damages, takes away the jurisdiction of this Court", the jurisdiction being the jurisdiction to grant an injunction. No reason whatsoever is given for this opinion. It was a case decided in 1864 before even the Conveyancing Act of 1881 came into force. It was followed by Starling J. in *Munchurji Furdoonji Mehta v. Noor Mahomedbhoy Jairajbhoy Pirbhoy*.<sup>4</sup> No reason is given for his judgment. He merely reproduces the clause about the remedy being in damages and then goes on to say that the case of *Prichard v. Wilson* "lays down the rule that in such a case a Court of Equity will not grant an injunction to stop a sale." This case was decided, as pointed out by Sir Dinshah Mulla, before the Transfer of Property Act was applied to Bombay. Counsel argued that this Court was bound to follow the case. It is the judgment of a Court of coordinate jurisdiction, and I believe counsel was referring to the decision of the Appeal Court in

1 (1879) L. R. 6 I. A. 145, 160.

2 (1899) 1 Bom. L. R. 273, 275.

3 (1864) 10 Jur. N. S. 330.

4 (1893) I. L. R. 17 Bom. 711,

717.



*Tyabji Dayabhai & Co. v. Jetha Devji & Co.*,<sup>1</sup> where Marten C. J. pointed out that a decision of a single Judge of this Court was binding upon another Judge on the Original Side, if it was a decision "which really followed the practice of this Court which had existed for a great number of years". The ruling embodied in *Prichard's* case and followed in *Muncherji Furdoonji's* case has not been mentioned in any case in Bombay either before *Muncherji Furdoonji's* case or after it. I should like also to point out that the clause in the mortgage deed on which counsel relies begins by saying "without prejudice to all rights conferred on the mortgagees by s. 69 of the Transfer of Property Act" etc. Now the right conferred by s. 69 (2) on the mortgagee is the right to exercise his power of sale only upon fulfilment of one of the two conditions; and as I have stated before, giving the notice required by s. 69(2) (a), is not only necessary but is imperative, and even the period of three months cannot be curtailed by agreement of the parties. I should like to point out the observation made in *Lasa Din v. Gulab Kunwar* by Sir George Lowndes at p. 385 that it is always dangerous to apply English decisions to the construction of an Indian Act. No doubt the two cases which I have referred to before do not bear upon the construction of any provision of the Transfer of Property Act, but I am reluctant to interpret s. 69(2) (a), even if it is followed by the clause as to the remedy in damages, on the basis of the decision in *Prichard v. Wilson* followed in *Muncherji Furdoonji Mehta's* case for which no reason has been assigned.

It was lastly argued that it did not appear on the facts of this case that the plaintiffs would ever be able, even if they were willing, to redeem this property, and that they were not even able to pay Rs. 500 within a couple of days as ordered by the Court. It was further contended that any relief in this suit would be futile because the mortgagee can any day sell under s. 69(2) (b) without notice. That may be so, but the fact that the mortgagee can hereafter take the right action cannot in my opinion legalise an action already taken which was not right and proper according to the law. It is true that granting an injunction is an equitable remedy. It is equally true that it is in the discretion of the Court. But the exercise of the discretion must always be based upon judicial principles; in other words, it can only be exercised according to the provisions and requirements of the law. I do not see why sitting as a Court of Equity I should refuse the equitable relief by way of injunction merely because the mortgagors were unable to pay in the past and might be unable to pay even in the future. I also do not see why I should refuse to grant the relief because the mortgagors can later come forward and claim damages, if any, by reason of an improper sale. Here there are two conditions which have not been fulfilled. There is no intimation of the exercise of the mortgagee's option, and there is no notice in writing as required by the statute; and the parties wish to stand upon their strict rights regardless of the consequences of any future action which may be taken by the mortgagee. I cannot say that conditions exist in this case which entitle the mortgagee to exercise his power of sale or which prevent the mortgagors from applying to the Court to restrain the exer-

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1 (1927) 29 Bom. L. R. 1196, 1204.

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There will be a decree for the plaintiffs in terms of prayer (a) of the plaint. •

Defendant to pay the plaintiffs' costs of the suit and interest on costs at six per cent. per annum.

*Suit decreed.*

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Attorneys for plaintiffs : *Benjamin, Chhatrapati & Co.*

Attorneys for defendant : *Kharas & Co.*

*Before Mr. Justice Kamia.*

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v.

October 12.

M. SUNDARAM.\*

*Society—Promotion of education—Position of such society whether akin to club, or joint stock company—Suit, maintainability of, for wrong done to society—Suit by minority of members in their own name—Societies Registration Act (XXI of 1860).*

The position of a society registered under the Societies Registration Act, 1860, is like that of a club or a joint stock company. In order to redress a wrong done to the society or to recover moneys or damages alleged to be due to the society, the action should be brought by the society itself. Where the persons against whom the relief is sought are in majority and control the society and do not permit an action to be brought in the name of the society, the minority of members can bring an action in their own names. But they cannot have a larger right to relief than the society itself would have if it had brought the action, and cannot complain of acts which are valid if done with the approval of the majority of the members, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.

*Burland v. Earle*,<sup>1</sup> referred to.

A society was registered in 1932, under the Societies Registration Act, 1860, to promote the education of boys and girls hailing from Southern India. At a general meeting of the society called on December 4, 1938, eight persons were elected to form the managing committee and they co-opted one more member in April, 1939. The managing committee resolved to borrow money for the purpose of erecting a school building. The plaintiff, who was a member of the society, challenged the advisability and legality of the acts of the managing committee. On a requisition being sent by eighteen members of the society, a general meeting was convened on October 15, 1939, at which the election of the managing committee and their acts were validated. The plaintiff filed a suit on behalf of himself and other members of the society, except the defendants who were the nine members of the managing committee whose appointment

\* O. C. J. Suit No. 1747 of 1939.

1 [1902] A. C. 83, 93.

and acts were confirmed by the general meeting held on October 15, 1939. The plaintiff sought for a declaration that the loans raised by the defendants were unauthorised and prayed that a managing committee be constituted under the direction of the Court :—

*Held*, that, as the acts of the defendants which were challenged were in respect of alleged wrong done to the society as a body, it was necessary that the society should be a party to the litigation ;

that it was not competent to the plaintiff, either alone or representing himself and the other members of the society other than the defendants, to bring a suit without ascertaining the wishes of the society ; and

that, therefore, the suit as framed was not maintainable and the Court had no jurisdiction to try it in the absence of the society.

*Nariman v. Municipal Corporation of Bombay*<sup>1</sup> and *Pender v. Lushington*,<sup>2</sup> distinguished.

THE facts appear fully in the judgment of his Lordship.

*M. P. Amin*, with *S. R. Tendolkar*, for the plaintiff.

*M. V. Desai*, with *N. K. Iyengar*, for the defendants.

KANIA J. The South Indian Education Society was registered in 1932 under the Societies Registration Act XXI of 1860. The memorandum of association, the rules and the by-laws of the society were duly registered in accordance with the Act. The memorandum defines the objects. The society was founded mainly to promote the education of the boys and girls of Southern India and with that object in view it thought of erecting a building to house the school. Not having sufficient funds on hand schemes were suggested to borrow money. It was suggested that debentures should be issued. To find out if that scheme would be workable several persons were approached and they expressed their willingness to subscribe. When it came to payment, however, the response on the whole being unsatisfactory, there occurred a divergence of opinion. The plaintiff who was a member of the society and who took part in getting promises to subscribe the debentures resigned in January, 1936. On July 26, 1936, a general meeting of the society was called at which a managing committee was elected. In the plaint the proceedings of this meeting are challenged. This election was for the years 1936-37-38. The next general meeting of the society was called on December 4, 1938. At that meeting eight persons were elected to the managing committee. They co-opted one member in April, 1939. The managing committee, on a consideration of the situation, resolved to borrow money from certain other parties and entered into an agreement with them for that purpose. The plaintiff started correspondence in which he challenged the advisability and legality of those acts. He challenged the constitution of the managing committee also. A requisition signed by eighteen members and dated September 24, 1939, was forwarded to the then existing managing committee which called a general meeting of the members on October 15, 1939. The requisition signed by the eighteen members showed a desire to pass four resolutions mentioned therein. They were to validate the election of the managing committee which had been functioning till then and their

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1 (1923) 25 Bom. L. R. 689.

2 (1877) 6 Ch. D. 70.

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acts. A notice containing the four resolutions which were intended to be passed at the meeting was sent to each member on the register of the society. The meeting was held on October 15, 1939, at which twenty-four persons were present. The four resolutions mentioned in the notice and requisition were duly proposed and passed unanimously. The plaintiff then filed this suit on behalf of himself and the other members of the society except the defendants. The defendants are the nine members whose appointment to the managing committee was confirmed by the general meeting held on October 15, 1939. The following reliefs are asked for : that it may be declared that the defendants were not the duly elected members of the managing committee elected on July 26, 1936 ; that it may be declared that the loans raised by the defendants in their capacity as members of the managing committee of the society were unauthorised ; that the agreement of mortgage entered into by the defendants with Hirji Laxmidas was not binding and that the defendants may be restrained from completing the mortgage. The plaintiff further prayed that a managing committee be constituted for the society by and under the direction of this honourable Court, and for that purpose all necessary directions may be given for enrolment of members and framing a proper register of members of the society.

The defendants filed a written statement in which they denied that the meetings of 1936 and 1938 were improperly convened. According to them the managing committees elected at those meetings were properly elected. They further contended that the meeting of October 15, 1939, was properly convened and the resolutions passed at that meeting in any event validated the resolutions passed by the managing committee at the previous meetings and their acts. It was also contended in the written statement that the suit as framed was not maintainable.

Several issues were raised. At the commencement of the hearing it was pointed out to the plaintiff that if he persisted in challenging the election of the managing committee at the meeting of July 26, 1936, the suit must fail, because he was re-elected a member by the same managing committee. If therefore the plaintiff's contention was accepted, and there was no validly elected managing committee, the plaintiff could not be a member of the society and therefore he will have no right to maintain the suit. On considering this contention Mr. Amin intimated to the Court that the plaintiff did not challenge the proceedings of the general meeting of the society held on July 26, 1936, and gave up his contentions in respect of the same. He also did not dispute that the defendants were duly elected members of the managing committee for the years 1936-37-38. On that, issues Nos. 3, 5 and 6 must be answered against the plaintiff. The third issue was raised because two of the defendants were not elected at the meeting of July 26, 1936, and that issue became unnecessary.

The first question is whether the suit as framed is maintainable. It was argued on behalf of the defendants that the society was not a party to the suit. The allegations contained in the plaint amounted to an alleged irregularity in the internal management of the society. Taking them all together they did not amount to an allegation that the acts were *ultra vires* the society. They were all acts within the powers of the society. The only dispute raised

by the plaint was whether, within the powers of the society, the managing body had acted according to its rules and by-laws. It was further argued on behalf of the defendants that as the society itself did not challenge the acts the question was one of the internal management of the affairs of the society and the Court had no jurisdiction to try the suit. If the society complained that the acts of the defendants were irregular and the society was not bound by the same, the position may be different. In such a case the Court can call a meeting of the members of the society and inquire whether the society, as a body approved of the challenged acts of the defendants or even if they were outside the powers of the defendants, but being within the scope of the society's affairs, it ratified the same. Such a situation cannot arise in this suit because the society was not a party to the litigation. The plaintiff relied on *Nariman v. Municipal Corporation of Bombay*<sup>1</sup> and *Pender v. Lushington*<sup>2</sup> to support his contention that the plaintiff alone was entitled to maintain the suit. In the former case the plaintiff alleged that an amendment to a certain proposition was moved and was declared lost by the casting vote of the chairman. The plaintiff contended that some of the councillors who voted at the aforesaid meeting were disqualified from voting by reason of s. 36 read with s. 16 of the City of Bombay Municipal Act (Bom. III of 1888) and the decision of the chairman therefore that the aforesaid amendment was lost was incorrect. The Court held that the plaintiff had a right to file the suit and challenge the capacity of named councillors to vote at the meeting. It held that the decision of the chairman was not conclusive and it was the function of the Court to decide whether it was conclusive or not. In my opinion that decision does not help the plaintiff at all. The existence of the Municipal Corporation is recognised by a statute and the working of it is controlled by the different sections of the Act. Section 36 lays down how a meeting of the Corporation has to transact its business. If therefore there was any irregularity and non-observance of the provisions of the section, it was not within the competence of anybody to validate the irregularity or ratify the action irregularly done. Because there were imperative provisions in the Municipal Act for working the Corporation, any omission to act according to those provisions made the transaction *ultra vires* the corporation. In the present case it is not even suggested that the disputed acts are *ultra vires* the society.

*Pender v. Lushington* also does not help the plaintiff. In that case a shareholder of the company was prevented from voting at a meeting. He filed a suit and applied for an injunction. The facts showed that the company was a party to the litigation. That was clearly a case where the plaintiff's individual right was denied and his status as a member of the company was in dispute. That gives rise to an individual grievance and a remedy for that can be obtained in a Court of law. In the present case it is not suggested that the plaintiff was prevented from doing anything as a member of the society.

The position of a society registered under the Societies Registration Act is more like that of a club or a joint stock company. The position of members

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1 (1923) 25 Bom. L. R. 689.

2 (1877) 6 Ch. D. 70.

O. C. J. of a company in respect of the acts of the directors or managers is stated by  
1940 Lord Davey in *Burland v. Earle*<sup>1</sup> as follows (p. 93) :—

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"Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the wellknown cases of *Foss v. Harbottle*<sup>2</sup> and *Mozley v. Alston*,<sup>3</sup> and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiff cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company."

In my opinion as the position of the members of this society is similar to that of the shareholders of the company and as the acts of the defendants which are challenged are in respect of the society, it is necessary that the society should be a party to this litigation. I do not think it is competent to the plaintiff either alone or representing himself and the other members of the society other than the defendants to bring a suit. The only grievance in respect of the disputed acts can be of the society. It is not open to the plaintiff, without ascertaining the wishes of the society, to file a suit on behalf of himself and all others except the defendants. The reason for that conclusion is obvious. Even if the Court decides in favour of the plaintiff, the society can call a meeting of its members tomorrow, confirm the acts of the defendants and confirm their position as members of the managing committee, thus rendering the decision of the Court a nullity. As I have pointed out, there is no suggestion here of an infringement of the individual right of the plaintiff. The suggestion is only in respect of the alleged wrong done to the society as a body. In the absence of the society as a party to this litigation, I am of opinion that the suit as framed is not maintainable and the Court has no jurisdiction to try the suit in the absence of the society.

Even if this view was incorrect, I think on the evidence the plaintiff's case must fail. I shall first consider the meeting of December 4, 1938. It was admitted by both parties that on that day there were only six members of the society who had paid their subscription or whose subscription was not in arrears for a period exceeding three months. At that meeting seven persons were present, four of whom were out of the above-mentioned six. The plaintiff contended that the resolutions passed at that meeting were illegal and not binding on the society because there was no necessary quorum at the meeting. In para. 6 of the plaint it is alleged that on December 4, 1938, there were twenty-eight persons on the role of the society according to the original register and sixty-seven according to the revised register. It was contended

1 [1902] A. C. 83.

2 (1843) 2 Hare 461.

3 (1847) 1 Ph. 790.

that under the circumstances the quorum for the general meeting would be either ten or twenty-three while only seven persons were present, out of whom three were disqualified to vote under s. 15 of the Act.

Section 15 runs as follows :—

"For the purposes of this Act a member of a society shall be a person who, having been admitted therein according to the rules and regulations thereof, shall have paid a subscription or shall have signed the role or list of members thereof, and shall not have resigned in accordance with such rules and regulations; but in all proceedings under this Act no person shall be entitled to vote or be counted as a member whose subscription at the time shall have been in arrears for a period exceeding three months."

The facts as now ascertained show that although several persons may have been shown to have joined the society as members on December 4, there were only six members who had paid their subscription so as to be eligible to vote at the meeting. In my opinion therefore it is improper to take into consideration the names of the persons who were on the role but who had not paid their subscription or were in arrears for over three months. In order to determine the quorum it is necessary to find out who were the persons eligible to attend the meeting; the latter part of s. 15 quoted above shows that in all proceedings under the Act a member whose subscription had been in arrear for over three months should not be counted as a member. If there were six members only who are to be treated as members and four of these were present at the meeting, it is clear that it cannot be contended that there was no proper quorum for the meeting.

It was next argued that in that event the election of eight members at the meeting was irregular because that included persons who were not members, and under rule 5 the managing committee must consist of not more than fourteen and not less than five members of the society. On behalf of the plaintiff it was contended that this election of persons, whose subscription was in arrears for over three months, was therefore invalid. This point is not free from doubt. However it is not necessary to consider this aspect of the case in view of the meeting of October, 1939.

In that connection the admitted facts are that on September 24, 1939, there were sixty-seven persons on the register of the society. Out of these ten had paid their subscription or were not in arrears for a period exceeding three months. A requisition for the meeting was signed by eighteen persons which included five of the above-mentioned ten. Under the orders of the then functioning managing committee a notice was issued by the Secretary to all persons on the register of the society calling a meeting on October 15, 1939. Before that date twenty-eight members had paid their subscription. At that meeting twenty-four persons, all of whom had paid all their arrears of subscription, were present and the four resolutions mentioned in the notice convening the meeting were passed. The plaintiff has challenged that this meeting was irregularly convened. In para. 9 of the plaint it is contended that the proceedings of this meeting were of a special or extraordinary nature. The requisition was signed by eighteen members of whom thirteen were disqualified by reason of s. 15 of the Act. The requisition was therefore improper or illegal. It is not disputed that if the proceedings of this meeting are held to be binding the plaintiff has no case.

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O. C. J. By-laws 8, 9 and 10 were relied upon in this respect. They run as follows :—

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8. Ordinary business meetings may be called from time to time at the instance of the managing committee as the business of the society demands. The Hon. Secretary shall give at least ten days notice of such meeting.

9. Extraordinary business meeting may be called by the managing committee to deal with emergent work. The Hon. Secretary shall give not less than two days notice of such meeting.

10. Ordinary business meetings may also be called on the requisition in writing of not less than one-quarter of the members of the society, the meeting to be called within a month of the receipt of the requisition.

It was argued that this meeting was called on a requisition submitted under by-law 10 and acting under the powers given under by-law 8. It was argued that at such a meeting extraordinary business could not be transacted. It was further argued that the four resolutions contained in the notice convening the meeting indicated that the business was of an extraordinary nature and could not be transacted at an ordinary business meeting convened under by-law 8. In my opinion this argument is unsound. The words used in framing by-laws 8, 9 and 10 are not happy, and it is evident that there is considerable confusion of thought in framing those by-laws and in the arguments based thereon. By-laws 8 and 10 are in respect of ordinary meetings. By-law 8 deals with the meetings called by the managing committee itself and by-law 10 deals with meetings called on requisitions of members. There is no provision for calling an extraordinary meeting. By-law 9 provides for an extraordinary business meeting to deal with emergent work. It is, therefore, clear that there is no distinction between ordinary business and extraordinary business or the meeting being ordinary meeting or extraordinary meeting. Apart from these three by-laws there are no other rules or by-laws in respect of calling general meetings of the society. The term extraordinary meeting is understood in a different way under the Indian Companies Act. There an extraordinary general meeting is called for the purpose of passing a special resolution. At an ordinary general meeting also business other than of sanctioning dividends, consideration of accounts, balance sheets and reports of the directors and auditors, election of directors and other officers in place of those retiring by rotation, and fixing the remuneration of the auditors can be transacted. But all that business is not ordinary business of the meeting but may be described as extraordinary or special business. Under the circumstances the meeting when called in the present case was called as a result of the requisition submitted under by-law 10 by the managing committee under by-law 8. That meeting was called for the purposes mentioned in the notice. The members were therefore not taken by surprise and they were informed definitely what matters were going to be discussed at the meeting. The resolutions passed at the meeting, although they were not of a routine nature, could be validly passed and in my opinion it is not proper to contend that it was outside the scope of by-law 8.

The next contention was that this meeting was improperly convened. In my opinion that argument is unsound. On the admitted facts on September 24, 1939, ten persons had paid their subscriptions and were not in arrears for a period exceeding three months. According to s. 15 those were the members



therefore who could send a requisition. Under by-law 10 one quarter of the members of the society had to send a requisition. It was sent by eighteen members which included five out of those ten. If the requisition were sent by those five persons alone, there could be no objection to the requisition. Because it was signed by some more who were on the role of the society but who were not entitled to vote at the meeting, the requisition did not become bad. There is no dispute about the proceedings of this meeting. The plaintiff has challenged only the requisition. On the admitted facts it is clear that the plaintiff will be unable to challenge the voting that took place at that meeting, and the resolutions passed thereat. If, therefore, this meeting was properly convened, there could be no doubt that the actions of the defendants as members of the managing committee were duly ratified and the society as such had at that meeting taken the necessary steps to do so. The election of the defendants as members of the managing committee was also ratified by one of the resolutions duly passed at that meeting. In view of that resolution therefore it is clear that the plaintiff's contentions must fail.

[After recording findings on the issues the judgment concluded.]

I have recorded these findings which are directed against the society on the footing that the society has challenged the same. As I have already pointed out, the society is not a party to this litigation and in fact has not challenged them. It is the plaintiff alone who has purported to challenge the acts as not binding on the Society. The result is that the plaintiff's suit is dismissed with costs.

*Suit dismissed.*

Attorneys for plaintiffs : *Solomon & Co.*

Attorneys for defendants Nos. 1, 2 and 9 : *Mazgamwala & Co.*

*Before Mr. Justice B. J. Wadia.*

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*v.*

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*Parsi Marriage and Divorce Act (III of 1936), Secs. 1 (2), 29 (3)—Act extends to "Parsi subjects of His Majesty"—"Subjects of His Majesty"—"British subjects"—Interpretation—Political status—Domicil—Change of domicil does not affect political status—"Resides" in s. 29 (3)—Interpretation.*

Section 1 (2) of the Parsi Marriage and Divorce Act, 1936, extends the Act even to Native States in India in its application to Parsis, provided the Parsis are subjects of His Majesty.

The expression "Parsi subjects of His Majesty" in the section refers to the political status of such subjects as opposed to their civil status, in other words, to their nationality and allegiance and not to their domicil. The change of domicil does not necessarily involve change of political status of a subject. The words "subject of His Majesty" mean the same thing as "British subject." A British subject, unless a certificate of naturalization in a foreign country has

\* O. C. J. Matrimonial Suit No. 16 of 1940.

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been granted to him, ordinarily means a person who is a natural-born British subject.

• The real meaning to be attached to the term "resides", as used in s. 29(3) of the Parsi Marriage and Divorce Act, depends upon the circumstances of each case. If a person resides permanently at a particular place, that place is his or her residence; but the residence need not necessarily be permanent. It is enough for the purposes of the section if the residence is bona fide, with an element of continuity about it, so that even if it is not permanent, it cannot be said to be merely casual or for a temporary or passing purpose.

#### CHAMBER SUMMONS.

Suit for judicial separation, permanent alimony and custody of children under the Parsi Marriage and Divorce Act, 1936.

The plaintiff Hilla was married to the defendant Maneksha in 1927 at Jalna in H. E. H. the Nizam's territory. Hilla's father was born in Bombay.

The defendant was born in Bombay, and as a child was taken to Surat, where he was educated till he was seventeen or twenty-one. Thereafter he lived with his parents at Jalna. The defendant's father was born at Surat and died in Bombay in May, 1940. The defendant joined the service of the Nizam as a permanent way inspector, a post which could only be held by a subject of the Nizam. At the material date he was living at Upalwai in the Nizam's State. The defendant's grandfather was also born at Surat, where he lived during his lifetime.

The parties lived together as husband and wife, and two daughters and a son were born of the marriage. Differences, however, arose between them, and the wife complained of cruelty on the part of the husband. Ultimately the plaintiff left the defendant's protection on November 5, 1939. She first resided with her father at Secunderabad, but in May, 1940, she came to Bombay and took up her residence there.

On December 12, 1940, as the defendant was residing outside the jurisdiction of the Court, the present plaintiff, after obtaining leave under s. 29 (3) of the Parsi Marriage and Divorce Act, 1936, filed this suit in the Parsi Chief Matrimonial Court at Bombay.

On January 22, 1941, the defendant took out summons praying that the leave granted to the plaintiff to file [her] suit in the Parsi Chief Matrimonial Court at Bombay under s. 29 (3) may be revoked on the ground that he was a subject of H. E. H. the Nizam, and that the plaintiff did not reside in Bombay within the meaning of s. 29 (3) of the Act.

The chamber summons was heard.

*N. H. C. Coyajee*, for the defendant in support.

*M. L. Maneksha*, for the plaintiff to show cause.

**B. J. WADIA J.** This is a chamber summons taken out by the defendant for revocation of the leave granted by this Court to the plaintiff on December 12, 1940, under s. 29 (3) of the Parsi Marriage and Divorce Act of 1936 for the purpose of enabling her to file this suit in this Court.

The suit is filed by the plaintiff against her husband for judicial separation, for permanent alimony, and for the custody of the children of the marriage. In paragraph 30 of the plaint it is alleged that the marriage cere-

mony was performed in Jalna in the Nizam State, that the defendant is a railway servant at Upalwai also in the Nizam State, and is residing there, that the plaintiff has now been residing in Bombay, and that it would be a great hardship to her if she was compelled to institute this suit in a Court outside Bombay. The application to the Court was made under r. 782 (2) of the Rules and Regulations for the Parsi Chief Matrimonial Court of Bombay. The application has according to that rule to be supported by the affidavit of the plaintiff in which she has to set out the grounds on which the leave is asked for. That affidavit was made on December 12, 1940, in which she has stated *inter alia* that she is at present residing in Bombay, that some of her witnesses are in Bombay, that it would be a great hardship for her and her Bombay witnesses to go to Upalwai where the defendant is residing, and further that there is no Parsi Matrimonial Court either at Secunderabad or at Hyderabad for the purpose of trying suits filed under the Parsi Marriage and Divorce Act. The defendant has made an affidavit under r. 782 (5), as he desires to contest the evidence on which the Court granted leave to the plaintiff. His application has also to be supported by an affidavit, and the summons is to be taken out before filing the written statement or before the time to file the written statement expires, whichever is earlier. Defendant denies that there will be any hardship to the plaintiff in filing the suit in the Nizam State. He denies also that she is at present residing in Bombay for the purposes of the Act. Defendant also in paragraph 8 of his affidavit states that the plaintiff admits that she has not been residing in Bombay as required under the Act. I do not know where this admission has been made, nor what particular admission is referred to; none at any rate has been pointed out to the Court. It is, however, admitted that there is no Parsi Matrimonial Court in the Nizam State for the purpose of trying suits under the Act. It is alleged that there is a Court in Secunderabad for trying suits between husbands and wives, but it is nowhere alleged that there is any Court at Secunderabad or in any part of the Nizam's dominions for trying a suit between a Parsi husband and a Parsi wife under the Parsi Marriage and Divorce Act of 1936. I quite agree that if this Court has no jurisdiction otherwise, the fact that there is no Court in the Nizam's dominions for the purpose of determining the suit may be no answer. The defendant has put in a supplemental affidavit in which he further alleges that he is not a Parsi subject of His Majesty the King Emperor and is not a Parsi subject within the provisions of s. 1 (2) of the Parsi Marriage and Divorce Act of 1936, and that therefore this Court has no jurisdiction to entertain the suit. The defendant should have asked for leave to put in the supplemental affidavit before it was filed, but since it raises only a point of law which can be argued even without an affidavit, I have allowed both the supplemental affidavit and the plaintiff's affidavit in reply thereto to be taken on file.

There are thus two grounds on which the defendant contends that leave ought not to have been granted to the plaintiff to file this suit. The first is that the plaintiff does not, as required by s. 29 (3), reside in Bombay, and the second is that this Court has no jurisdiction to entertain the suit. Section 1 (2) defines the extent of the Act and it says that it extends to

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the whole of British India, and, in respect of the Parsi subjects of His Majesty, to the whole of India. The effect therefore is to extend the Act even to Native States in India in its application to Parsis, provided the Parsis are subjects of His Majesty. A Parsi is defined in the Act as a Parsi Zoroastrian. The Act thus applies to Parsi Zoroastrians residing in any of the Native States, if they are subjects of His Majesty. There is a proviso under which the Act could be modified in its application to territories in India beyond the limits of British India by notification in the *Gazette of India*.

I will take up the second ground first, for if this Court has no jurisdiction, then the Act cannot apply, and no question of leave under s. 29 (3) of the Act can arise. The terms "British India" and "India" are not defined in the Act, but they are defined in the General Clauses Act: see s. 1 (7) and s. 1 (27). I do not think there can be any dispute that the Native States, including the Nizam's State are not a part of British India, but they would be still a part of India. It is pointed out by Halsbury, Hailsham's edn., Vol. VI, paragraph 242, at page 199, that

"Every person at birth becomes a member both of a political and of a civil society. The former determines his political status or nationality, on which depends his allegiance to a sovereign; the latter determines his civil status."

A person's civil status depends upon the law of his domicile according to which his municipal rights and obligations are determined. It is pointed out that every person has a domicile at every period of his life, and that no person can have more than one domicile at one time. That is also laid down in *Udny v. Udny*,<sup>1</sup> where Lord Westbury at p. 457 observes as follows:—

"The law of *England*, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*."

The words in s. 1 (2) of the Act, namely, "Parsi subjects of His Majesty" refer to the political status of such subjects as opposed to their civil status. Therefore the jurisdiction of the Court depends upon the political status of the Parsi subject, that is his nationality and his allegiance, and not upon his domicile.

The expression "subject of His Majesty" is not defined, but I do not think there is any difference between "subject of His Majesty" and "British subject". Under s. 2 (a) of the Indian Naturalization Act, VII of 1926, "British subject" means a British subject as defined in s. 27 of the British Nationality and Status of Aliens Act, 1914. Under s. 27 (1) of that Act "British subject" means a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted, or a per-

son who has become a subject of His Majesty by reason of any annexation of territory. A British subject, therefore, unless a certificate of naturalization in a foreign country has been granted to him, means a person who is a natural-born British subject. Under s. 1 of the same Act certain persons are deemed to be natural-born British subjects, amongst them being, "(a) Any person born within His Majesty's dominions and allegiance." I need not refer to the other sub-sections, as they are not necessary for the purpose of this summons.

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It is in evidence that the defendant was born in Bombay in 1898. He was therefore born within his Majesty's dominions and allegiance, and he is a natural-born British subject. His father was born at Surat and therefore he too would be a natural-born British subject within His Majesty's dominions and allegiance. The question arises whether the defendant by going over to and taking service in the Nizam's State and remaining there for a number of years has ceased to be a British subject, or, to put it shortly, has lost or changed his political status. The political status of a British born subject can only be lost if a person goes to a Foreign State and there obtains a certificate of naturalization, or by any other voluntary and formal act, becomes naturalized therein. It is also pointed out in Halsbury, Vol. VI, Hailsham's edn., paragraph 461 at p. 415, that natural allegiance is due from all natural-born British subjects, and a natural-born British subject cannot, apart from statute, divest himself of his British nationality so as to free himself from the duty of allegiance. If such a subject becomes naturalised in a foreign country, he would cease to be a British subject. It is therefore necessary for the defendant to show that he has become naturalised in the Nizam's State. There is no statute existing in the Nizam's State under which any certificate of naturalization is granted to a subject owing allegiance to the British sovereign going over and settling down in the Nizam's territory. The only piece of evidence which the defendant relies on is art. 39 of the Hyderabad Civil Service Regulations which provides that

"No person unless specially authorised by His Exalted Highness can be appointed permanently or temporarily in the superior or inferior service of the Government, if he is not a natural born subject of His Exalted Highness or is not domiciled within the Dominions."

It is not suggested that the defendant was a natural-born subject of His Exalted Highness. He is in the service of His Exalted Highness by reason of his domicile within his dominions, and Note (1) to the article points out that—

"If a person has permanently resided in the Dominions for 15 years or has continuously served under the Government for 12 years, he and his lineal male descendants to two generations will be considered to be domiciled in the Dominions."

The defendant therefore is at best only domiciled in the Nizam's State, and by the fact of his having acquired a domicile in that State he cannot be said to have given up his allegiance to the British sovereign. His bare allegation in the box that he is not a British subject but is a subject of His Exalted Highness the Nizam cannot carry him any further. A mere statement is not proof of the allegation. Defendant has not ceased to be a British subject of His Majesty. He is therefore a Parsi, i.e. a Parsi Zoroastrian, subject

O. C. J. of His Majesty. He has changed his domicile no doubt, but thereby has  
 1941 not in any way changed his nationality or his political status. It was pointed  
 — out also by Lord Westbury in the same case, namely, *Udny v. Udny*, that a  
 PANTHAKY change of domicile does not necessarily mean a change of nationality, that is,  
 v. of natural allegiance. That would be, as he points out, to confound the  
 PANTHAKY political and civil states of an individual, and to destroy the difference bet-  
 — ween *patria* and *domicilium*. In Dicey's Conflict of Laws, 5th edn., pages  
 B.J. Wadia J. 891-892, the learned author says that—

"The doctrine was at one time laid down that a change of domicile involves something like a change of allegiance, and that, for instance, an Englishman, in order to acquire a French domicile, must at any rate, as far as in him lies, endeavour to become a French citizen. This doctrine was strictly inconsistent with the theory, on which the received definitions of domicile are based, that a domicile is merely a permanent home. As long, therefore, as this doctrine was maintained, it was impossible for English Judges to treat as satisfactory any of the current definitions of domicile. The attempt, however, to identify change of domicile with change of allegiance has now been pronounced on the highest authority a failure."

The condition of the law as it existed before the decision in *Udny v. Udny* is also referred to by the House of Lords in *Casdagli v. Casdagli*.<sup>1</sup> Viscount Haldane pointed out that there was some obscurity at one time as to whether a change of allegiance was not also required in order to establish the acquisition of a new domicile, an obscurity which has now been removed, and a man can acquire a new domicile without in any way changing his allegiance as a natural-born subject of his sovereign.

Under the circumstances I hold that the defendant is a Parsi subject of His Majesty. There is no doubt that the plaintiff is also such a subject. It is not in evidence before me as to where she was born, but under s. 1 (b) (i) of the British Nationality and Status of Aliens Act, 1914, even a person born out of His Majesty's dominions is deemed to be a natural-born British subject, if his or her father was born within His Majesty's allegiance, and there is evidence that her father was born within His Majesty's dominions and allegiance. Both the plaintiff and the defendant therefore are Parsi subjects of His Majesty, and the provisions of the Act apply to both of them.

The next ground is that the plaintiff cannot be said for the purposes of leave to be a person residing in Bombay. It may be noted that the Parsi Marriage and Divorce Act makes residence and not domicile a condition of jurisdiction. It was pointed out by Sir Charles Sargent as far back as 1878 in *Mahomed Shuffli v. Laldin Abdulla*<sup>2</sup> that the meaning to be given to the word "residence" in legislative enactments depends upon the intention of the Legislature in framing the particular provision in which the word is used, and that the word "reside" is for all practical purposes the same as the word "dwell". "Reside", therefore, is an elastic term and has a variety of meanings according to circumstances or the statute or the document in which it is used. In *Ex parte Breull*: *In re Bowie*<sup>3</sup> a debtor was held for the purposes of the Bankruptcy Rules, 1870, to reside in the City of London where he was employed in a bank, though he lived with his mother at a place outside the

1 [1919] A. C. 145, 171.

3 (1880) 16 Ch. D. 484.

2 (1878) 1, L. R. 3 Bom. 227.

jurisdiction of the London Court. "Residence" signifies a person's abode. In an old English case Blackburn J. observed that "a man's residence is where he habitually sleeps". But I doubt whether this test would apply to modern conditions of living. It is, however, not essential that for the purpose of residence a person should have a house of his own. The question still remains what length of time is requisite to constitute residence in law. The residence which the learned Judge was considering in *Mahomed Shuffli's* case was residence under s. 380 of the old Civil Procedure Code of 1877 for the purpose of claiming security for costs from the plaintiff residing outside British India. He has further pointed out at p. 229 that neither the expression "reside" nor "dwell" necessarily implies a permanent state of things. Counsel for the defendant argued that the word "resides" in s. 29(3) must mean "reside" both permanently and bona fide. There is no doubt that the residence must be bona fide. A mere temporary sojourn which is casual, or to use the words of Kenyon C. J. in *The King v. The Duke of Richmond*<sup>1</sup> "mere passage residence", or the residence of a traveller passing from one place to another on his travels, is not such residence as is sufficient in law. That was pointed out in *Arthur Flowers v. Mirmie Flowers*,<sup>2</sup> and also by our Appeal Court in *Nusserwanji Wadia v. Eleonora Wadia*.<sup>3</sup> The question is whether bona fide residence must also be permanent. If that was so, no residence which is temporary, even though not casual and even though not for a passing purpose, can ever be bona fide, merely because it is not permanent. Some degree of continuity of residence is, however, necessary. There must be something more than a mere passing temporary occupation. If, however, it was the intention of the Legislature in the Act of 1936 to mean by the word "resides" a permanent residence, there was nothing to prevent it from having said so clearly. Plaintiff in her evidence stated that she intends to stay in Bombay permanently for the reasons given by her. Her intention in itself is immaterial, for she can change it at any time. But the evidence with regard to her intention is still relevant for the purpose of determining whether her residence is merely casual or for a temporary purpose. She stated that she left her husband's house at Upalwai sometime in November, 1939, and never intended for some reason or the other to return to it. Her permanent residence during her married life would naturally be that of her husband. Having broken away from his home and having gone with the intention of not returning to it, the question is what was really her place of residence. The mere fact that her father has a permanent residence in Secunderabad and that she went and stayed with him for some time, especially for the purpose of her confinement, as she always used to do before, does not make her father's place her permanent residence. She denied that she was residing in Bombay merely for the purpose of this suit. I need not point out that there are various cases on either side of the line in which a short period of a few days has been in some Courts considered sufficient to establish residence and by some Courts considered insufficient. Many of the earlier ones are mentioned in *Shri Goswami v. Shri Govardhanlalji*.<sup>4</sup> In *Srinivasa Moorthy v. Ven-*

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B. J. Wadia J.

1 (1796) 6 T. R. 560, 561.

2 (1910) I.L.R. 32 All. 203, 205,  
F.B.3 (1913) I.L.R. 38 Bom. 125, 149,  
s. c. 15 Bom. L. R. 593.

4 (1890) I. L. R. 14 Bom. 541.

O. C. J. *katawarada Iyengar*,<sup>1</sup> the appellant who at the date of the suit had taken a house on hire in Madras and intended staying there with his family for some months was held by the Privy Council to be residing in Madras. But as I have said, there are cases on either side of the line, and the meaning of the term "residence" must depend upon the circumstances of each case. If a person resides permanently at a particular place, there can be no doubt that that is his or her residence. But the residence need not necessarily be permanent. It is enough if it is bona fide, with an element of continuity about it, so that even if it is not permanent, it cannot be said to be merely casual or for a temporary or passing purpose. I am satisfied, therefore, that the plaintiff is residing in Bombay for the purpose of s. 29(3), and that the leave which was asked for was properly granted.

Under the circumstances the chamber summons must be dismissed with costs.

I have heard both counsel on the question of costs. The hearing of this summons has lasted for more than a day and has also involved the taking of evidence on both sides. The Court now has power under r. 785 (R) to give any special direction as it chooses in its discretion with regard to the payment of costs. I direct the defendant to pay the plaintiff's costs of this summons as if the summons was adjourned into Court and the costs were taxed as of a summons adjourned into Court on the Original Side, refresher being allowed.

*Chamber summons dismissed.*

Attorneys for plaintiff : *Dastur & Co.*

Attorneys for defendant : *Chitnis & Kanga.*

*Before Mr. Justice Blackwell.*

KHIMJEE THAKARSEE

*v.*

THE PIONEER FIBRE CO., LTD.\*

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December 3.

*Lease—Permission to lessees to erect temporary structures on land leased—Lessees given right to remove structures on determination of tenancy—Lessees vacating premises without removing structures—Attachment of lessees' interest in land and structures—Sale of structures mentioned in proclamation of sale—Whether lessees' interest in structures continued after determination of tenancy—Application by lessor to raise attachment—Transfer of Property Act (IV of 1882), Sec. 108—Contract to exclude provisions of this section.*

A clause in a lease required the lessees to deliver over possession of the demised premises at the determination of the tenancy in the same good condition as it was at the time the lessees entered into possession subject to wear and tear. Another clause provided that "on the determination of the tenancy the lessees shall be entitled to remove the structure or shed which they might have erected

<sup>1</sup>. (1911) L. R. 38 I. A. 129, 139,  
s. c. 13 Bom. L. R. 520.

\* O. C. J. Suit No. 1063 of 1939.



during the continuance of the tenancy." The lease came to an end on August 31, 1939, and the lessees vacated the premises without removing certain structures. On September 13, 1939, a creditor of the lessees attached their right, title and interest in the land and the structures. On an application by the lessor to raise the attachment :—

*Held*, that, as the first clause made it obligatory upon the lessees to deliver over possession at the determination of the tenancy, the lessees were given no right to remain in possession after the determination of the tenancy ;

that the second clause amounted to a contract between the parties which excluded the provisions of s. 108 of the Transfer of Property Act, 1882 ;

that having regard to the words "on the determination of the tenancy" in the second clause, if the lessees wished to remove the structures they were obliged to make provision for their removal by severing them from the soil, or by taking any steps which might be necessary so that they could remove them on the determination of the tenancy ;

that as the lessees had not done so, they lost all their rights to remove the structures or to demand possession of them from the lessor ;

that even if the lessees had the right to remove the structures after the determination of the tenancy and after they had gone out of possession, they would only have had the right to remove them within a reasonable time of the determination of the tenancy, forty-eight hours being enough in this case :

*Govindaprasad Shaha v. Charusheela Dasee*<sup>a</sup>, referred to.

CHAMBER summons to raise attachment.

The plaintiff, Khimjee, supplied cotton and cotton stripping to the defendants, the Pioneer Fibre Co. Ltd. The defendants had rented a plot of land of the applicants admeasuring about 5000 square yards for the purposes of their business. Under the terms of the lease the tenancy was to expire on August 31, 1939. The defendants were at liberty to erect temporary structures which might be required for their business, and it was agreed that on determination of the tenancy they should be entitled to remove the structures which might have been erected by them during the continuance of the tenancy.

A sum of Rs. 1,891 was found due to the plaintiff on December 31, 1938, for goods supplied to the defendants.

As the defendants failed to pay that amount the plaintiff filed a suit on July 31, 1939, to recover it and a decree for Rs. 2,196-13-0 was passed in his favour.

The plaintiff thereafter applied for the execution of the decree by attachment of the right, title and interest of the defendants in the immoveable property in their possession. He also applied for attachment of moveable property belonging to the defendants. The properties were attached on September 13, 1939, and four structures purported to have been erected by the defendants were mentioned in the draft proclamation of sale.\*

The applicants, Cawasji Jehangir & Co., Ltd., the lessors, took out a chamber summons applying for raising the attachment. They submitted *inter alia* that the defendants had left the premises before August 31, 1939, the date on which the tenancy was to expire, that they had let out the land with the existing structures to one Star Trading Company from September 1, 1939, that the Star Trading Company were in possession of the land and

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the structures as their lessees from September 1, 1939, that the defendants had no interest in the land or the structures at the date of the warrant of attachment; that some of the structures were not erected by the defendants, that even if the defendants were entitled to remove the structures they could only have done so during the continuance of the tenancy and could not remove them after they ceased to be in possession of the property.

The plaintiff in his affidavit in reply stated that the lease in respect of the premises was not registered and the defendants were only monthly tenants of the applicants, that the defendants continued to be in possession after August 31, 1939, that the applicants were not justified in letting the premises to the Star Trading Company as the defendants continued to be monthly tenants until ejection proceedings were taken against them by the applicants, that all the four structures were erected by the defendants and they had a right to remove them, and that the plaintiff was entitled to attach them and sell them as they belonged to the defendants.

*M. V. Desai*, for the plaintiff.

*R. J. Colah*, for the defendants.

BLACKWELL J. This is a summons taken out by the applicants for an order that the attachment levied by the plaintiff on the property at Fergusson Road, Lower Parel, by the warrant of attachment dated September 13, 1939, be raised. This summons was adjourned into Court for taking evidence. In view, however, of the arguments of counsel, and in particular of what has been conceded by counsel for the plaintiff, evidence has not become necessary. The matter has been greatly shortened by the concessions made by the learned counsel for the plaintiff.

The defendants became the tenants of the applicants. The terms upon which they became the tenants of the applicants are set out in the correspondence annexed to the affidavit of N. M. Bhagalia dated March 6, 1940. That correspondence amounting to an agreement to lease ought to have been registered by reason of the definition of a lease in s. 2(3) of the Indian Registration Act and s. 17(1)(d). It was not registered. Notwithstanding registration by virtue of the proviso to s. 49 of the Indian Registration Act these letters may be looked at as evidence of any collateral transaction not required to be affected by a registered instrument. Mr. M. V. Desai for the plaintiff has conceded that these letters can be looked at in connection with the present application.

Mr. Desai conceded by reason of the terms contained in these letters that the term began from September 1, 1931, and ended on August 31, 1939. Having regard to the allegation in Mr. Bhagalia's affidavit and the affidavit sworn by Manharlal Dwarkadas Mehta on March 6, 1940, Mr. Desai conceded that the term of the defendants ended on August 31, 1939, that they went out, and that the Star Trading Co. became the lessees of the applicants and went into possession under a lease on September 1, 1939.

The attachment levied by the plaintiff was not levied till September 13, 1939. It was on a piece or parcel of land situate at Fergusson Road, Lower Parel, by admeasurement seven hundred and sixteen yards and seven-eighths of another square yard or thereabouts with all the tenements, buildings, outhouses,

godowns and watchman's shed thereon. The present summons relates to four structures alleged by the plaintiff to have been erected by the defendants on that parcel of land. The applicants contend that structures 1, 3 and 4 were not even standing on the portion of the applicants' land described in the warrant of attachment, and that No. 2 was the only structure standing on that portion. They also contend that structures 1 and 3 were not erected by the defendants. These contentions are disputed by the plaintiff. It has, however, not become necessary to go into any question of evidence relating to this dispute because this matter falls to be determined on a point of law.

Clause 12 of the letter of July 27, 1931, which letter became one of the terms between the parties, requires the lessees to deliver over possession of the demised premises at the determination of the tenancy in the same good condition as it was at the time the lessees entered into possession subject to wear and tear. Clause 15, which also became one of the terms, provides as follows :—

"On the determination of the tenancy the lessees shall be entitled to remove the structure or shed which they might have erected during the continuance of the tenancy."

Mr. Desai contended that this is a contract between the parties such as is contemplated by s. 108 of the Transfer of Property Act.

Section 108 of the Transfer of Property Act provides that in the absence of a contract, or local usage to the contrary, the lessee may even after the determination of the lease remove at any time whilst he is in possession of the property leased, but not afterwards, all things which he has attached to the earth : see s. 108 (B) (h). As will be seen from Sir Dinshah Mulla's commentary on the Transfer of Property Act, 2nd edn., at page 609, this sub-section has been amended by the insertion of the words "even after the determination of the lease" to settle a conflict of decisions referred to in *Angammal v. Aslami Sahib*,<sup>1</sup> as to whether a lessee is entitled to an allowance of a reasonable time after the determination of the lease for the removal of his fixture. A further amendment "whilst he is in possession of the property leased but not afterwards" fixes definitely the time during which the right may be exercised. As Sir Dinshah Mulla points out the amendment introduces no new principle, but limits and defines the tenant's right to remove as one to be exercised during the term and negatives any right to remove when the tenant is not in possession. If he once quits possession Sir Dinshah Mulla says that he may not return, and the fixtures become the property of the lessors. In this connection reference may usefully be made to *Govindaprasad Shaha v. Charusheela Dasee*.<sup>2</sup>

In my opinion cl. (15) does amount to a contract between the parties which excludes the provisions of s. 108 of the Transfer of Property Act. I have to construe cl. (15) and determine the rights of the defendants and the lessors in the light of it. Having regard to cl. (12) of the terms which makes it obligatory upon the lessees to deliver over possession at the determination of the tenancy, I am of opinion that the defendants were given no right to remain in possession after the determination of the tenancy. Clause 15 gives the lessees the right to remove the structures or sheds on the determination of

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1 (1913) I. L. R. 38 Mad. 710.

2 (1933) I. L. R. 60 Cal. 1042.

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the tenancy. It is important to observe that the words are "on the determination of the tenancy," and not "after the determination of the tenancy". Having regard to the obligation to deliver over possession at the determination of the tenancy, I am of opinion that if the lessees wished to remove the structures they were obliged to make provision for their removal by severing them from the soil, or by taking any steps which might be necessary so that they could remove them on the determination of the tenancy. They did not do so and in my view they lost all their rights to remove the structures, or to demand possession of them from the lessors.

Even if I am wrong in my construction of cl. (15) and the lessees had, by virtue of cl. (15) or otherwise, the right to remove the structures after the determination of the tenancy and after they had gone out of possession, as they did, on August 31, 1939, I think that they would only have had the right to remove the structures within a reasonable time of the determination of the tenancy. That I fix at forty-eight hours. They did not remove those structures within that period and even on this view of the matter, I am of opinion that they had lost any right they might have had, if this should be the proper construction of cl. (15), long before September 13 arrived, the date upon which the plaintiff attached the right title and interest of the defendants.

Mr. Desai contended that even if the defendants had lost their right to remove the structures, the property in the structures still remained in the defendants and they were entitled to demand possession of them or compensation for them. I am unable to agree with this contention. If the defendants chose to leave these structures on the property of the lessors and chose not to remove them within the time allowed by the contract, or by law in that behalf, then in my opinion the defendants lost all right title and interest in those structures. They could not, in my view, have claimed to enter upon the premises with a view to remove them; they could not have sought to compel the lessors to remove them and hand them over, and the result is that it became the right of the lessors to do what they liked, with those structures, to destroy them, or leave them there as they chose.

Accordingly I am of opinion that the applicants are entitled to have this attachment raised. I direct it to be raised accordingly, and I direct the plaintiff to pay to the applicants the costs of this summons. The costs of the matter in Chambers being 135, I fix the costs of this matter including those costs at Rs. 750.

*Order accordingly.*

Attorneys for plaintiff : *Jhavery & Co.*

Attorneys for defendants : *Mulla & Mulla.*

## FULL BENCH—APPELLATE CIVIL.

Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice Divatia, and  
Mr. Justice Sen.

DASHRATHLAL CHHAGANLAL

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1940

December 6.

*Pre-emption—Custom of pre-emption—Ahmedabad city—Custom attached to land—Whether personal law—Custom applies to houses and not to open sites—Custom applies to freeholds—Leasehold estates not affected by pre-emption.*

The law of pre-emption must, in places in which it exists by custom, be regarded as a right attached to the land, and not as a mere personal right.

*Sheobaram Singh v. Kulsum-un-Nissa*,<sup>1</sup> followed.

*Gobind Dayal v. Inayatullah*,<sup>2</sup> referred to.

The *ratio decidendi* in *Hamedmiya v. Benjamin*<sup>3</sup> cannot be supported.

*Quære*, whether the law of pre-emption applies by custom to houses within the old limits of the city of Ahmedabad or it applies also to houses in the new extensions of the city.

*Motilal Dayabhai v. Harilal Maganlal*,<sup>4</sup> commented on.

*Quære*, whether the custom of pre-emption which applies to houses can be extended to open sites.

*Jagjwan Haribhai v. Kalidas Mulji*,<sup>5</sup> *Ram Chand Khanna v. Goswami Ram Puri*,<sup>6</sup> and *Jadu Lal Sahu v. Janaki Koer*,<sup>7</sup> referred to.

The custom of pre-emption exists only as between freeholders, that is to say, the neighbouring land in respect of which the right of pre-emption is claimed as also the land sought to be pre-empted must be freehold. The right of pre-emption does not arise on the sale of a leasehold interest in land.

*Baboo Ram Golam Singh v. Nursing Sahoy*,<sup>8</sup> *Sheikh Mohammad Jamil v. Khub Lal Raut*,<sup>9</sup> and *Phul Mohammad Khan v. Quazi Kutubuddin*,<sup>10</sup> followed.

Per *Divatia J.* The custom of pre-emption exists among the Hindus of Ahmedabad with regard to sales of house properties from beyond legal memory. It is a kind of custom which is so long known and so well known as not to require any proof at the present time.

#### PRE-EMPTION.

The property to be pre-empted was situate in the Bhadra locality in the city of Ahmedabad.

\* Second Appeal No. 233 of 1939, from the decision of P. H. Gunjal, Extra. Assistant Judge at Ahmedabad, in Appeals Nos. 233 and 245 of 1937, confirming the decree passed by T. V. Chapatwala, Joint Subordinate Judge at Ahmedabad, in Civil Suit No. 569 of 1932.

1 (1927) L. R. 54 I. A. 204,

s. c. 29 Bom. L. R. 877.

2 (1885) I. L. R. 7 All. 775, F.B.

3 (1928) I. L. R. 53 Bom. 525,

s. c. 31 Bom. L. R. 374.

4 (1919) I. L. R. 44 Bom. 696,

s. c. 22 Bom. L. R. 806.

5 (1920) I. L. R. 45 Bom. 604,

s. c. 23 Bom. L. R. 81.

6 (1923) I. L. R. 45 All. 501.

7 (1912) L. R. 39 I. A. 101,

s. c. 14 Bom. L. R. 436.

8 (1875) 25 W. R. 43.

9 (1920) 5 P. L. J. 740.

10 (1937) I. L. R. 16 Pat. 519.

F. B. The plaintiff, Dhondubai, was a Deccan Brahmin. Her family came originally from the Deccan, and settled down in Ahmedabad nearly 150 years ago. She owned plots of land bearing Nos. 4608, 4609 and 4611 which were built upon with houses.

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One Bai Lakshmi owned plots Nos. 4605, 4606 and 4607, of which plot No. 4607, which was an open building site, was contiguous to plaintiff's plots Nos. 4608 and 4609. The other two plots, viz. Nos. 4605 and 4606, were built upon with ordis or rooms, and were contiguous to plot No. 4607.

All the lands in the Bhadra locality, inclusive of the lands belonging to the parties, were held under sanads issued by Government in form H given in the schedule and referred to in s. 133 of the Bombay Land Revenue Code, 1879. The lease in question contained the following provisions :—

"You have agreed as a tenant at will and accordingly you are confirmed in the said occupancy, and you shall have to pay anna one and pies ten per annum as land revenue. The terms of your tenure are as under and subject to the said terms your occupancy is both transferable and heritable, and will be continued by the British Government without any objection or question as to title to whatsoever from time to time be its lawful holder and subject only to the condition of the payment annually of the above land revenue according to the provisions of the Bombay Land Revenue Code or of any other law for the time being in force and subject to the terms stated below, and to the liability to have the said rate of assessment revised at the expiration of a term of . . . years received from the . . . and thereafter at successive periods of years in perpetuity, and to the necessity of compliance with the provisions of the law from time to time in force as to the time and manner of payment of the said assessment, and to the liability of forfeiture of the said occupancy and of all rights and interests connected therewith in case of your failure to pay the said assessment as required by law.

"2. If the Government want to have at any time this land or any part thereof it has a right to do so after giving a year's written notice to you, your successors-in-title or your alienees in respect thereof and at that time if there be any superstructure built on the said land or part thereof, the Government shall pay as compensation the market price that may be estimated in respect thereof. If there be any difference as regards this market value, the market value shall be fixed in accordance with the Land Acquisition Act or the law in force at that time or the provisions of any other law (in force). But if any land is taken in this way before 31-7-1950, the Government shall pay the market value prevailing at the time in respect of the said land being taken (by Government) to you, your successors-in-title or your assignees.

"3. As stated in para 2 so long as the Government does not take the said land the annual rent at the rate of one pie per 5 yards has to be paid by you your successors-in-title and your assignees for keeping the said land in your management for your personal use and the said rent is to be paid on 1-8-20 and thereafter (to be paid) in advance on the 1st of August every year."

On September 23, 1931, Bai Lakshmi sold the open land (No. 4607) and the ordis (rooms) with the lands underneath (Nos. 4605 and 4606) to the defendants Chhaganlal and Lallubhai for Rs. 2,121.

The plaintiff who was then away from Ahmedabad did not know of the sale. She learnt about it for the first time on December 2, 1931, when she returned to Ahmedabad.

Immediately on coming to know of it at 8 a.m. on December 2, 1931, either the plaintiff or her son made the first demand known as talab-i-Mowashibat. She next deputed her son to make the second demand, talab-i-ishhad, which he did.

The defendants showed no willingness to be pre-empted.

On April 30, 1932, the plaintiff filed a suit to enforce her right of pre-emption, against plots Nos. 4605 to 4607, together with the ordiis.

The defendants contested the suit.

The trial Court held that the plaintiff's right to pre-empt could not be doubted in view of the ruling in *Motilal v. Harilal* (22 Bom. L. R. 806), since according to the ruling in *Jadulal Shahu v. Janki Koer* (35 Cal. 575) it was not necessary to assert or prove the existence of the custom of pre-emption amongst the Hindus after it was judicially recognised, that even leasehold property could be claimed by the right of pre-emption, that the plaintiff could only claim plot No. 4607 by the right of pre-emption, and that the antecedent formalities of talabs were validly performed by the plaintiff. The plaintiff's claim was therefore decreed only as regards plot No. 4607.

On appeal, this decree was affirmed by the Assistant Judge, who observed as follows :—

"It was urged on behalf of the appellants that the property being a leasehold property there could be no right of pre-emption in respect of the same. No authority was cited in support of this contention. The provisions of the Mahomedan law also do not support the contentions raised on behalf of the appellants. The right of pre-emption only arises on a sale of property. According to the provisions of the Mahomedan law it is not restricted that the property, in respect of which the right of pre-emption is claimed, must be owned by the vendor. The tenure of the property appears to be immaterial. In the absence of any provision in the Mahomedan law and any judicial decision, the argument raised on behalf of the appellants cannot be accepted. I therefore hold that a right of pre-emption arises on a sale of leasehold property."

The defendants appealed to the High Court. The plaintiff filed cross-objections to assert her right to pre-empt plots Nos. 4605 and 4606 also.

On November 7, 1940, the appeal was heard by Wassoodew J., who referred it to a division bench.

Accordingly on November 28 and 29, 1940, the appeal was heard by Beaumont C. J. and Sen J., when their Lordships referred it to a full bench.

A full bench consisting of Beaumont C. J., Divatia J. and Sen. J. heard the appeal on December 5 and 6, 1940.

*I. I. Chundrigar*, with *K. T. Pathak*, for the appellants.

*A. G. Desai* and *J. C. Shah*, for the respondent.

*I. I. Chundrigar.* The land in dispute is leasehold property. It is Government land given on lease and not an occupancy, as the tenant has to pay rent to Government and not assessment. Again, the sanad for holding the land was given in consideration of the tenant agreeing to remain on the land as a tenant at will. The tenancy expires on July 31, 1950. Even during the period of tenancy, the Government has the right to resume the land after giving a year's notice to the tenant. The tenant has the right to sell the superstructure on the land. He can also transfer his leasehold rights, as the lease is heritable and transferable but he has no occupancy rights, because he can be turned out at any time. The land is not at all a freehold; at the most it can be regarded as held on a yearly tenancy. The Mahomedan law of pre-emption is applied to the parties here, who are Hindus on the basis of custom.

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F.B. It is laid down in Mulla's Mahomedan Law (11th edn., p. 185, s. 180) that  
1940 the right of pre-emption is recognised by custom among Hindus who are  
either natives of or are domiciled in certain parts of Gujarat.

DASHRATH- I submit that no custom of pre-emption has been alleged in the plaint. The  
LAL plaintiff has based her suit on a right to purchase the property from the vendor  
CHHAGANLAL in preference to any other person. The right of pre-emption is a right of re-  
purchase from the purchaser of certain immoveable property. The plaintiff  
only relies on certain rulings of the High Court which hold that such a right  
exists by custom in some places and in respect of some properties.

The earliest reported case is that of *Umbaram Mukunddas v. Rughoonath Laldas*.<sup>1</sup> It refers to a house in the Raipur locality in Ahmedabad. The pre-emptor was held to have forfeited his right "by declining the purchase of the house in dispute". The next case is that of *Gordhandas Girdharbhai v. Prankor*.<sup>2</sup> In this case the finding of the lower Court was that the evidence of the witnesses for the plaintiff did not amount to proof of the custom set up by him but the High Court recognised the existence of a local custom as to the right of pre-emption among the Hindus of Gujarat, following cases decided by the Sadar Divani Adalat from the districts of Broach and Surat. This case was from the Surat District. In *Rewa v. Dukabhdas*<sup>3</sup> the house sought to be pre-empted was situated in Jambusar in the Broach district. The property in dispute in *Dahyabhai Motiram v. Chunilal Kishordas*<sup>4</sup> was situated in Borsad in the Kaira district. In this case the Court held that the observations in *Gordhandas Girdharbhai v. Prankor*<sup>2</sup> were very wide and could not be extended to apply to any district except those of Broach and Surat. In other districts, the plaintiff must allege and prove that the custom of pre-emption was adopted as a usage amounting to ancient and invariable custom in that district. In this connection I may refer to *Digambar Singh v. Ahmad Said Khan*<sup>5</sup>, where the party was asked to prove that the custom of pre-emption survived the partition of property concerned theré.

In *Mahomed Beg Amin v. Narayan Meghaji*<sup>6</sup> it was held that the rule of pre-emption did not exist in the district of Khandesh either as a rule of law or as a rule of justice, equity and good conscience. The case came from a village in the Nandurbar taluka. The case of *Gokaldas v. Partab*<sup>7</sup> came from Godhra in the Panch-Mahals district, and the Hindus of the place were held to be governed by the doctrine of pre-emption. The custom of pre-emption was not applied to Hindus in the Panvel taluka of the Kolaba district in *Sitaram Bhaurao v. Sayad Sirajul*.<sup>8</sup>

The case of *Motilal Dayabhai v. Harilal Magonlal*<sup>9</sup> decided that the custom of pre-emption existed amongst the Hindus of Ahmedabad, but the plaintiffs in this case were Jains, and the right was claimed over a house.

1 (1822) 2 Borr. 402.

2 (1869) 6 B. H. C. R. (A. C. J.)  
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3 (1902) 4 Bom. L. R. 811.

4 (1913) I. L. R. 38 Bom. 183,  
s.c. 15 Bom. L. R. 1136.

5 (1914) L. R. 42 I. A. 10,  
s.c. 17 Bom. L. R. 390.

6 (1915) I. L. R. 40 Bom. 358,  
s.c. 18 Bom. L. R. 81.

7 (1916) 18 Bom. L. R. 693.

8 (1917) I. L. R. 41 Bom. 636,  
s.c. 19 Bom. L. R. 549.

9 (1919) I. L. R. 44 Bom. 696,  
s.c. 22 Bom. L. R. 806.



In the next case—*Jagjivan Haribhai v. Kalidas Mulji*<sup>1</sup>—the custom of pre-emption was held applicable to Hindus of Surat district as regards houses, but it was treated as an open question whether they had adopted the law with regard to agricultural lands. Macleod C. J. remarked (p. 607): "It is certainly not advisable, in my opinion, to extend any customary law which is in conflict with the personal law of the parties unless there is evidence that such alien law has been adopted."

The case of *Hamedmiya v. Benjamin*<sup>2</sup> came from Ahmedabad, but the vendor being a Bene Israel, the law of pre-emption was not applied against him, and the Court held that the right of pre-emption was not an incident of property and was nothing more than a right of re-purchase from the purchaser. The property in suit was an open piece of land.

Even where a custom of pre-emption is found to exist in a particular portion of a town, a person claiming the right in another portion of it should prove such custom affirmatively: *Lal Chand v. Hans Kumar*.<sup>3</sup> In the present case there is no proof that the custom of pre-emption existed in the Bhadra locality of the city of Ahmedabad.

The properties in dispute in all the Bombay cases were freehold. None of the cases related to leasehold properties. The plaintiff has to prove that the custom applies to transfers of leasehold lands. Unless she does so, she must fail.

The transferor of the property to be pre-empted was not the owner of the land. She was only a tenant and what she sold was only the leasehold right she possessed. The right of pre-emption arises only out of a valid, complete and bona fide sale. It does not arise out of gift, wakf, inheritance, bequest, or a lease, even though in perpetuity (Mulla, p. 188, s. 182). A lease thus does not give rise to pre-emption, much less would a transfer of leasehold rights do so.

It has been held very early in the Calcutta High Court in *Moonoolly Ram v. Baboo Huree Ram*<sup>4</sup> that pre-emption applies only to sales. A lease in perpetuity with a rent (however small) reserved is not a sale, and cannot therefore be the subject of pre-emption. In other words, the Mahomedan law says you cannot get leasehold rights by pre-emption. You can only get the rights as owner. The same view was taken in the later case of *Baboo Ram Golam Singh v. Nursing Sahoy*,<sup>5</sup> where it was held that the right of pre-emption applies to sales only, and cannot be enforced with reference to leases in perpetuity like a mokurruree, which (however small the reserved rent) are not sales, and in which there is no "milkyut" or ownership on the part of the shufee or pre-emptor. It will appear from the facts narrated on p. 44 that this was the case relating to the transfer of leasehold rights and not the creation of a lease. The facts of that case are, therefore, identical with the facts of this case. The Patna High Court took the same view in *Sheikh Mohammad Jamil v. Khub Lal Raut*,<sup>6</sup> and held that the doctrine of pre-emption did not apply to the sale of the mukurrari interest. Sultan Ahmad J., after refer-

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3 (1928) I. L. R. 7 Lah. 55.

4 (1867) 8 W. R. 106.

5 (1875) 25 W. R. 43.

6 (1920) 5 P. L. J. 740.

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ring to the above cases, among others, said (p. 742) : " Unless the proprietary interest is transferred, the right of pre-emption does not accrue. The main pedestal on which the right of pre-emption stands is reciprocity. It is well-established on the texts as well as on the case-law that the pre-emptor must have the *milkiyat* or ownership in the property on account of which he claims the right of pre-emption. . . The *milkiyat* or ownership of the property being *sine qua non* for the exercise of the right of pre-emption, it is obvious that defendants Nos. 2 and 3 holding only the *mokurrari* interest could not pre-empt if the plaintiffs had sold their property. So the very principle of mutuality upon which the whole doctrine of pre-emption is based is wanting in this case, and so under no circumstances could the plaintiffs claim the right of pre-emption when only the *mokurrari* interest was transferred." The above case was followed in *Mussammatt Bibi Saleha v. Haji Amiruddin*<sup>1</sup> though the facts were somewhat different.

If the view is that pre-emption applies only to a section of the public then it should be proved that a particular section of the Hindu community has adopted that law. The plaintiff is a Deccani Brahman. It is not proved that Deccani Brahmins settling in Ahmedabad have adopted the custom of pre-emption. Her family should be deemed to have carried the personal law of Deccan with them and this did not include the law of pre-emption. No particular custom is referred to in the plaint, neither is such custom proved. The right is claimed from the vendee, not from the vendor so far as open land is concerned.

No custom was proved in *Jagjivan Haribhai v. Kalidas Mulji*,<sup>2</sup> *Ram Chand Khanna v. Goswami Ram Puri*<sup>3</sup> and *Hamedmiya v. Benjamin*.<sup>4</sup>

Moreover proof of the existence of the custom of pre-emption is not enough. Such a custom must be shown to be applicable not only to houses but also to lands in cities or lands in agricultural areas, as the case may be. The lower Courts have passed a decree for pre-emption in respect of an open piece of land. The question is, does the law of pre-emption apply to open lands in cities? Our High Court held in *Jagjivan Haribhai v. Kalidas Mulji*<sup>2</sup> that the existence of the custom of pre-emption in respect of houses would still leave the question of the prevalence of the custom in respect of agricultural lands an open one, with the burden of proving it on the plaintiff. In *Hamedmiya v. Benjamin*<sup>4</sup> this distinction was recognised and Patkar J. held that if the custom had been alleged, it would have been necessary to send down an issue for a finding as to whether the law of pre-emption applies by custom to an alienation of a small piece of land in the city. Patkar J. referred to the case of *Ram Chand Khanna v. Goswami Ram Puri*.<sup>3</sup> According to the latter case, although a custom of pre-emption relating to house property and based on Mahomedan law prevails in the city of Benares, it does not follow that such custom should be extended, without strict proof of its applicability to the sale of land as distinct from house property. As such, the plaintiff has not merely to prove the existence of the custom of pre-emption in Ahmedabad in respect of houses but also in respect of open land. Plaintiff has not been

1 (1928) I. L. R. 8 Pat. 251.

2 (1920) I. L. R. 45 Bom. 604,

s. c. 23 Bom. L. R. 81.

3 (1923) I. L. R. 45 All. 501.

4 (1928) I. L. R. 53 Bom. 525,

s. c. 31 Bom. L. R. 374.

able to prove a single case, in which the custom applies to open lands in the city of Ahmedabad, and must, therefore, fail.

The land in dispute is Crown land. There is no authority to show that the custom of pre-emption applies to Crown lands. In the present case there is only a transfer of leasehold right, and the law of pre-emption does not apply to such a transfer.

Further, the plaintiff is not entitled to exercise the right of pre-emption, for she is not the owner of the adjoining property.

It is common knowledge that none of the properties in the fort of Bhadra in Ahmedabad are freehold. All these properties belong to Government and are given by them on lease to persons occupying them.

Only an owner of adjoining immoveable property is entitled to pre-empt and not his tenant (Mulla, p. 186, s. 181). Here both the pre-emptor and the owner of the property sought to be pre-empted are tenants of Government. The plaintiff has not alleged, much less proved, that she is the owner of her lands. She cannot, therefore, pre-empt.

As regards the formalities attendant on the exercise of the right of pre-emption, the lower appellate Court has not applied the law to the facts as found. It is alleged in the plaint that the first talab known as the *talab-i-mowasibat* was performed by the plaintiff's son. The finding of the Court is that it was performed by the plaintiff herself. It is also found that the second talab, i.e. *talab-i-ishhad*, was performed by the plaintiff's son who was authorised by the plaintiff in that behalf. Now the plaintiff's son in making the second talab makes reference only to the first talab as made by himself and not the one made by his mother. This is irregular and makes the second talab inoperative.

I concede that the plaintiff could make talabs through agents.

A. G. Desai. I submit *Hamedmiya v. Benjamin*<sup>1</sup> goes much too far in confining the law of pre-emption to particular classes of Mahomedans. The law of pre-emption no doubt applies primarily to Mahomedans. But it applies by custom in particular localities to non-Mahomedans as well. There is no justification in cutting up non-Mahomedans in those localities into several communal divisions and applying the law to one and not to the other.

In *Jadu Lal Sahu v. Janki Koer*<sup>2</sup> the Privy Council holds at p. 106 "that the right of pre-emption is enforceable irrespective of the persuasion of the parties concerned."

Zimmes or Infidels like Christians and Hindus can as well avail of the privilege (Baillie, p. 477). Thus Hedaya at p. 558 says: "A Mussulman and a Zimmee, being equally affected by the principle on which shaffa is established, and equally concerned in its operations, are therefore on an equal footing in all cases regarding the principle of shaffa."

The law of pre-emption, wherever it is recognised by force of custom, will be "presumed to be founded on and co-extensive with the Mahomedan law upon that subject" (*Jadu Lal Sahu v. Janki Koer*<sup>3</sup>). And under the Maho-

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2 (1912) L. R. 39 I. A. 101,  
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3 (1912) L. R. 39 I. A. 101, 107.

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medan law the right of shaffa or pre-emption is not a mere personal right but is a right attached to land. As observed by Mahmood J. in *Gobind Dayal v. Inayatallah*<sup>1</sup> it is not a right of "re-purchase", either from the vendor or from the vendee, involving any new contract of sale. According to Hedaya as translated from the original Arabic (in *Gobind Dayal v. Inayatallah*<sup>2</sup>): "Pre-emption becomes obligatory (i.e. enforceable) by a contract of sale, which means after the sale. Not that sale is the cause (of pre-emption), for the cause is conjunction (of the properties)". Thus the foundation of the right of shuffa is "the conjunction" of the tenements concerned. The right of shuffa thus exists antecedently to the sale. And the sale is a condition precedent, not to the *existence* of the right,—because the right (*shafi-i-jar*) is already there by reason of "conjunction" of vicinage—but only to its enforceability (Tajibo) (*Gobind Dayal v. Inayatallah*<sup>3</sup>). It is thus a right of substitution entitling the shafi-i-jar or the pre-emptor to step into the shoes of the vendee on complying with certain formalities (*Gobind Dayal v. Inayatallah*<sup>4</sup>).

The principle laid down in *Hamedmiya's* case that the right of pre-emption is merely a personal right and is not attached to the land is based on the ruling of the Calcutta full bench in *Sheikh Kudratulla v. Mahini Mohan Shaha*<sup>5</sup> which says that the right of pre-emption is nothing more than a right of *re-purchase* from the vendee and that it is a right which "comes into existence" after the right to the property has completely passed to the purchaser.

There is thus a conflict between two full bench decisions of the Allahabad and the Calcutta High Courts and *Hamedmiya v. Benjamin* has preferred to follow the latter. But the conclusion of the Calcutta full bench is based on a mistranslation of the Arabic word "Tajibo" in the Hedaya. And as pointed out by Mahmood J. in *Gobind Dayal v. Inayatallah*<sup>6</sup> the correct interpretation of the word is not "established" as given by Hamilton in his Hedaya—which is a translation not of the original Arabic text, but of a translation of the Persian version of the Arabic text—but "becomes obligatory, necessary or enforceable". The right of pre-emption on the point of vicinage does not require to be "established" like "a right of re-purchase." It is attached and continues to be attached to the tenement concerned and can under certain circumstances at once be "enforced" against the adjoining tenement sold.

The right is thus not personal but is an incident of property and has nothing to do with the caste or the community to which the parties belong. In fact this right was enforced against the Official Assignee, as a right annexed to the land and not dependent on the religious persuasion of the parties concerned in *Sehobaran Singh v. Kulsum-un-Nissa*.<sup>7</sup>

As regards non-Mahomedans, therefore, all that need be proved is whether the right of pre-emption is recognised by custom in the locality in which the dispute is raised. And if such custom is proved, it is not necessary to prove to which particular community the party belongs.

1 (1885) I.L.R. 7 All. 775, 809, F.B.

2 (1885) I.L.R. 7 All. 775, 800, F.B.

3 (1885) I.L.R. 7 All. 775, 801, F.B.

4 (1885) I.L.R. 7 All. 775, 809, F.B.

5 (1869) 4 Beng. L. R. (F.B.)

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6 (1885) I.L.R. 7 All. 775, 801, F.B.

7 (1927) L. R. 54 I. A. 204,

s.c. 29 Bom. L. R. 877.

The plaintiff is domiciled in Ahmedabad and her family has lived there for over one hundred and fifty years and the property in dispute is situate within the precincts of the ancient city of Ahmedabad. And so far as the city of Ahmedabad is concerned the right of pre-emption has been judicially recognised in several decisions. See *Motilal Dayabhai v. Harilal Maganlal*<sup>1</sup> and the other instances referred to in the judgment of the trial Court under appeal in that case : see also *Nanlal Motilal v. Natvarlal Trikamlal*<sup>2</sup> in which this custom was judicially recognised as applying to Hindus in Ahmedabad. And once a custom is judicially recognised, it is not necessary to assert or prove it : *Jadu Lal Sahu v. Janki Koer*<sup>3</sup> and *Gireeshchandra Bhattacharya v. Rabeendranath Das*.<sup>4</sup>

It is true that the right of shaffa or pre-emption arises only out of a completed sale and not out of a mere lease even though in perpetuity (Mulla, para 182). But that does not mean the two tenements must be freehold. The nature of tenure of the two tenements is irrelevant for the purposes of pre-emption. And the argument based on the doctrine of reciprocity is equally irrelevant. Because no one is bound to pre-empt and shuffee does not concern itself with the benefits or disadvantages that may or may not accrue to the parties concerned. The Mahomedan law, I submit, does not make any distinction between freehold and leasehold properties nor between houses and lands. And it is therefore better first to examine the texts themselves rather than ascertain what the Judges may have said in this behalf.

Because Courts are not entitled to put their own interpretation on the Koran when it is interpreted in a particular way, e.g., by the Hedaya (*Aga Mahomed Jaffer Bindaneem v. Koolsom Bee Bee*<sup>5</sup>) or to introduce new rules of law when the ancient commentators did not themselves deduce those conclusions : *Baker Ali Khan v. Anjuman Ara Begam* : *Sidik Ali Khan v. Anjuman Ara Begam*.<sup>6</sup>

And the Hedaya quotes the Prophet as saying "Shaffa takes place with regard to all lands or houses" (p. 558) and makes no distinction between freehold and leasehold or between houses and building sites. The Mahomedan law does no doubt not recognise alienation by way of a lease as giving rise to pre-emption. But it does not follow from this that the property transferred must not be leasehold or that it must be freehold. In Chap. III in dealing with the articles against which the right of pre-emption can or cannot be enforced, the Hedaya expressly mentions articles against which the right cannot operate (p. 558). And it is noteworthy that leasehold land is not included in that category.

Futawa Alamgiri is another authoritative text on Mahomedna law and Baillie in his Digest of Mahomedan Law, which is mainly founded on Futawa Alamgiri, mentions six requisites for enforcement of the right of shaffa. And

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2 (1939) F. A. No. 130 of 1937,  
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3 (1912) L. R. 39 I. A. 101,  
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4 (1930) I. L. R. 61 Cal. 694.

5 (1897) L. R. 24 I. A. 196, 204.

6 (1903) L. R. 30 I. A. 94, 111,  
s.c. 5 Bom. L. R. 410.

F. B. he mentions the sixth requisite or condition as follows (Book VII, c. 1, p. 47) :  
 1940 "There must be *milk* or ownership of the *shufee*, or pre-emptor, at the  
 — time of the purchase, in the mansion on account of which he claims the right  
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 LAL is merely the tenant for hire, or that he has sold before the purchase, or has  
 CHHAGANLAL converted into a *musjid*, or place of worship". This condition in the first  
 v. place is confined to ruba or *mansion* and has no reference to akar or land on  
 BAI which it stands. It does not say that the pre-emptor must be the owner of  
 DHONDUBAI both the mansion (ruba) and also of the land (akar). Next the meaning  
 — of the expression "there must be *milk* of the shufee" does not really mean  
 that the shufee must be the absolute owner of the tenement. Baillie no doubt  
 translates "milk" as "ownership" and though the word "ownership" may  
 be the nearest equivalent of *milk* in Arabic, the latter expression according to  
 Mahomedan jurists "covers a wider range of ideas than those included in  
 mere proprietary rights" : see Abdul Rahim's Muhammadan Jurisprudence,  
 p. 262. The idea underlying condition No. 6 is that the pre-emptor must  
 have full and free power of disposition over the property and not that he  
 must also be the full owner thereof. This is illustrated in the three illustra-  
 tions given in condition No. 6 itself.

In the present case the plaintiff is admittedly the owner of the ruba or the  
 superstructure and the site on which it stands also belongs to her at any rate  
 till 1950, and she had a free right of transfer thereof. She is not a mere  
 tenant under Government. She is a grantee of occupancy rights on certain  
 terms and conditions. The parties concerned hold sanads in form B given  
 in schedule H of the Bombay Land Revenue Code with permanent rights of  
 occupancy though no doubt defeasible on certain terms by Government. Such  
 terms may or may not be enforced by Government. But all lands held even  
 on unrestricted survey tenure could be forfeited e.g. for failure to pay assess-  
 ment to Government. And if the argument on the other side is carried to its  
 logical conclusion pre-emption can never be claimed except in the case of inam  
 lands where nothing need be paid to Government.

*Moorooly Ram v. Baboo Huree Ram*<sup>1</sup> simply says pre-emption applies to  
 sales and not to leases even though in perpetuity. The case does not touch  
 the point now under consideration. The case of *Baboo Ram Golam Singh v.*  
*Nursing Sahoy*<sup>2</sup> follows *Moorooly Ram v. Baboo Huree Ram*<sup>3</sup> and says the  
 right of pre-emption applies to sales only and not to leases in perpetuity,  
 because there is no "milkyut or ownership in the pre-emptor" (p. 45). The  
 conclusion in this case is correct but the reasoning is wrong and is based on  
 a wrong conception of the word "*milkyut*" or *milk* in Baillie's Digest at  
 p. 477. "Milk" in condition No. 6 referred to by Baillie at p. 477 really  
 means, as already stated, right of disposition (*milku't-tasarruf*) : Abdul Rahim,  
 p. 263.

The case of *Sheikh Mohammad Jamil v. Khub Lal Raut*<sup>4</sup> follows these  
 two cases and *Sakina Bibi v. Amiran*.<sup>5</sup> No attempt has, however, been made  
 in this case by Sultan Ahmad J. to ascertain the correct meaning of the word

1 (1867) 8 W. R. 106.

2 (1875) 25 W. R. 43.

3 (1867) 8 W. R. 106.

4 (1920) 5 P. L. J. 740.

5 (1888) I. L. R. 10 All. 472.

"milk" or milkyut beyond making a general assertion :—"It is well established on the text... that the pre-emptor must have milkyut or ownership in the property." And in support of this statement the only text quoted is Baillie, pp. 473, 474, and Baillie's interpretation of the word milk or "ownership" is accepted without demur.

The case of *Mussanmat Bibi Saleha v. Haji Amiruddin*<sup>1</sup> follows *Sheikh Mohammad Jamil v. Khub Lal Raut*<sup>2</sup> and suffers from the same infirmity. Both these cases introduce the principle of reciprocity which is not at all recognised by Hedaya or Fatwa Alam in relation to pre-emption. So also in *Phul Mohammad Khan v. Kazi Kutubuddin*<sup>3</sup> the interpretation of the word "milk" is assumed to be "ownership" and the attention of the Court does not seem to have been drawn to the three divisions of *milk* as given by Abdul Rahim at p. 262.

The advocate also discussed the following cases : *Sitaram Bhaurao v. Sayad Sirajut*<sup>4</sup> ; *Motilal Dayabhai v. Harilal Magankal*<sup>5</sup> ; *Sitaram Bhaurao v. Jialul Hasan Sirajul Khan*<sup>6</sup> ; *Ram Chand Khanna v. Goswami Ram Puri*<sup>7</sup> ; *Mussanmat Sheoratri v. Munshi Lal*<sup>8</sup> ; *Charitar Dusadh v. Bhagwati Pandey*<sup>9</sup> and *Tejpal v. Girdhari Lal*<sup>10</sup>.

I. I. Chundrigar was not called upon to reply.

BEAUMONT C. J. This is a second appeal from the Extra Assistant Judge of Ahmedabad. In the suit the plaintiff seeks to exercise a right of pre-emption in respect of the suit property, which is situate in the Bhadra division of Ahmedabad. The plaintiff seeks to exercise the right of pre-emption by reason of her owning property adjacent to the suit property. So that we are only concerned in this case with the right of a neighbour to exercise the right of pre-emption, and not with the right of other parties, like co-owners.

Pre-emption is a part of the Mahomedan law, and, so far as is necessary for the purpose of the present appeal, one may say that it is the right of an owner of property to acquire from the purchaser of adjacent property such property at the price and on the conditions at and on which he has bought it. The object of the law, as explained in the Hedaya, was to enable landowners to avoid the advent of an undesirable neighbour, and the Prophet laid down that the neighbour has a right superior to that of a stranger in the land adjacent to his own. So that, under Mahomedan law, a neighbour can acquire property, which has been sold, from the purchaser, provided he observes certain formalities, and in this case the lower Courts have held that the formalities were duly complied with, and that is a finding of fact which cannot be challenged in second appeal.

It is rather curious, having regard to the antiquity of this doctrine, to find that even at the present time there is considerable doubt as to some of its important features, and in particular as to whether the rights and burden of

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3 (1937) I. L. R. 16 Pat. 519.

4 (1917) I. L. R. 41 Bom. 636,

s.c. 19 Bom. L. R. 549.

5 (1919) I. L. R. 44 Bom. 696,

s.c. 22 Bom. L. R. 806.

6 (1921) I. L. R. 45 Bom. 1056,

s.c. 24 Bom. L. R. 595, P.C.

7 (1923) I. L. R. 45 All. 501.

8 (1925) I. L. R. 6 Pat. 154.

9 [1934] A. I. R. Pat. 596.

10 (1908) I. L. R. 30 All. 130.

F. B. pre-emption are incidents annexed to the land, like an easement, or whether  
 1940 they are personal to the owners of the lands affected. This Court in a case,  
 ————— to which I will refer later, in the year 1928 held that in all cases pre-emption  
 DASHRATH- is a mere personal right, depending on the community of the parties; but  
 LAL Mr. Justice Mahmood in the judgment which he delivered as a member of  
 CHHAGANLAL a full bench of the Allahabad High Court in *Gobind Dayal v. Inayatullah*<sup>1</sup>  
 v. discusses exhaustively the whole question of pre-emption, and comes to the  
 BAI conclusion that the right is in the nature of an easement, that it is annexed  
 DEONDUBAI to the land under Mahomedan law, and that the right comes into existence  
 ————— on the completion of the sale. The person from whom the land must be  
 Beaumont C.J. acquired by the neighbour is the purchaser, but, as Mr. Justice Mahmood  
 ————— points out, that is because, until the sale is actually effected, it cannot be  
 said that the owner of the land in question has unequivocally elected to part  
 with it. But as soon as he has sold, the right of the neighbour to be substituted  
 for the purchaser arises. I agree with the view expressed by Mr. Justice  
 Mahmood that this right of pre-emption was originally under Mahomedan  
 law a right attached to the land. No doubt, at the present time, as between  
 Mahomedans in British India it has become part of their personal law, but  
 that is because the law of pre-emption is no part of the general law of British  
 India, and since Mahomedans are scattered about over India and are not  
 segregated in particular localities, unless this rule be regarded as part of their  
 personal law, they would cease to enjoy the benefit of it. But in this case we  
 are not dealing with Mahomedans. The parties are all Hindus. The plaintiff  
 is a Deccani Brahmin, and one argument of the appellants is that this right  
 of pre-emption is personal, and does not apply to Deccani Brahmins. For  
 the reasons I have given, I think that that argument has no substance in it,  
 and that if the right affects the land in suit, the plaintiff can exercise it.

It is clear from many cases that although the right of pre-emption does  
 not apply to British India generally, it has been adopted by custom in certain  
 localities, and it is said that it has been adopted by custom in Ahmedabad.  
 I am clearly of opinion that the custom as adopted in a particular locality  
 must be in accordance with the law as it originally was, and I think, therefore,  
 that in places in which the law of pre-emption exists by custom, it must be  
 regarded as a right attached to the land, and not as a mere personal right.  
 In my opinion, the Privy Council in *Sheobaran Singh v. Kulsum-un-Nissa*<sup>2</sup>  
 have really decided that point. They were dealing there with a case in which  
 the parties were Hindus, and the owner of the land in respect of which the  
 right of pre-emption was sought to be exercised had become insolvent, and  
 the land had vested in the Official Assignee. It was held by the Privy Council  
 that the Official Assignee took the land with all its benefits and all its burdens,  
 including the obligation of having this right of pre-emption exercised against  
 him. It seems to me to follow from that decision that the Privy Council  
 regarded this right, where it exists by custom, as a right annexed to the land,  
 because if it were a mere personal right, depending on the religious persuasion  
 of the parties concerned, it could hardly pass to an Official Assignee.

The appellants have taken three points on this appeal, apart from the

1 (1885) I. L. R. 7 All. 775, F.B.

2 (1927) L. R. 54 I. A. 204,  
 s. c. 29 Bom. L. R. 877.



point which I have mentioned that the plaintiff, being a Deccani Brahmin, is not entitled in any case to exercise the custom. They say, first of all, that no custom is alleged, or proved, in the plaint. The answer to that, made in both lower Courts, is that this custom has been judicially recognized as applying to Ahmedabad; and, no doubt, it is the law that if a custom is known, and has been judicially recognized, it is not necessary to allege or prove it; it has become part of the local law of which the Court takes judicial notice. Putting it shortly, the authorities on this point come to this. In *Gordhandas Girdharbhai v. Prankor*<sup>1</sup> it was asserted by a division bench that the custom was recognized in the whole of Gujarat, though it was not necessary for the purposes of that decision to go as far as that. In *Dahyabhai Motiram v. Chunilal Kiskordas*,<sup>2</sup> which was a case relating to the Kaira district which is in Gujarat, the Court considered that there was no justification for the view that this custom prevailed throughout Gujarat, and they held that it did not apply in the Kaira district. That case undoubtedly very much weakened the authority of *Gordhandas Girdharbhai v. Prankor*. It was held in *Mahomed Beg Amin v. Narayan Meghaji*<sup>3</sup> that the custom did not apply to Khandesh district. Then comes *Motilal Dayabhai v. Harilal Maganlal*<sup>4</sup> in which it was held that the custom existed amongst Hindus in Ahmedabad, and then there is *Hamedmiya v. Benjamin*<sup>5</sup> (which I have mentioned) in which the Court held that, assuming the custom to exist in Ahmedabad, it did not extend to the vendee in that case, who was a Bene Israelite. The Court expressed the view that this right was purely personal, and for the reasons I have given I think that the *ratio decidendi* in *Hamedmiya v. Benjamin* cannot be supported. However, it is not in any case a direct authority for the proposition that the custom exists in Ahmedabad. For that one has to go back to *Motilal Dayabhai v. Harilal Maganlal*. In that case the learned Chief Justice Sir Norman Macleod says that the trial Judge referred to a number of decisions both of the High Court and of the Courts at Ahmedabad, in which the custom had been considered, and he says that the custom was not disputed, but was assumed to exist, and that the effect of the decisions is that the custom of pre-emption amongst Hindus in Ahmedabad must be recognized. One criticism which arises on that decision is that "Ahmedabad" is a very vague expression. Ahmedabad is a city, and not a district, and in recent times the limits of Ahmedabad city have very much extended. Generally speaking, a local custom must be certain as to the locality in which it operates, and I do not myself know of any authority for saying that a local custom can apply within the limits of a city for the time being, and that it will expand or contract with the growth or shrinkage of the city. However, it is not disputed in this case that the lands in question are within the ancient city of Ahmedabad as it existed in the time of the Moghuls when, no doubt, this custom originated, and it may well be that the custom within the walled city of Ahmedabad does exist. It is not necessary in the

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1 (1869) 6 B. H. C. R. (A. C. J.)  
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2 (1913) I. L. R. 38 Bom. 183,  
s. c. 15 Bom. L. R. 1136.

3 (1915) I. L. R. 40 Bom. 358,  
R. 75.

s. c. 18 Bom. L. R. 81.

4 (1919) I. L. R. 44 Bom. 696,  
s. c. 22 Bom. L. R. 806.

5 (1928) I. L. R. 53 Bom. 525,  
s. c. 31 Bom. L. R. 374.

F.B. view I take of the case to express any final opinion on that subject.  
 1940 Then another objection which has been taken by the appellants is that  
 — the suit property in this case is an open site, and all the cases in which this  
 DASERATH- custom has been recognized in Ahmedabad have been cases of house property.  
 LAL In *Jagjivan Haribhai v. Kalidas Mulji*,<sup>1</sup> which was a case dealing with the  
 CHHAGANLAL custom in Surat, and in *Ram Chand Khanna v. Goswami Ram Puri*,<sup>2</sup> which  
 v. was a case dealing with the custom in the city of Benares, the Courts.  
 BAI pointed out that the custom had been shown to exist in respect of house  
 DHONDUBAI property in the districts concerned, but they declined to extend it to open  
 — sites. I agree with the view expressed in those cases that this custom is not  
 Beaumont C.J. one which should be extended. The law may have been a beneficial one as  
 — applied to village communities in ancient times by ensuring that a man did not  
 get an unpopular neighbour, but it obviously is less suitable to conditions of  
 life in a city where people come and go frequently, and a man may well not  
 know his neighbour by sight. It is moreover difficult to reconcile the custom  
 with modern views as to the desirability of free disposition of immoveable  
 property. Therefore, I am certainly not disposed to extend the custom, but  
 Mr. Desai for the respondent points out that the general rule as laid down  
 by the Privy Council in *Jadu Lal Sahu v. Janaki Koer*<sup>3</sup> is that where this  
 right of pre-emption is introduced by custom amongst Hindus, the right  
 must be co-extensive with the right as it existed under Mahomedan law,  
 and under Mahomedan law it seems to have been applicable both to land  
 and houses. That is clearly stated in Hamilton's Hedaya at p. 548. I doubt  
 if the custom can be confined to house property, but again it is not necessary  
 to express any decided opinion on that second point.

The third point taken, which seems to me to be fatal to the respondent,  
 is that this custom of pre-emption only exists as between freeholders, that is  
 to say, the neighbouring land in respect of which the custom is claimed  
 must be freehold, and the land sought to be pre-empted must also be free-  
 hold. Now, in this case the learned Extra Assistant Judge held that the  
 defendants' interest was a leasehold interest up to July 31, 1950. That is  
 clearly wrong. When one looks at the sanads, under which the defendants  
 hold, they are in the form given in sch. "H" to the Bombay Land Revenue  
 Code with certain modifications, and I think the result of the sanads is to  
 show that the defendants are given a permanent right of occupancy, but  
 subject to the right of Government at any time on a year's notice to resume  
 possession of the property on payment of certain compensation, which varies  
 according to whether the resumption takes place before or after July 31, 1950.  
 The right of Government to resume possession at any time on a year's  
 notice is plainly inconsistent with the view that the land is owned by the  
 defendants as freehold. There is no evidence, nor is there any allegation, as  
 to what the plaintiff's title is, but it is common knowledge that within the  
 district of Bhadra all properties are held on the same footing as the property  
 of the defendants. I think we must assume that the title of the plaintiff

1 (1920) I. L. R. 45 Bom. 604,  
 s. c. 23 Bom. L. R. 81.

2 (1923) I. L. R. 45 All. 501.

3 (1912) L. R. 39 I. A. 101,

s. c. 14 Bom. L. R. 436, on  
 appeal from (1908) I. L. R.  
 35 Cal. 575.

is of that nature, but, at any rate, the plaintiff has failed to establish that she is the full owner of the property.

The question then arises, whether this right of pre-emption exists as between parties who have got something less than the full freehold interest. Mr. Desai admits that there is nothing in the Hedaya which lays it down that the right exists in respect of anything less than the freehold interest, but he says that there is also nothing which restricts the right to freehold interest. Since in ancient times the Mahomedan law did not recognize leases, although it recognized the hire of land for purposes of user, it is not surprising that the matter is not discussed in the Hedaya. But in Baillie's "Digest of Mahomedan Law", Part I (2nd edn.), in which the author sets out the conditions on which the right of pre-emption can be exercised, the 6th condition at p. 477 is in these terms :—

"6th. There must be *milk* or ownership of the *shufee*, or pre-emptor, at the time of the purchase, in the mansion on account of which he claims the right of pre-emption. So that he has no right on account of a mansion of which he is merely the tenant for hire, or that he has sold before the purchase, or has converted into a *musjid*, or place of worship."

That is a definite assertion that the pre-emptor, at any rate, must have the full ownership, and in *Sheikh Mohammad Jamil v. Khub Lal Raut*<sup>1</sup> which has been followed recently in Patna in *Phul Mohammed Khan v. Quazi Kutubuddin*,<sup>2</sup> the learned Judges held, relying on that condition as showing that the pre-emptor must have the full ownership, that so also must there be full ownership in the land pre-empted, because otherwise there would be no reciprocity, and reciprocity is essential for the existence of this right of pre-emption. Those cases also follow *Baboo Ram Golam Singh v. Nursing Sahoy*,<sup>3</sup> in which it was held that the right of pre-emption did not arise on the sale of a leasehold interest in land. I see no reason for differing from those authorities. I think the cases were rightly decided, and as I have already indicated, I am certainly not disposed to extend this custom beyond the limits within which up to now it has been recognized.

In my judgment, on that ground the appellants must succeed. The plaintiff has not shown that she possesses land which entitles her to exercise this right of pre-emption. She seems also to have claimed in the trial Court to exercise a right of purchase by contract, and issue No. 6 in the trial Court related to that matter. That issue was reserved. If the parties wish to have that issue tried, the matter will have to go back to the trial Court for trial of that issue alone.

All costs in the trial Court, except costs of issue No. 6, and costs in the District Court and this Court must be paid by the respondent.

Cross-objections dismissed with costs.

DRIVATIA J. I agree that the appeal should be allowed on the ground that the right of pre-emption attaches under the Mahomedan law only to sales of proprietary interest in the land and the suit property is held not in proprietorship but under a precarious leasehold tenure.

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1 (1920) 5 P. L. J. 740.

2 (1937) I. L. R. 16 Pat. 519.

3 (1875) 25 W. R. 43.

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Divatia J.

It may be taken for the purpose of this appeal that the custom exists among the Hindus of Ahmedabad to exercise the right of pre-emption with regard to sales of house properties, and speaking for myself, I have no doubt about the existence of such a custom from beyond legal memory. It is a kind of custom which is so long known and so well known as not to require any proof at the present time. As early as 1823 it had been judicially recognized and it was also recognized in *Motilal Dayabhai v. Harilal Maganlal*.<sup>1</sup> If some decisions have proceeded on the admission of the custom, it was because the custom as admitted could not have been successfully challenged in a Court of law. Whether the custom extends beyond the original city walls of Ahmedabad, it is not necessary to decide in this case as the suit property is situated in Bhadra which is a part of the ancient city of Ahmedabad and within its walls. It is, however, clear that all cases in which pre-emption has been allowed are those relating to houses of absolute ownership of the parties. The origin of the custom is due to the natural desire of acquiring the adjacent property for the growing needs of the family especially where one house with its peculiar structure for the accommodation of one family is partitioned into different parts between its co-owners. It is also partly due to the desire of preventing an outsider from breaking up the homogeneous character of the locality. The only law recognising the right of pre-emption being the Mahomedan law which governed a large part of the population of Ahmedabad, the Hindus also conveniently adopted it as a customary right. It would not, however, be quite correct to say that the custom was adopted by the local Hindus as their personal law. It was more in the nature of a local custom attached to property than a part of the personal law of the Hindus. It is true that in *Hamedmiya v. Benjamin*<sup>2</sup> the custom was not recognised in the case of a Bene Israel vendee at Ahmedabad on the ground that it was proved to exist only among the Hindus of that city. But I think it is more logical to recognise the custom as attaching to property in a local area than to regard it as a personal custom. The recognition of the custom as applying to the Hindus of Ahmedabad was due to the fact that when it was being established there were few non-Mahomedans in the city who were not Hindus. Although, therefore, the custom is held applicable to Hindus, it should be not regarded as having a personal origin but as attaching to houses situated within the city of Ahmedabad.

But whether the custom be regarded as attaching to persons or to property, it is clear that both under the Mahomedan law and the customary law, the right of pre-emption can be exercised only with respect to property in which proprietary rights could be and have been transferred. The terms of the sanad granted for the suit property make it absolutely clear that it was given to the holder as a tenant-at-will, although it is provided that he may not be ejected without a year's written notice. It is also stated that the holder can at any time be ejected after the requisite notice was given, and he may be compensated for the land as well as the building in different ways depending upon its resumption before or after 1950. It is further stated

1 (1919) I. L. R. 44 Bom. 696,  
s. c. 22 Bom. L. R. 806.

2 (1928) I. L. R. 53 Bom. 525,  
s. c. 31 Bom. L. R. 374.

that what was to be paid for the land to the Government was certain annual rent for its occupation and that the rent was to be paid so long as the Government did not resume the said land. It is, therefore, clear that the holder of the land was not granted absolute rights of ownership in it but certain rights created under a leasehold tenure under which the tenant could be ejected at any time after a year's notice. There is no decision either under the Mahomedan law or under the custom of pre-emption which lays down that the right of pre-emption would attach to property held under such a leasehold tenure. On the other hand, there are several decisions of the Calcutta, Allahabad as well as Patna High Courts which clearly show that the right of pre-emption cannot be exercised with respect to property transferred under *mukarrari* tenure or leases granted in perpetuity. The decisions in *Baboo Ram Golam Singh v. Nursingh Sahoy*,<sup>1</sup> *Sheikh Mohammad Jamil v. Khub Lal Raut*,<sup>2</sup> *Sakina Bibi v. Amiran*,<sup>3</sup> and the latest decision in *Phul Mohammad Khan v. Quazi Kutubuddin*<sup>4</sup> are relevant on this point. It is, however, urged on behalf of the respondent that the texts in the Mahomedan law do not specifically say that the right of pre-emption could not be exercised in respect of leasehold land. But the word used in the texts is "milkiat" and the Hedaya uses that term only in the sense of a proprietary right. It is not only the property for which pre-emption is claimed that must be held in absolute proprietorship but as held in *Sakina Bibi v. Amiran* the pre-emptor also must have vested ownership in the tenement for which the right of pre-emption is exercised. That seems to be consistent with the reason of the law of pre-emption. A person requires the right of pre-emption either because of his permanent interest in his property he wishes to prevent an undesirable person from becoming his neighbour, or because he wants to enlarge his house by purchasing the adjacent property. But there would be no meaning in granting such a right to a person whose tenure is so precarious that he is liable to be ejected at any time by the superior holder from his own house or from the house acquired by pre-emption.

It would be a question also whether the right of pre-emption would attach to an open piece of land. So far as agricultural lands are concerned, it has been rightly doubted by our Court in *Jagjivan Haribhai v. Kalidas Mulji*<sup>5</sup> as to whether the right of pre-emption would attach to such lands, and the Allahabad High Court has in the case of Hindus in Benares expressly held that the right of pre-emption attaches to houses only but not to open land.

There is no doubt that the rule of pre-emption, which puts fetters on the unrestricted right of transfer and enjoyment of property and is against the rule of justice, equity and good conscience, should be strictly applied, especially when it is sought to be relied upon as a part of custom, and in the present case I am of the opinion that the right of pre-emption based on custom should not be extended to transfers of leasehold property in respect of which it has not been exercised in the past.

It must, therefore, be held that the plaintiff has no right of pre-emption with regard to this land held under a leasehold tenure. It may be open to

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1 (1875) 25 W. R. 43.

2 (1920) 5 P. L. J. 740.

3 (1888) I. L. R. 10 All. 472.

4 (1937) I. L. R. 16 Pat. 519.

5 (1920) I. L. R. 45 Bom. 604.  
s. c. 23 Bom. L. R. 81.

F. B. her to prove the oral agreement which she has set up, but that would rest  
1940 upon a special contract and not upon the ground of custom.

I, therefore, agree that the appeal should be allowed.

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SEN J. I agree and have nothing to add.

*Appeal allowed : cross-objections dismissed.*

*Divalia J.*

## CRIMINAL REVISION.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

1941

EMPEROR

v.

February 19.

NOORMAHOMED HAJI JANMAHOMED.\*

*City of Bombay Municipal Act (Bom. III of 1888), Secs. 3(m)†, 257(1) and 375—"Owner", meaning of.*

The word "owner" as defined by s. 3(m) and used in ss. 257(1) and 375 of the City of Bombay Municipal Act, 1888, does not include trustees of a wakf property who, under a permission of the High Court to raise a loan on the property, borrow money on the property and give to the creditor the right of collecting rents from the tenants of the property entitling him out of the rent to pay to himself a commission of certain per cent. and to appropriate the balance of the rent in reduction of the loan.

The expression "receives the rent" in s. 3 (m) is not used in any technical sense.

THE accused and certain other persons were trustees of certain wakf properties in Bombay.

Under a permission obtained from the High Court the trustees were enabled to raise a loan of Rs. 20,000 on the security of the wakf properties. The trustees accordingly raised on February 5, 1940, a sum of Rs. 3,500 from one Mohiuddin (creditor) and gave to him the right of collecting rent from the tenants of certain wakf property on condition that out of the rent the creditor

\* Criminal Application for Revision No. 517 of 1940, against conviction and sentence passed by D. D. Storror, Hon. Presidency Magistrate, Fort (Municipal) Court, Bombay.

† Section 3 (m) runs as follows :  
"Owner" when used in reference to any premises, means the person who receives the rent of the said premises, or who would be entitled to receive the rent thereof if the premises were let, and includes—

(i) an agent or trustee who re-

ceives such rent on account of the owner ; and

(ii) an agent or trustee who receives the rent of, or is entrusted with, or concerned for, any premises devoted to religious or charitable purposes ; and

(iii) a receiver, sequestrator or manager appointed by any Court of competent jurisdiction to have the charge of, or to exercise the rights of an owner of, the said premises.

was to pay to himself a commission of twelve and a half per cent. and apply the balance in reduction of the amount of the advance.

On March 9, 1940, the accused was served by the Bombay Municipality with a notice under ss. 257(1) and 375 of the City of Bombay Municipal Act, 1888, requiring him to clean the water-closet pans, to put in working order the flushing tanks, to clean and repair the waste water pipes and to lime-wash the house internally.

On September 11, 1940, the accused pointed out to the Municipality that the house in question was in the possession of Mohiuddin under a deed and that he (creditor) was receiving rents in respect of it.

The accused was tried by an Honorary Presidency Magistrate, who found him guilty of offences under ss. 257(1) and 375 of the City of Bombay Municipal Act, 1888, and sentenced him to pay a fine of Rs. 60 on the two charges.

The accused applied to the High Court in revision.

*B. S. Panisuff*, for the accused.

*B. G. Rao*, Assistant Government Pleader, for the Crown.

BEAUMONT C. J. This is a revision application against the conviction of the accused by a Bench of Honorary Presidency Magistrates of offences under ss. 257(1) and 375 of the City of Bombay Municipal Act, 1888.

The accused was served with a notice on March 9, 1940, requiring him to do certain work covered by those sections. The only question is whether he is a person liable to be served with such a notice and required to do the work in question, and that depends entirely on the definition of the expression "owner". It is not suggested that the accused is an occupier, which is one of the words used in s. 375. The only question is whether he is an owner.

"Owner" is defined in s. 3(m) of the Act as meaning the person who receives the rent of the said premises, or who would be entitled to receive the rent thereof if the premises were let, and includes an agent or trustee who receives such rent on account of the owner, and an agent or trustee who receives the rent of, or is entrusted with, or concerned for, any premises devoted to religious or charitable purposes. It is suggested that these premises are devoted to charitable purposes. But there is no evidence that the accused is a trustee or concerned with the management thereof.

The position with regard to the receipt of rent at the date when the notice was served was this. Under a document, which is exhibit C, dated February 5, 1940, the accused and certain other persons, who are said to be trustees of wakf property, entered into an agreement with one Mohiuddin Bawa Saheb, under which it is recited, that the parties of the first part, who are called the debtors, had obtained permission from the High Court to raise a loan of Rs. 20,000 and that they were at the moment in urgent need of a loan of Rs. 3,500, which the party of the second part, called the creditor, had agreed to advance. Then by the document the debtors gave to the creditor a right of collecting rent from the tenants of the property in question, and out of the rent he was to pay to himself a commission of twelve and a half per cent. and the balance of the rent he was to appropriate in reduction of the advance of Rs. 3,500. Whatever that document may amount to in law, whether it is an assignment of rent or power-of-attorney, it seems to me that as long as

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the loan or any part of it is outstanding, it is the creditor, and not the debtors, who can collect the rent. In my opinion, the expression "receives the rent" in s. 3(m) of the City of Bombay Municipal Act is not used in any technical sense. The Court has to see whether the person charged with an offence under the Act is one who receives rent of the premises. No doubt he may receive the rent directly from the tenants or indirectly from an agent. But if he is not entitled to receive the rent at all, and does in fact not receive it, I do not think that he can be said to be an owner. Here the accused and his co-owners of the property have parted with the right to receive the rent. They cannot recover it, and, that being so, it seems to me that they are not owners within the meaning of the Act. I gather that the Bench relied upon a clause in exhibit C under which the debtors covenanted to pay the Municipal taxes and to attend to all Municipal notices and to carry out the requirements contained therein. But that is a matter between the debtors and their creditor. The creditor, if he complies with the notice, may have a right to recover the amount of his expenditure from the debtors. But a clause of that sort cannot affect criminal liability arising under the Act of Parliament.

In my opinion, therefore, the accused is not an owner within the meaning of the act, and, therefore, his conviction was wrong and must be set aside. Fine, if paid, to be refunded.

MACKLIN J. I agree.

*Conviction and sentence set aside.*

## APPELLATE CIVIL.

*Before Mr. Justice Broomfield and Mr. Justice Divatia.*

MAHALINGAPPA CHANMALLAPPA GOTKINDI

v.

SHANKARAYYA GURUSHANTAYYA HIREMATH.\*

1940  
 —  
 July 11.

*Land Improvement Loans Act (XIX of 1883), Sec. 7, proviso—"Mortgagees of that interest"—Interpretation—Mortgage by owner of land—Subsequent tagai loan by owner—Sale of land for non-payment of tagai—Such sale extinguishes prior mortgage.*

The effect of the proviso to s. 7 of the Land Improvement Loans Act, 1883, is that, on the sale by Government of the land (for the improvement of which tagai loan is borrowed) for non-payment of the loan, while the interest of third parties (e.g. the right of an occupancy tenant) is protected, the interest of the borrower and that of the mortgagee or charge-holder from such borrower with regard to the property sold is extinguished.

*Sankaran Nambudripad v. Ramaswami Ayyar*,<sup>1</sup> followed.

\* First Appeal No. 27 of 1939, from the decision of V. R. Mangalvedkar, First Class Subordinate Judge at

Belgaum, in Regular Civil Suit No. 11 of 1936.

1 (1918) I. L. R. 41 Mad. 691.



SUIT to enforce mortgage.

The mortgage in suit was passed on August 29, 1919, by Shankarayya (defendant No. 1) to Channmallappa (father of the plaintiff Mahalingappa) for Rs. 8,000 on the security of his lands, survey No. 94 and seven other plots.

On February 1, 1921, defendant No. 1 took a tagai loan from Government for the improvement of survey No. 94. The loan was not repaid. Survey No. 94 was therefore taken possession of by Government for the non-payment, and was sold by Government to defendant No. 4 in 1932.

On January 3, 1936, the plaintiff sued to recover the money due on the mortgage (i.e. Rs. 16,000) by sale of the mortgage land inclusive of survey No. 94. Defendants Nos. 2, 3 and 5 were sons of the mortgagor, defendant No. 1.

Defendant No. 4 resisted the claim mainly on the ground that the sale of survey No. 94 to him by Government for non-payment of tagai loan was free from all encumbrances, and that therefore survey No. 94 was not amenable to the claim.

The trial Court held that the sale of survey No. 94 was exempt from the mortgage claim of the plaintiff, for the following reasons :—

"Section 7 (c) of the Land Improvement Loans Act, XIX of 1883, together with the proviso clearly goes to show that the land survey No. 94 for the benefit of which the tagai loan was contracted for by defendant No. 1 can be sold free of any prior incumbrance. Plaintiff's pleader argues that if defendant No. 4's view is to prevail, then the proviso is redundant. It is not within the purview of the present inquiry as to how and why the proviso to s. 7(c) came to be embodied. At any rate, s. 7(c); and the proviso clearly prove that the encumbrance goes away when the land is forfeited, treated as a waste land, and then sold by Government. Plaintiff's pleader does not allege that there was any irregularity or illegality in the procedure adopted by the Collector in selling this land. It is immaterial whether plaintiff had notice of this forfeiture and sale by Government. It is true that the proviso is not very happily worded. But it does show that a previous encumbrancer has no claim over this land for his money. Defendant Nos. 4's pleader relies on 41 Mad. 691 and 142 I. C. 376, 377. In both these rulings it is clearly held that when a land is sold under s. 7(c) of the Land Improvement Loans Act, the prior encumbrance, if any, goes away. I have, therefore, no hesitation in holding that plaintiff cannot lay any claim to this land for his dues."

The plaintiff's claim was accordingly decreed by passing the usual mortgage decree against the mortgaged lands other than survey No. 94.

The plaintiff appealed to the High Court.

*B. D. Belvi*, for the appellant.

*H. F. Mudireddi*, for the respondent.

DIVATIA J. This appeal is preferred by the plaintiff in a suit to recover Rs. 16,000 with interest due on a simple mortgage for Rs. 8,000 passed by defendant No. 1 in favour of the deceased father of the plaintiff on August 29, 1919. The mortgaged property comprised eight survey numbers one of which was revision survey No. 94. On February 1, 1921, defendant No. 1 took a tagai loan from the Government for improving his field, survey No. 94, and for that purpose he mortgaged to the Government another land of his, namely, revision survey No. 11/1. He failed to repay that tagai loan, and as a result Government sold survey No. 94 in 1932 when it was purchased

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by defendant No. 4 for Rs. 1,525 and he passed a *kabulayat* to the Government for that number. Thereafter the appellant brought this suit on January 3, 1936, to recover the amount due on the mortgage. The main issue was whether the plaintiff could hold survey No. 94 in suit liable for the suit debt in view of the fact that the land was forfeited and sold by the Government for arrears of tagai. The learned Judge held that the plaintiff cannot hold that land liable for the suit debt, and he, therefore, passed a decree against the defendants to the effect that the plaintiff was entitled to recover his money by sale of the mortgaged property except survey No. 94.

The plaintiff has now preferred this appeal against that part of the decree by which his claim against survey No. 94 was dismissed, and his contention before us is that the lower Court was wrong in holding that that survey number was not liable for the suit debt. The provision of law under which this land was sold for the non-payment of the tagai dues is in s. 7 of the Land Improvement Loans Act, XIX of 1883. The relevant part of that section is :—

“(1) Subject to such rules as may be made under section 10, all loans granted under this Act, all interest (if any) chargeable thereon, and costs (if any) incurred in making the same, shall, when they become due, be recoverable by the Collector in all or any of the following modes, namely :—

\* \* \* \* \*

(c) out of the land for the benefit of which the loan has been granted—as if they were arrears of land-revenue due in respect of that land ;”

Then the proviso to that section is as follows :—

“Provided that no proceeding in respect of any land under clause (c) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgagees of, or persons having charges on, that interest ..”

It is contended before us on behalf of the appellant that the plaintiff's right as mortgagee before defendant No. 1 took the tagai loan could not be extinguished under the proviso which is sought to be construed as not affecting any right of a prior mortgagee of the land. In our opinion, however, there is no warrant for that construction. The proviso clearly states that it would not affect any interest which existed before the order granting the loan other than the interest of the borrower and other than the interest of the mortgagee of that interest. It is clear that by the words “of mortgagees of that interest” the Legislature meant to include the mortgagee of the land before the loan was taken. The appellant's contention is that the words “mortgagees of that interest” mean the mortgagees of the interest of the borrower at the date of the loan, and that interest was only the ownership of the equity of redemption. This argument implies that there must be two mortgages before that date, first of all, the mortgage created over the property, and, secondly, a mortgage of the equity of redemption remaining with the mortgagor after the first mortgage was created. But that assumes that the purpose of the proviso was to protect the prior mortgagee of the land for which there is no warrant whatever. The clear meaning of the words of the proviso is that the interests of third parties are protected, but that the interest of the borrower and the interest of the mortgagee or charge-holder from the mortgagor with

regard to the property sold would be extinguished.

This construction of the section is supported by the decision in *Sankaran Nambudripad v. Ramaswami Ayyar*.<sup>1</sup> There the learned Judges had to construe this particular proviso and they have construed it as meaning that a sale under s. 7(1)(c) of the Land Improvement Loans Act to recover the loan was free of prior incumbrances. It is stated that the proviso releases rights other than those of the borrower and of the mortgagees, e.g., the rights of an occupancy tenant.

We think that that construction of the proviso is correct and that the Legislature meant to protect the rights of third parties only and not of those who claim under the borrower himself even though the transaction was created before the date of the loan.

We think, therefore, that the decision of the lower Court is correct, and the appeal is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Broomfield and Mr. Justice Macklin.*

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*Transfer of Property Act (IV of 1882), Sec. 53A—Part-performance—Limits of rule of part-performance—Agreement to lease—Present demise—Registration—Indian Registration Act (XVI of 1908), Secs. 17(1)(d), 17(2)(v).*

The first requirement of s. 53A of the Transfer of Property Act, 1882, is that there should be a writing signed by the transferor or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. The words "signed on his behalf" in the section must mean presumably signed by a person who has authority to bind or represent the transferor.

The third clause of the section makes it a condition that the transferee has performed or is willing to perform his part of the contract. The section is primarily intended for the benefit of the transferee. When the section speaks of the performance of his part or willingness to perform his part, it means complete performance or complete willingness so far as he is concerned.

The section debars the transferor from exercising rights which he would have apart from the agreement. There is, however, an exception to this disablement in the words "other than a right expressly provided by the terms of the contract." It is clear that the transferor can in any case derive no rights from this section which are inconsistent with the conditions subject to which the section comes into operation. As it is a condition precedent that the transferee shall have performed his part of the contract or should be willing to perform his part of the contract, the material time being obviously the time when the

<sup>1</sup> (1918) I. L. R. 41 Mad. 691.

\* First Appeal No. 278 of 1939, from the decision of T. U. Chapat-

wala, Joint First Class Subordinate Judge of Ahmedabad, in Suit No. 1236 of 1935.

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section is sought to be made use of, it follows that a suit for damages, for *breach* of a contract can never be founded upon the section.

• *Suleman v. Patel*,<sup>1</sup> dissented from.

*Pir Bakhsh v. Mahomed Tahar*<sup>2</sup> and *Probodh Kumar Das v. Dantmara Tea Co.*,<sup>3</sup> referred to.

The Borough Municipality of Ahmedabad sold the right to occupy their vegetable market for a period of three years at an auction, one of the conditions of which was that the successful bidder was to pass a registered rent-note at his own expense. The defendant's predecessor was the successful bidder, who at the end of the auction signed the conditions of auction, which were also signed by the Chairman of the Standing Committee who held the auction. The sale was in due course adopted by the Standing Committee and adopted by the General Body of the Municipality. The bidder went into possession of the market and paid two months' rent in advance. When called upon to pay the estimated cost of getting a rent-note executed and registered, he took no notice of the demand and also of the reminder that was sent to him subsequently. He still continued to occupy the market and paid the rent regularly till he died. His widow intimated to the Municipality that the contract was at an end and offered to hand over possession of the market to the Municipality, which she later did. The Municipality then sued to recover damages for breach of the contract after forfeiting the deposit, relying on s. 53A of the Transfer of Property Act, 1882 :—

*Held*, dismissing the suit, (1) that the conditions necessary for the coming into operation of s. 53A were not satisfied in the case ;

(2) that, apart from s. 53A, there was a present demise of the market, and that the contract contained in the writings relied on by the Municipality required registration under s. 17(1)(d) of the Indian Registration Act, 1908 :

*Sultanali v. Tyeb*<sup>4</sup> and *Ramjoo Mahomed v. Haridas Mullick*,<sup>5</sup> followed ;

(3) that the whole case of the plaintiff implied that there was an agreement by way of lease, and not merely an agreement to execute a lease at a later date such as would come under s. 17(2) (v) of the Indian Registration Act.

SUIT to recover damages for breach of contract.

The Borough Municipality of Ahmedabad (plaintiff) wanted to let their vegetable market consisting of stalls situated in Manekchowk in the city of Ahmedabad for a period of three years. A resolution to that effect was passed by the Standing Committee of the plaintiff on January 5, 1934.

The conditions of the auction were settled, which contained, among other things, the following :

"2. This auction is for the period of three years from 1-4-34 to 31-3-37 and hence the bidder will have to pass a registered rent-note at his own expense for three years immediately after the General Board sanctions the auction.

4. The bidder (auction purchaser) shall have to pay at the time of auction the amount equal to one month's rent as deposit immediately after the last bid and the rent will have to be paid every month in advance before the first day of every month.

7. If the amount of rent is not paid in advance every month as mentioned in condition No. 4 the Municipality will take over the possession of the market stalls:

1 (1933) 35 Bom. L. R. 722.

2 (1934) L. R. 61 I. A. 388,  
s. c. 36 Bom. L. R. 1195.

3 (1939) L. R. 66 I. A. 293,

s. c. 42 Bom. L. R. 199.

4 (1929) 32 Bom. L. R. 188.

5 (1925) I. L. R. 52 Cal. 695.

and the open lands at once before the period of letting is over without first giving any notice, and will lease by fresh auction to another person at the cost and responsibility of the lessee and if the Municipality suffers any loss in rent etc. by a lower bid or no bid at the fresh auction, the lessee is bound to make good the same.

16. The auction of the stalls of this market and the open land being for a period of three years will be taken as final after it is sanctioned by the General Board and the registered rent-note will have to be passed before handing over the possession of the market."

The auction was held on January 21, 1934, when one Bechardas Samaldas (represented by Bechardas Damodardas, defendant) was declared the highest bidder at Rs. 2,551 per month. On the same day, the conditions of auction were signed by the bidder Bechardas Samaldas, and by the chairman of the Standing Committee as also by the members of that Committee.

On January 30, 1934, the bidder agreed to deposit two months' rent instead of one month as provided in the conditions of auction. On the same day the Standing Committee resolved to make a recommendation to the General Body to sanction the auction. This the General Body did on February 14, 1934.

On February 24, 1934, Bechardas was informed of the sanction and asked to pay Rs. 467 to meet the cost of preparing a rent-note and getting it registered. This was not done. It was only on February 16, 1935, that the plaintiff sent a reminder about payment of the above cost. This too remained unheeded.

Meanwhile, on April 1, 1934, Bechardas obtained possession of the market and remained in possession paying the rent as stipulated till his death, which occurred on April 30, 1935.

On May 17, 1935, Divali, the widow of Bechardas, wrote to the plaintiff that her husband had died and that the contract of lease had come to an end. She again wrote to the plaintiff asking them to take possession of the market at the latest on June 30, 1935.

The Standing Committee resolved on June 11, 1935, to take possession of the market and to take legal steps to recover damages for rent from Divali. This was communicated to Divali on June 13, 1935; and possession of the market was taken on June 17, 1935.

After several infructuous attempts to sell the right of the unexpired lease, it was knocked down to two merchants for Rs. 1,651 per month on August 6, 1935. The General Body sanctioned the sale on August 7, 1935. The possession of the market was handed over to the new bidders on August 8, 1935.

On September 5, 1935, the Standing Committee by its resolution forfeited the deposit made by Bechardas.

On October 4, 1935, the plaintiff Municipality filed a suit against Divali to recover Rs. 26,054-1-10 as damages consequent on the breach of contract by Bechardas. Divali having died pending suit on February 17, 1936, the defendant was brought on the record as her heir.

The defendant contended *inter alia* that even if the lease was proved, it being for a period of three years should have been in writing and registered under s. 17(1) (d) of the Indian Registration Act, 1908, and that even if Bechardas acted upon the tenancy the plaintiff did not thereby obtain any right to treat the tenancy as concluded.

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The trial Court held that the plaintiff had proved the contract of lease, that it was proved to be a valid and binding contract as could form the basis of a suit for damages, that either Bechardas or Divali had broken the terms of the lease and that the plaintiff was entitled to recover Rs. 26,025-13-0 as damages. The Court gave the following reasons :—

“ It is thus obvious that in this suit the most important question is whether the plaintiff can maintain the present suit for recovery of damages when there is no written lease duly registered as required by s. 107 of the Transfer of Property Act and s. 17 of the Indian Registration Act. There is no written lease—much less registered. The pakka lease was to be engrossed and registered at the cost of the lessee. The lessee did not come forward to give costs for the making of the pakka lease though the plaintiff called upon him to do so and yet took possession of the vegetable market and acted under the auctioned out lease which was for a period of three years as if the lease was completely legal and operative. If the lessee had not taken the possession the plaintiff would have thought it necessary or been obliged to sue the lessee for specific performance of the agreement to pass a pakka lease and to abide by it. That necessity did not arise because the lessee took the possession of the vegetable market, gave deposit money and monthly rent in advance as settled under the terms and conditions of the auctioned out lease and under his Kabuliyat, exhibits 61 and 62. These writings under the signature of the lessee only purported to take a pakka lease on the General Board of the plaintiff sanctioning the bid of rent given by the lessee ; inasmuch as they purport to create a pakka lease on a future date they fall short of creating a present demise of or interest in the leased property. That being so, the ruling in *Suleman v. Patell*, 35 Bom. L. R. 722, which is almost on all fours with the facts in this suit is to be relied upon for holding that exhibits 61 and 62 can legally form the basis of the present suit for damages as in the said ruling the aid of s. 53A of the Transfer of Property Act was invoked on the consideration that it was available to the transferor to base a suit for damages. The learned advocate for the defence urges that the ruling betrays a misconception of the limited scope of the section and cites rulings in the cases of *Mst. Nasiban v. Mohamed Sayed*, [1936] A. I. R. Nag. 174, and of *Danimara Tea Co. v. Probodh*, 41 C. W. N. 54, in support of his view. I have carefully studied all these rulings and am clearly of opinion that the view taken by his Lordship Honourable Justice Wadia in the above-named Bombay ruling correctly interprets s. 53A of the Transfer of Property Act. The section debars the transferor from enforcing only any right against the transferee other than the right created by the agreement partly performed notwithstanding that the transaction has not been completed according to law. Thus it does not debar the transferor's right to sue either for specific performance or for damages on the agreement to take a pakka lease especially when such an agreement as not creating the present demise is not compulsorily registrable. It is wrong to say that the section merely creates a passive equity conferring the right to defend a suit to the transferee and that it creates a disability for a transferor. It is proper to think that all rights and liabilities under the incomplete written agreement were meant to be mutually enforceable by the legislature by this section. In the present case there being not even the written pakka lease, it is also possible to take a view that s. 53A of the Transfer of Property Act may not come into play and that the plaintiff's right to sue for damages could be recognisable on the consideration that the writing, exhibit 61, does not create a present demise and can without requiring registration form the basis of the present suit and can be admissible for proving the contract. Such a view was taken in the ruling in the case of *Rajah of Venkatagiri v. Narayana*, 17 Mad. 456. As this ruling has been dissented from in the above said Bombay ruling I do not base my conclusion on it and think it proper to invoke the aid of s. 53A of the Transfer of Property Act for admitting exhibit 61 into evidence. The result is that I record my findings in the affirmative on issues Nos. 1 and 2.”

The defendant appealed to the High Court.

*I. I. Chundrigar*, with *K. T. Pathak*, for the appellant.

*J. C. Shah*, for the respondent.

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BROOMFIELD J. This is an appeal by one Becharadas Damodardas against whom a decree for Rs. 20,000 and odd has been passed by the Joint First Class Sub-Judge, Ahmedabad, at the suit of the Ahmedabad Municipality.

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There is no dispute as to the facts which are fully set out in the plaint. The Ahmedabad Municipality has a vegetable market, the right to occupy which is periodically sold by auction. There was an auction held on January 21, 1934, at which one Becharadas Samaldas was the highest bidder. The terms of the tenancy were set out in the conditions of the auction, exhibit 61, a document which after his bid was made was signed by Becharadas Samaldas and also by the Chairman of the Standing Committee which carried out the auction. The period of tenancy was to be three years from April 1, 1934, to March 31, 1937. The person who obtained the lease was to pass a registered rent-note at his own expense. He was to deposit one month's rent and he was to pay the rent every month in advance. There were numerous other conditions, but we are not at the moment concerned with those.

On January 30, 1934, Becharadas Samaldas agreed to deposit two months' rent instead of one month as provided in exhibit 61. Before the tenancy became effective it was necessary that the highest bid should be sanctioned by the General Board of the Municipality, and after a resolution of the Standing Committee on January 30, 1934, recommending the acceptance of the bid, the General Board on February 14, 1934, sanctioned that recommendation. Becharadas was informed of this on February 24, 1934, and he was called upon to pay Rs. 467, the estimated cost of getting a rent-note executed and registered. He did not pay this money and nothing was done about execution or registration of the rent-note. Nearly a year later, on February 16, 1935, a reminder was sent to him about paying the costs of the document but apparently he took no notice of this either. In the meantime he had obtained possession of the vegetable market on April 1, 1934, and he continued in occupation paying the rent of Rs. 2,551 every month regularly in advance until he died on or about April 30, 1935.

Becharadas's widow Bai Divali informed the Municipality of her husband's death and said that the contract was at an end, and that she was ready to hand over possession at any time between June 1 and 30. The Municipality then made several attempts to re-auction the lease. Auctions were held on two or three occasions but either no bids were received or the bids were considered insufficient. Possession of the market had been re-taken on June 17, 1935, and Bai Divali was informed that arrangements would be made for a new lease at her risk. Ultimately in August, 1935, a bid for Rs. 1,651 was received which was accepted and sanctioned by the General Board, which also authorised a suit for damages being filed on the old agreement. On October 4, 1935, the suit was filed against two defendants, viz., Bai Divali and Shankardas Samaldas, brother of the deceased Becharadas Samaldas. This Shankardas died on November 8, 1935, and his name was then struck off. Bai Divali died on February 17, 1936, and Becharadas Da-

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In the suit the plaintiff Municipality claimed damages amounting to Rs. 26,000 and odd, the amount being arrived at in this way. The total amount which would have been paid by way of rent under the agreement with Bechardas Samaldas was Rs. 91,836. From that amount was deducted the sum of Rs. 33,000 and odd which had been received as rent from Bechardas and also the sum of Rs. 32,000 and odd which was to be received from the new tenants within the period of the original tenancy. In addition a small sum was claimed for the expenses of advertisement and so on.

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The learned trial Judge relying on a decision of Mr. Justice B. J. Wadia in *Suleman v. Patel*<sup>1</sup> held that the case was covered by s. 53A of the Transfer of Property Act and that, in spite of there being no registered agreement or lease, the plaintiff Municipality was entitled to recover the amount which they would have recovered if the agreement had been carried out, less what they actually received. It may be mentioned in this connection that one of the conditions contained in the auction paper, exhibit 61, No. 21, was that if the lessee did not act according to the conditions of the tenancy, the Municipality had the right to take over possession of the market, to forfeit the deposit and to recover the loss if any.

The first argument of the learned advocate for the appellant is that s. 53A does not apply in terms to a case like the present and that the section can only be relied on as a defence and not as the foundation of an action. The first requirement mentioned in s. 53A is that there should be a writing signed by the transferor or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. The words "signed on his behalf" in the section must mean presumably signed by a person who has authority to bind or represent the transferor.

The documents relied on by the Municipality are the auction paper, exhibit 61, the further agreement by Bechardas to deposit two months' rent, exhibit 62, and the resolution of the General Committee, which does not in itself contain any of the terms of the agreement but sanctions the recommendation of the Standing Committee that the highest bid should be accepted. By s. 48(4) of the Bombay Municipal Boroughs Act, 1925, it is provided that every contract under or for any purpose of this Act shall be made on behalf of the Municipality by the Chief Officer. Exhibit 61, as I have mentioned, is signed by the Chairman of the Standing Committee. This signature also appears on exhibit 62 which is the subsequent agreement. Under s. 34(2) (c) of the same Act the Chief Officer may delegate any of his powers or duties to any municipal officer or servant with the sanction of the Standing Committee. There is no evidence of any delegation of the Chief Officer's powers in the present case, but it is to be noted in this connection that this particular point was not taken at the hearing. Another point to be noted is that the Chief Officer appears to have signed the resolution of the General Committee or a copy of it, though why or in what capacity he did this does not appear. However, under the circumstances we are not pre-



pared to say that the requirements of the first clause of s. 53A have not been satisfied.

The principal difficulty which the plaintiff Municipality seeking to rely on the section has to get over is the third clause which makes it a condition that the transferee has performed or is willing to perform his part of the contract. Leaving aside for the moment the question whether this section is only enacted for the protection of the transferee and confers no rights on the transferor, it is obvious both from the language and also from the history of this enactment that it is *primarily* intended for the benefit of the transferee and that being so, when the section speaks of the performance of his part or willingness to perform his part, it must mean in our opinion complete performance or complete willingness so far as he is concerned. Otherwise there would be no reason why the transferor should be confined within the four corners of the contract. We are quite unable to accept the argument of the learned advocate for the respondent that it is a sufficient compliance with this condition that the transferee should have performed his part of the contract to some extent. It is true that Mr. Justice B. J. Wadia in *Suleman v. Patell*<sup>1</sup> has taken this view, but with all deference to the learned Judge we are unable to agree. We think, therefore, that the conditions necessary for the coming into operation of s. 53A are not satisfied in this case, and that is really enough to dispose of the appeal, so far as the application of s. 53A is concerned.

I propose, however, to refer very briefly to some of the cases which have been cited in the argument. *Pir Bakhsh v. Mahomed Tahar*<sup>2</sup> was a case to which s. 53A did not apply, but their Lordships of the Privy Council described the section as a partial importation into India of the English equitable doctrine of part performance and they also said that it enables a *defendant* in certain circumstances to plead his possession under an unregistered contract.

In *Probodh Kumar Das v. Dantmara Tea Co.*<sup>3</sup> the facts were that the plaintiffs were in possession under an unregistered contract of sale whereas the defendants had the title to the property. The plaintiffs sought a declaration that the defendants had no title and were debarred from enforcing any right to the estate. The case therefore is not directly in point, but there are observations in the judgment which undoubtedly support Mr. Chundrigar's argument that the section is only available as a defence. The material passage in the judgment is this (p. 297) :—

"In their Lordships' opinion, the amendment of the law effected by the enactment of s. 53A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mitter J. in the High Court that 'the right conferred by s. 53A is a right available only to the defendant to protect his possession.' They note that this was also the view of their late distinguished colleague, Sir Dinshah Mulla, as stated in the second edition of his treatise on the Transfer of Property Act, at p. 262. The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act."

I may say that in the commentary at page 262 of Sir Dinshah Mulla's

1 (1933) 35 Bom. L. R. 772.

2 (1934) L. R. 61 I. A. 388,  
s. c. 36 Bom. L. R. 1195.

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3 (1939) L. R. 66 I. A. 293,  
s. c. 42 Bom. L. R. 199.

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book to which their Lordships refer the learned commentator criticised *Suleman v. Patell* as being based on a misconception of the limited scope of the section.

It is not necessary for our purposes to say that the transferor can never rely on the section. According to its terms it debars the transferor from exercising rights which he would have apart from the agreement. There is, however, an exception to this disablement in the words "other than a right expressly provided by the terms of the contract." But it is clear, we think, that the transferor can in any case derive no rights from this section which are inconsistent with the conditions subject to which the section comes into operation. If it is a condition precedent, as we think it is, that the transferee shall have performed his part of the contract or should be willing to perform his part of the contract, the material time being obviously the time when the section is sought to be made use of, it must follow that a suit for damages for breach of a contract can never be founded upon this section. We find ourselves unable to accept *Suleman v. Patell* as a correct exposition of the law on this point.

If s. 53A cannot be availed of, the question is whether the suit can be maintained apart from it. It has been argued on behalf of the respondent that the document on which the plaintiff relies did not require registration. Under s. 17(1)(d) of the Indian Registration Act leases of immoveable property for any term exceeding one year are compulsorily registrable. The definition of "lease" in the Act includes an agreement to lease. It has been held, however, e.g., by the Privy Council in *Hemanta Kumari Debi v. Midnapur Zamindari Co.*,<sup>1</sup> that an agreement to lease in order that it should require registration must be one which effects an actual demise or creates a present and immediate interest in the land. Mr. Shah has contended that in the present case there was no actual demise and that no immediate interest in the property was created. According to him the intention of the parties was that a formal lease should be executed and registered, and until that was done, there was nothing which could be called an agreement to lease.

We cannot accept this argument. Possession of the property was given under the agreement on April 1, 1934, and from that date the parties acted exactly as though the tenancy was in force. The importance or rather the lack of importance which the Municipality attached to the formal lease is shown by their conduct. They did no doubt write a letter to Bechardas asking him to pay the money for the registered deed, but, when he failed to comply, they took no further steps in the matter and waited nearly a year before they so much as reminded him about it. The fact that the tenancy was to commence at a date subsequent to the agreement does not of course prevent there being a present demise: see *Sultanali v. Tyeb*<sup>2</sup> and *Ramjoo Mahomed v. Haridas Mullick*.<sup>3</sup> In the latter case there is a full discussion of the authorities English and Indian. In view of these authorities we have no hesitation in holding that there was a present demise and that the contract contained in the writings relied on by the plaintiff Municipality required registration.

<sup>1</sup> (1919) L. R. 46 I. A. 240,  
s. c. 22 Bom. L. R. 488.

<sup>2</sup> (1929) 32 Bom. L. R. 188.

<sup>3</sup> (1925) I. L. R. 52 Cal. 695.

In fact it is obvious, we think, that the whole case of the plaintiff implies that there was an agreement by way of lease, and not merely an agreement to execute a lease at a later date such as would come under s. 17(2)(v) of the Indian Registration Act. In paragraph 8 of the plaint it is stated that the deceased Bechardas "took on lease by public auction" the vegetable market and the land pertaining to it, and generally speaking it may be said that the plaint is drawn up on the footing that there was a tenancy and that the plaintiff was entitled to damages for breach of the terms of the tenancy. If it were really the fact that there was not an agreement for a lease which would have been valid as a lease if properly registered, the plaintiff would be out of Court, for his only remedy in that case would have been a suit for specific performance of the agreement to take the lease.

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One argument put forward on behalf of the appellant was that the suit had abated as against Shankerdas, the original defendant No. 2, and that as his heirs had not been brought on record within the time fixed by law the estate of Bechardas was not represented. This is based on the contention that Bechardas Samaldas and his brother Shankerdas were members of a joint family. On this point, however, the evidence is very far from clear. The learned trial Judge has referred to a deed of family arrangement, exhibit 83, by which a dispute between Bai Divali and Shankerdas was settled. Some of the terms of this document, in particular the provision that Shankerdas was to be paid a salary for managing the estate, are difficult to reconcile with the theory that he was the owner of the property by survivorship. If the brothers were not joint, the widow of Bechardas represented his estate and a decree against that estate in the hands of the appellant, who was brought on record within time after Divali's death, would seem to be in order. In the view we take of the case the point of course does not arise.

The result of our findings is that the appeal must be allowed and the suit dismissed with costs throughout. The cross-objections are also dismissed with costs.

*Appeal allowed : cross-objections dismissed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

THE AHMEDABAD VICTORIA IRON WORKS LTD.

v.

MAGANLAL KESHAVAL PANCHAL.\*

1941

January 23.

*Workmen's Compensation Act (VIII of 1923), Sec. 10—Notice of accident—Trivial injury—Trivial injury developing serious consequences—Notice when to be given—Notice to co-employee whether sufficient—Finding that evidence showed sufficient cause for not giving notice whether question of law—High Court—Practice.*

\* First Appeal No. 203 of 1940, against the decision of D. S. Bakhale, Commissioner for Workmen's Com-

pensation at Bombay, in Application No. 717/c/125 of 1939.

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—  
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—

Under the Workmen's Compensation Act, 1923, it is not necessary for a workman to give notice of every trivial accident to which he may be subject.

• *Halembi v. Ardesbir*,<sup>1</sup> approved.

A workman is, however, bound to give notice of any accident which is not trivial, and it is not for him to decide whether it is likely to give rise to a claim for compensation. If an accident, too trivial in the first instance to require notice, subsequently develops serious consequences, the obligation to give notice as soon as practicable would be met by giving notice when the consequences ensue.

Notice to a fellow workman is not sufficient under s. 10(2) of the Workmen's Compensation Act, 1923.

The question whether there was any evidence before the Commissioner for Workmen's Compensation on which he could hold that there was sufficient cause for not giving notice of an accident under s. 10 of the Workmen's Compensation Act, is a question of law on which the High Court can interfere in appeal.

APPLICATION under the Workmen's Compensation Act, 1923.

The facts are stated in the judgment.

*P. B. Shingne*, with *M. R. Vidyarthi*, for the appellant.

*N. K. Desai*, with *S. G. Chitale*, for the respondent.

BEAUMONT C. J. This is an appeal under the Workmen's Compensation Act against the award of the learned Commissioner awarding a sum of Rs. 448 as compensation to the workman.

The facts as found by the learned Commissioner are that on July 5, 1939, the workman was working on a lathe in the workshop of the appellant, and got a particle of something into his eye. He admittedly did not give notice at once of the accident, but the next day did not attend work, and he says that he told his fellow employee, Ambalal, to tell the Mistry the reason for his not attending. Ambalal denies that story, and the learned Commissioner has not found as a fact whether Ambalal was told or not. The learned Commissioner has not found the facts very clearly. According to the evidence, however, the workman went to his doctor the day after the accident, and the doctor gave him some treatment. A day after that the workman complained that he could not see, and, at any rate, three days after the accident he was in great pain. Apart from his having, as he says, sent word through Ambalal, that he was remaining absent, he still gave no notice. But he says that he went to the factory eight or ten days after the accident, and then gave notice to the Mistry, but the Mistry says that he did not pass this information on to the Manager, although he usually passed on information to the Manager about an accident. The learned Commissioner says that it is curious that he did not pass on the information, but whether he believed the Mistry or not, I do not know. Eventually the workman gave notice to the Factory Inspector on July 18, that is thirteen days after the accident, and the Factory Inspector then wrote to the employers, and this was the first written notice. Even assuming that the Mistry passed on the information about the accident when he received it from the workman, that was, according to the evidence, some eight or ten days after the accident. The learned Commissioner has found

as a fact that the accident arose out of and in the course of the employment, and he has also found that there was sufficient cause for not giving earlier notice of the accident, and this appeal is brought on the ground that the Commissioner was wrong in holding that there was sufficient cause for not giving notice.

The material provisions of the Act are contained in s. 10. The section provides :

"No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof".

Then there are certain provisos, the third of which is in these terms :

"Provided, further, that the Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause".

So that the Commissioner may entertain the claim, notwithstanding the failure to give notice as soon as practicable, if he is satisfied that the failure was due to sufficient cause.

The first question, which arises, is whether there is a right of appeal against the opinion entertained by the Commissioner that there was sufficient cause to justify the workman in not giving notice. A bench of this Court in *Halemabi v. Ardeshir*<sup>1</sup> held that the question whether there was sufficient cause is a question of law, and that an appeal lies, therefore, against a decision of the Commissioner on such question under s. 30 of the Act. I am not quite sure myself that the Court paid sufficient attention to the words of the proviso which show that it is for the Commissioner, and not for the Court, to be satisfied, and, if satisfied, he can entertain the claim. However, the question whether there was any evidence before the Commissioner on which he could properly be satisfied is undoubtedly a question of law on which this Court can interfere. For the purpose of this case it is not necessary to go beyond that, because the argument of the appellants is that there was no evidence before the Commissioner on which he could hold that there was sufficient cause for not giving notice in proper time.

It is clear that the necessity of giving notice of an accident is imposed for the protection of the employer. Section 11 enables the employer to get the workman examined by his own medical practitioner, after he receives notice of an accident. The notice is required both to enable the employer to check the fact of the accident having occurred to the workman in the course of his employment, and also to enable the employer to take such steps as he may think fit to mitigate the consequences of the accident; and it is obviously important that the notice be given as soon as practicable after the accident, as the section provides.

I agree with the view expressed in the case to which I have referred, *Halemabi v. Ardeshir*, that it is not necessary for a workman to give notice of every trivial accident to which he may be subject : a mere knock which gives him a bruise, or some particle getting into his eye, which would probably

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A. C. J. recover by the next day, would not necessitate notice. On the other hand,  
 1941 I am inclined to think that Mr. Justice Patkar in that case went rather too far  
 — in saying that the workman need not give notice of any accident unless he  
 AHMEDABAD thinks that the accident is one which will give rise to a claim for compen-  
 VICTORIA sation. I think a workman is bound to give notice of any accident which is  
 IRON WORKS not merely trivial, and it is not for him to decide whether it is likely to give  
 LTD. rise to a claim for compensation. If an accident, too trivial in the first in-  
 v. stance to require notice, subsequently develops serious consequences, I am of  
 MAGANLAL opinion that the obligation to give notice as soon as practicable would be  
 KESHAVAL met by giving notice when the consequences ensue. Until then, there has  
 — Beaumont C.J. not really been an accident. In the present case I will assume that in the first  
 — instance a particle of metal flying into the workman's eye was not an  
 accident of which he was required to give notice, but any injury to the eye  
 is, of course, likely to develop into something serious ; and it seems to me that  
 on the evidence of the workman himself, and of the doctor to whom he went,  
 it is plain that within three days at the outside the accident had developed  
 into a serious matter, and the workman was bound to give notice. I am  
 satisfied that within three days of the actual accident there was in fact an  
 injury which showed that the accident was one of which notice was required to  
 be given, and the learned Commissioner gives no reasons for holding that  
 there was sufficient cause for not giving notice then. It is clear that, even if  
 the workman did give notice to a fellow workman, that is not sufficient.  
 Under sub-s. (2) of s. 10 notice must be served upon the employer or upon  
 any person directly responsible to the employer for the management of  
 any branch of the trade or business in which the injured workman was  
 employed. It is obvious that a co-employee does not come within that  
 description. So that giving notice to Ambalal, even if it was given, was  
 useless. The obligation to serve the notice suggests that it must be a written  
 notice, in which case the notice to the Mistry could not be relied upon ; but,  
 in any case, the notice to the Mistry, even if passed on to the Manager, was  
 too late, because it was given six or seven days after the accident had to the  
 knowledge of the workman become one in respect of which he was required to  
 give notice. In my opinion, therefore, there was no evidence before the  
 learned Commissioner on which he could hold that there was sufficient cause  
 for not giving notice of the accident as soon as practicable.

That being so, we must allow the appeal and set aside the award.

MACKLIN J. I agree.

*Appeal allowed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

# SHIVAWWA BALAPPA RAMPUR

v.

## CHENBASAPPAGOWDA SANGANGOWDA GOWDAR.\*

1941

January 24.

*Guardians and Wards Act (VIII of 1890), Secs. 7, 25, 19—Minor in custody of aunt since birth—Application by father for custody of minor—Applicability of s. 25.*

Under s. 7 of the Guardians and Wards Act, 1890, the Court, before making an order, should insist on evidence showing that the order was in the best interests of the child. It cannot pass such an order in advance. It is bound to consider, at the time when the order is to take effect, whether the applicant is the proper person to have the custody of the child.

In s. 25 of the Act custody means actual, and not constructive, custody. The section therefore does not apply where a ward has never been in the custody of his legal guardian.

*Achratlal Jekisandas v. Chimanlal Parbhudas*,<sup>1</sup> followed;

*Beasant v. Narayaniah*,<sup>2</sup> explained;

*Ibrahim Nachi v. Ibrahim Sahib*<sup>3</sup> and *Sathi v. Ramandi Pandaram*,<sup>4</sup> dissented from.

APPLICATION under s. 9 of the Guardians and Wards Act, 1890.

The opponent Chenbasappagowda's wife, Gangawa, was in the family way and went to the house of her elder sister Shivawwa (applicant) for delivery. On October 28, 1937, she gave birth to a daughter, and died shortly thereafter i.e., on November 3, 1937. After her death the child remained in the care and custody of the applicant.

In February, 1938, the opponent filed a suit in the Court of the Subordinate Judge of Bagalkot, for custody of the child. During the pendency of the suit, the applicant in July, 1938, made the present application under s. 7 of the Guardians and Wards Act in the Court of the District Judge of Bijapur to appoint her the guardian of the minor who was in her custody. This application stood over pending the result of the civil suit. The civil suit was decided on December 21, 1938. The suit was dismissed on the ground that, having regard to the tender age of the child, it was better left with the aunt, but that the opponent could make a further application for custody in the future. After this decision the applicant's application came before the District Judge of Bijapur on January 18, 1939, and he then directed that the applicant should remain as guardian of the person of the minor till it became two years old. The opponent was appointed guardian of the property of the minor. After the child became two years of age the District Judge made an order, on the application of the opponent, that the opponent should be declared the guardian of the minor and directed the applicant to hand over the minor to him forthwith.

\* First Appeal No. 7 of 1940, against the decision of D. R. Pradhan, District Judge at Bijapur, in Miscellaneous Application No. 16 of 1938.

1 (1916) I. L. R. 40 Bom. 600,

s. c. 18 Bom. L. R. 582.

2 (1914)) L. R. 41 I. A. 314, s. c. 16 Bom. L. R. 625.

3 (1915) I. L. R. 39 Mad. 608.

4 (1919) I.L.R. 42 Mad. 647, F.B.

A. C. J. The applicant appealed to the High Court.

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*N. M. Hungund*, for the appellant.

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*S. R. Parulekar*, for the respondent.

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BEAUMONT C. J. This is an appeal from an order made by the District Judge of Bijapur in an application under s. 7 of the Guardians and Wards Act of 1890.

The material facts are that the minor girl, in respect of whom this application was made, was born on October 28, 1937, and the mother died on November 3. The mother had gone for delivery to the house of her elder sister, who is the applicant in these proceedings, and after the birth of the child the sister kept and looked after it. In February, 1938, the father of the child filed a regular suit in the Court of the Subordinate Judge of Bagalkot, which is in the Bijapur District, asking for the custody of the child, and in July, 1938, the present application was launched under s. 7 of the Guardians and Wards Act, in the Court of the District Judge of Bijapur, by the aunt who had the actual custody of the child. She asks to be appointed guardian of the child, and to be confirmed in the custody. When the application first came before the Court, it stood over pending the result of the civil suit. The civil suit was decided on December 21, 1938. The Subordinate Judge dismissed the suit on the ground that, having regard to the tender age of the child, it was better left with the aunt, but he stated that the father could make a further application for custody in the future. After that decision, the application under the Guardians and Wards Act came before the learned District Judge of Bijapur on January 18, 1939, and he then directed that the applicant should remain as guardian of the person of the minor till it became two years old. The father was appointed guardian of the property of the minor. After the child became two years of age, the learned Judge made an order that the father should be declared the guardian of the minor, and directed the aunt to hand over the minor to him forthwith. It is clear that before making any order the District Judge ought to have insisted on evidence, showing that the order was in the best interests of the child. He seems to have thought that he had actually made an order in advance in January that the minor was to be handed over to her father when she became two years of age. But he was not competent to make such order. He would be bound to consider, at the time when the order was to take effect, whether the father was the proper person to have the custody of the child. However, apart from that, the contention of the appellant is that the Court had no jurisdiction to make the order.

Section 7 of the Guardians and Wards Act, under which the application was made, enables the Court to appoint a guardian of the person or property of the minor. But s. 19 provides that the Court has no power to appoint a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor. As that was the position in this case, the learned Judge could not appoint the aunt as guardian; all he could do was to dismiss her application, so far as it related to guardianship. Custody is dealt with in s. 25, which provides that if a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to



return to the custody of his guardian, may make an order for his return.

It was held by a bench of this Court in *Achrallal Jekisandas v. Chimantal Parbhudas*<sup>1</sup> that that section does not apply, if the ward has never been in the custody of the guardian, which is the case here, and I must confess that I do not see any answer to that. The words are "If a ward leaves or is removed from the custody of a guardian". Custody must there mean actual custody; if it means constructive custody, and it be said that the ward is always in the constructive custody of the legal guardian, then the answer is that there is no occasion for making an order, because it has not left such constructive custody. In my opinion custody in the section means actual custody, and it cannot be said that a minor who has never been in the custody of his guardian has either left or been removed from such custody. In *Ibrahim Nachi v. Ibrahim Sahib*<sup>2</sup> a bench of the Madras High Court differed from that view and held that in order to give effect to what, it considered, must have been the intention of the Legislature, s. 25 could be construed as giving power to the Court to make an order that the guardian should have the custody of the minor in all cases. There are other cases to the same effect, though not in this Court. I should be glad to hold that the statute confers such a power upon the Court, but I cannot extract such a meaning from the language which the Legislature has used. It is contended by the respondent that the Court must have power under the Guardians and Wards Act to make an order for custody, because by a decision of the Privy Council, *Besant v. Narayaniah*,<sup>3</sup> it has been held that no mofussil Court can make an order for custody, except under the Guardians and Wards Act. A full bench of the Madras High Court in *Sathi v. Ramendi Pandaran*,<sup>4</sup> no doubt, held that that is the effect of the Privy Council decision; but, in my view, the decision of the Privy Council did not go as far as the Madras High Court supposed. In the case before the Privy Council the suit had been filed by the father in the District Court of Chingleput to have it declared that he was entitled to the guardianship and custody of his sons, and, no doubt, the Privy Council held in that case that the District Court, in which the suit had been instituted, had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act of 1890, and that, having regard to the terms of s. 9, the Court had no jurisdiction over the infants in question who were not residents within its jurisdiction. But the Privy Council was considering a suit filed in the District Court, which is the Court referred to under the Guardians and Wards Act; and the suit dealt with a matter covered by the Act, because the minors had left the custody of their guardian. In my opinion, the decision has no application to a suit filed in the Court of a Subordinate Judge asking for relief not covered by the Act. As at present advised, I am not prepared to accept the view that a Subordinate Court would not have jurisdiction to entertain a suit by the father of a minor, to have custody of that minor handed over to him. It was not apparently suggested that the Subordinate Court of Bagalkot had no such jurisdiction in the suit which the father previously filed. I think the

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2 (1915) I. L. R. 39 Mad. 608.

3 (1914) L. R. 41 I. A. 314,  
s. c. 16 Bom. L. R. 625.

4 (1919) I.L.R. 42 Mad. 647, F.B.

A. C. J. learned Judge in that case directed his attention to the right question, viz., the welfare of the minor. However, so far as this appeal is concerned, I think it must be allowed, because, in my opinion, the decision in *Achralal Jekisandas v. Chimanlal Parbhudas* is right, and in any case it binds us, and we must hold that there was no jurisdiction in the District Judge to direct the custody of the minor to be handed over to the father in these proceedings under the Guardians and Wards Act.

The appeal, therefore, must be allowed. Costs of the appeal to be paid by the respondent.

Beaumont C.J.

Appeal allowed.

Before Mr. Justice Divatia.

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BAI JAYA

v.

January 22.

GANPATRAM KALIDAS DAVE.\*

*Hindu law—Maintenance—Widow earning income by personal exertions—Whether such income justifies reduction of maintenance—Reduction when permissible.*

Under Hindu law personal income obtained by a widow by her own exertions cannot be regarded as a sufficient change in the circumstances to justify the Court in reducing the amount of maintenance fixed under a decree. It is only the permanent reduction in the income of the family property which affords a valid reason for reducing the amount of maintenance.

*Jai Ram v. Mst. Shiv Devi*,<sup>1</sup> followed.

*Bahuria Saraswati Kuer v. Bahuria Sheoratan Kuer*,<sup>2</sup> *Sundari Ammal v. Venkatarama*,<sup>3</sup> *Gopikabai v. Dattatraya*<sup>4</sup> and *Lala Maheshwari Prasad v. Musammat Sahdei Kumwar*<sup>5</sup>, referred to.

SUIT for declaration and injunction.

In 1928, one Bai Jaya (defendant), a Hindu widow, filed a suit against her husband's brother Dalpatram (plaintiff) to get her maintenance from the joint family property. This suit ended in a compromise decree under which the plaintiff agreed to give to the defendant Rs. 65 per year as her maintenance. This amount was paid to the defendant till the year 1935, when the plaintiff filed the present suit against the defendant for varying the amount of maintenance, on the ground that the income of the ancestral property had decreased, that since about a year before the suit the defendant had been earning Rs. 45 per month as a nurse in a private institution and that therefore the changed circumstances justified the cessation of the payment, or in any

\* Second Appeal No. 631 of 1939, from the decision of M. C. Kaveeshwar, Assistant Judge at Nadiad, in Appeal No. 3 of 1937, modifying the decree passed by M. I. Patel, Subordinate Judge at Umreth, in Regular Civil Suit No. 320 of 1935.

1 (1937) I. L. R. 19 Lah. 352.

2 (1933) I. L. R. 12 Pat. 869.

3 [1934] A. I. R. Mad. 384.

4 (1900) I. L. R. 24 Bom. 386, s. c. 2 Bom. L. R. 191.

5 (1936) I. L. R. 13 Luck. 13.

case, a reduction of the amount. The defendant *inter alia* contended that her service was only temporary and insecure and that the fact that she was earning by private service did not entitle the plaintiff to stop or reduce the payment for her maintenance which had been fixed under the decree.

The trial Court found that there was no appreciable reduction in the income of the ancestral property, but that as the defendant was earning Rs. 45 per month as a nurse and this income was likely to continue in future, that constituted a sufficient change in the circumstances justifying a reduction of the maintenance. The trial Judge reduced the amount of maintenance to Rs. 15 per year. In his judgment he observed as follows :—

"The first question is whether a widow is entitled to maintenance out of the income of the joint property which passed into the hands of the surviving coparcener when she has private property of her own out of which she is able to maintain. The answer is "No" according to the Calcutta High Court and "Yes" according to the Madras High Court. According to the Madras High Court the right of the widow of a coparcener in a Hindu family to maintenance is an absolute right due to her membership in the family and does not depend on any necessity arising from her want of other means to support herself. She is, therefore, entitled to some maintenance out of her husband's estate. However, the private means of a widow should be taken into account in determining the quantum of maintenance to be decreed to her, *vide* 38 Mad. 153. Hindu Law and Usage, by Mayne, 9th ed., at pp. 659 and 660, states that if the widow's private property produces an income, this is to be taken into consideration, for her right is to be maintained and so far as she is already maintained out of her own property that right is satisfied.

In 2 Bom. 573, 584, it is laid down that the doctrine that widow's peculiar property should not be taken into account, was regarded as highly unreasonable. This doctrine is also opposed to Mayukha. If the private means of a widow are shown to be sufficient in themselves to support her adequately in her station in life her right of maintenance would be wholly in abeyance though it might revive on a change in her circumstances."

On appeal the Assistant Judge also held that the income of the defendant as a nurse was a sufficient change in the circumstances to justify the Court in reducing the amount of maintenance. The learned Judge, however, modified the decree of the trial Court by granting a further declaration that in case the defendant lost her service or in case of a change in her circumstances she was at liberty to apply to the Court in execution proceedings to claim a higher amount for maintenance and residence up to Rs. 65 per year.

The defendant appealed to the High Court.

C. K. Shah, for the appellant.

J. C. Shah, for the respondent.

**DIVATIA J.** The parties to this dispute are a Hindu widow and her husband's brother. The appeal arises in a suit filed by the plaintiff, who is the husband's brother, against the widow for a declaration that the defendant is not entitled to get Rs. 65 per annum for her maintenance as settled in a consent decree in a previous suit in 1928, and for a permanent injunction restraining the defendant from executing the decree. In the alternative he prayed for a reduction of the said amount of maintenance in view of the changed circumstances of the parties.

The facts which led to the litigation are shortly these :—In 1928 the widow filed a suit against the present plaintiff for getting her maintenance from the

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joint family property. That suit ended in a compromise under which the plaintiff was to give Rs. 65 per year as maintenance to her. That amount had been paid by him since then, but in 1935 the plaintiff brought the present suit on the ground that the income of the ancestral property had decreased, that since about a year before the suit the widow had been earning Rs. 45 per month as a nurse in a private institution at Ahmedabad, and that the changed circumstances justified the cessation of the payment, or in any case, a reduction of the amount. The widow contended that her service was only temporary and insecure, that she had got no property fetching any income, and that the fact that she was earning by private service at that time did not entitle the plaintiff to stop or reduce the payment for her maintenance which had already been fixed under the consent decree.

The trial Court found that there was no appreciable reduction in the income of the ancestral property, but that the widow had been earning Rs. 45 per month as a nurse and that income was likely to continue in future. In its opinion that was a sufficient change in the circumstances justifying a reduction of the amount of maintenance already fixed, and on that ground alone the trial Judge reduced the amount of maintenance from Rs. 65 to Rs. 15 per year.

On appeal by the widow the Assistant Judge confirmed this decision on the same ground that the income of the defendant as a nurse was a sufficient change in the circumstances which would justify a Court in reducing the amount of maintenance. The learned Judge, however, modified the order of the trial Court by adding that in case the widow lost her service or in case of a change in her circumstances she was at liberty to apply to the Court in execution proceedings to claim a higher amount for maintenance and residence than Rs. 15 per year up to Rs. 65 per year which was fixed under the original decree.

It is against this order that the present appeal has been filed by the widow, and it is contended on her behalf that the fact that she has at present got some income on account of her personal exertions cannot be regarded as a sufficient change in the circumstances which might justify the Court in reducing the amount already fixed under the decree. For this proposition the appellant relies upon several decisions of the Indian High Courts. The latest decision is in *Jai Ram v. Mst. Shiv Devi*.<sup>1</sup> There the suit was brought by a person, who was bound to pay Rs. 10 per mensem as maintenance allowance to a widow of the family, for its reduction on the ground that she was employed as a mistress in a Municipal girls' school and was earning more than Rs. 50 per month. It was found that it was not a stable income of the widow and that after her appointment she had consented to work on a reduced salary. It was held that the fact that the widow was having some separate income of her own by her personal exertions was no reason to vary the decree obtained by her because such income cannot be treated as permanent and described as her means. It was observed in the judgment that the income was liable to be stopped at any time when her employers chose to do so, and it was obvious that she could not be forced to work for her own living if

she did not wish to do so. In the present case also the evidence shows that the widow is working as a nurse in a private hospital since nearly a year before the suit was filed, and that it was not a permanent job with gratiation of salary or security of tenure. The principle of the Lahore case is, therefore, applicable to the facts of the present case.

The Patna High Court has also taken the same view in *Bahuria Saraswati Kuer v. Bahuria Sheoratan Kuer*.<sup>1</sup> There the widow, who was claiming maintenance from her husband's relations, was being paid some amount annually by her brother for her maintenance. It was contended that that income should be taken into consideration in assessing the amount of maintenance which the defendant was liable to pay to her. It was held that a voluntary payment of such an amount by the widow's brother to her could not be taken into consideration in fixing the amount which she was entitled to receive from her husband's estate, and that such an amount cannot be described as "means" which the widow possessed, because the word "means" meant only the income to which she was either legally entitled or the income of her stridhan estate. The Madras High Court also has, in *Sundari Ammal v. Venkatarama*,<sup>2</sup> held that where a widow received certain amount of maintenance from the family but subsequently improved her financial condition either by her own efforts or by the generosity of others, she was not liable to have that allowance reduced. There some amount was being paid to the widow by a person out of compassion for her by way of an annual gift, and it was held that such an amount cannot be described as an increase in the means of the widow.

There is no authority for the proposition that any personal income obtained by a widow by her own exertions is a justifying cause for reduction of the amount of her maintenance already fixed. The principle which would apply to the case of reduction of an amount already fixed, has been laid down by our High Court in *Gopikabai v. Dattatraya*.<sup>3</sup> That principle is that a suit will lie to obtain a reduction in the amount of maintenance decreed to a Hindu widow on a change of circumstances, such as permanent deterioration in the value of the family property; but where such deterioration was due to the plaintiff's own default in not keeping the property in a proper state of repair, he had no right to ask for a reduction. To the same effect is a recent decision of the Chief Court of Oudh in *Lala Maheshwari Prasad v. Musamat Sahdei Kunwar*,<sup>4</sup> in which it is held that the amount of maintenance fixed for a Hindu widow can be subsequently reduced by the Court if the income of the family property is permanently reduced, but it should not keep on varying with every fluctuation in the income of the estate. On the same principle the amount of maintenance, already fixed, cannot be varied with every fluctuation in the private income of the widow even if such income could at all be taken into consideration. It is obvious that income by personal service is always contingent and irregular on account of various causes such as illness, leave without pay, change in salary, etc.

It is, however, contended on behalf of the respondent that the stridhan property of a widow must be taken into consideration in fixing the amount of

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KALIDAS

Divatia J.

1 (1933) I. L. R. 12 Pat. 869.

s. c. 2 Bom. L. R. 191.

2 [1934] A. I. R. Mad. 384.

4 (1936) I. L. R. 13 Luck. 13.

3 (1900) I. L. R. 24 Bom. 386,

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 —  
*Divatia J.*  
 —

her maintenance, and her income from service is her stridhan property. Even assuming that it is so, it is not every kind of stridhan that goes to reduce the amount of maintenance. Just as unproductive stridhan of not very high value and which the widow is not likely to dispose of cannot be taken into account in fixing the amount of maintenance, so also her personal earnings, especially when they are uncertain in amount and unstable in duration, should not go to reduce the amount of her maintenance from her husband's property, much less when it is already fixed by a consent decree. On principle, such reduction is objectionable as it would, in many cases, encourage the widow to lead an idle life when she feels that her own earnings will not materially add to her income as her maintenance would be proportionately reduced. It is, therefore, a sound principle that once her amount of maintenance is fixed, it is only the permanent reduction in the income of the family property which would afford a valid reason for reducing the amount, and that it should not be affected by her income from personal service. This principle is not opposed to any provision of Hindu law. On the other hand, it is consistent with its rule that it is only the stridhan property of a widow capable of producing income that is to be considered in fixing the amount of maintenance.

I think, therefore, that the lower Courts were wrong in holding that the amount of maintenance, which the defendant had already obtained under the consent decree was liable to be reduced because of her earnings by personal service.

The appeal is, therefore, allowed, the decree of the lower appellate Court is set aside, and the plaintiff's suit is dismissed with costs throughout.

*Appeal allowed.*

#### ORIGINAL CIVIL.

*Before Mr. Justice Kania.*

FIDAHUSSEIN KADERBHAI

v.

1940

November 11.

TYABALLY MULLA EUSUFALLY.\*

*Trust—Deed of settlement—Trust administered by trustees according to deed for number of years—Suit by settlor's heir's heir for declaration that deed was void and inoperative and for order directing cancellation of deed and delivering property—Limitation—Indian Limitation Act (IX of 1908), Sec. 10—Whether s. 10 applies to such suit.*

A person who claims to be entitled to property, as an heir of the settlor, on the ground that the trust deed is void, is not a person claiming against a trustee holding the property for an express purpose. Section 10 of the Indian Limitation Act, 1908, does not apply to such a case.

*Khaw Sim Tek v. Chuah Gnoh Neoh*,<sup>1</sup> *Mahomed Ebrahim v. Abdul Latiff*,<sup>2</sup> and *Shirinbai v. Sir Navroji Vakil*,<sup>3</sup> followed.

\* O. C. J. Suit No. 459 of 1939.

1 (1921) 25 Bom. L. R. 121, P.C.

2 (1912) 14 Bom. L. R. 987.

3 (1935) 37 Bom. L. R. 946.

A Mahomedan made a trust deed of his immoveable property on October 22, 1895, under which the income of the property was to be given to him during his life-time, and after his death the trustees were to pay the income in certain proportions to the beneficiaries under the deed. Since the death of the settlor on June 7, 1897, the trustees administered the property as under the trust. On March 28, 1939, the plaintiff who was the settlor's heir's heir filed a suit for a declaration that the deed was void and inoperative, and for an order cancelling the deed and directing the trustees to deliver the property to him and render account of their management :—

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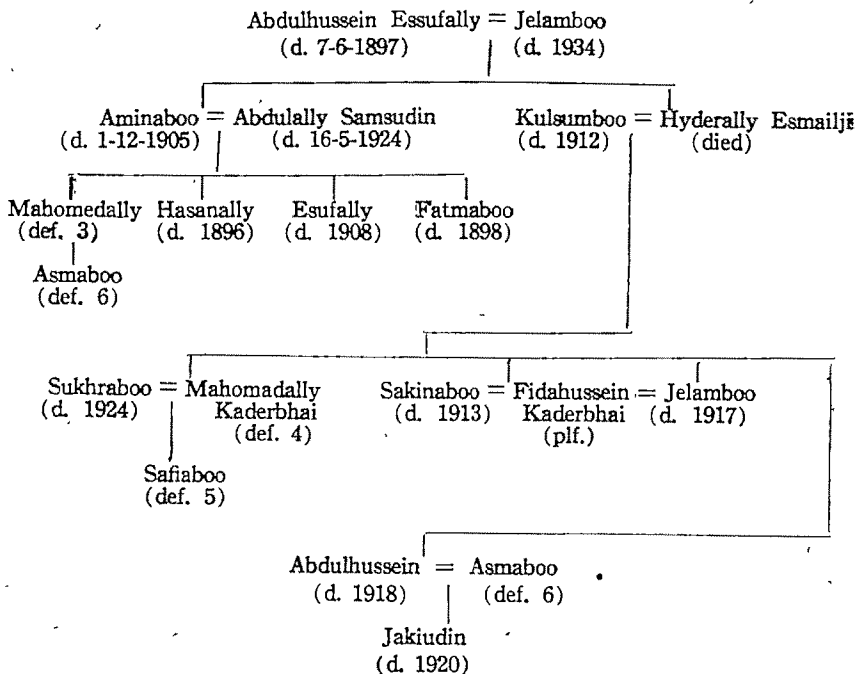
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*Held*, that, as the trustees were in possession of the property under the trust deed and had held it for the beneficiaries and administered it according to the deed, the property was not vested in the trustees for a specific purpose; and that s. 10 of the Indian Limitation Act, 1908, therefore did not apply and the suit was barred by limitation.

SUIT to set aside a trust deed.

One Abdulhussein, a Bohra Mahomedan, by a deed made on October 29, 1895, conveyed to himself and another trustee his immoveable property situate in Bombay. Under the deed the trustees were to pay the income of the property, after discharging outgoings, to Abdulhussein for his life and after his death to the beneficiaries mentioned in the deed in certain proportions.

The following pedigree shows the relationship of the parties :—



Abdulhussein died on June 7, 1897, leaving behind him his widow Jelamboo, and two daughters, Aminaboo and Kulsumboo.

Defendant No. 1, Tyabally, defendant No. 2, Saifudin, and defendant No. 3, Mahomedally, were trustees appointed by Jelamboo under the trust deed.

O. C. J. Till Jelamboo's death in 1934, the trustees paid the income of the trust  
 1940 property to her and to her two daughters, Aminaboo and Kulsumboo.  
 FIDAHUSSEIN Aminaboo was married to one Abdulally and she had three sons, Mahomed-  
 KADERBHAI ally (defendant No. 3), Hasanally and Eusufally, and one daughter, Fatma-  
 v. boo. Aminaboo died on December 1, 1905, and Abdulally, on May 16, 1924.  
 TYABALLY Hasanally died in 1896 and Essufally, in 1908, without leaving any issue.  
 EUSUFALLY Kulsumboo was married to Hyderally and she had one son, Abdulhussein  
 and three daughters, Sukhraboo, Sakinaboo, and Jelamboo. Kulsumboo died  
 in 1912 after the death of her husband Hyderally. Sukhraboo was married to  
 defendant No. 4, Mahomedally Kaderbhai, and had one child defendant  
 No. 5, Safiaboo. Sakinaboo was married to the plaintiff, Fidahussein Kader-  
 bhai, and she died in 1913. The plaintiff thereafter married Jelamboo, sister  
 of Sakinaboo. Jelamboo died in 1917. Abdulhussein died in 1918 leaving  
 one son Jakiuddin and widow Asmaboo (defendant No. 6). Jakiuddin died  
 in 1920.

The plaintiff alleged that the deed which was a wakf deed was void and inoperative; that he and defendants Nos. 3 to 6 and 8 were entitled to the trust property as heirs to the estate of Abdulhussein; that defendants Nos. 1 to 3 were holding the property as trustees and had never put forward any claim to the property on their own behalf; and that the possession of defendants Nos. 1 to 3 was permissive and the suit was within time.

The plaintiff prayed for a declaration that the deed was void and inoperative and for an order cancelling the deed and giving possession of the property to the plaintiff and defendants Nos. 3 to 6 and 8, and directing the trustees to render a full and complete account of their management of the property.

Defendants Nos. 1, 2 and 3 in their written statement contended *inter alia* that the plaintiff's suit was barred by the law of limitation; that the deed executed by Abdulhussein was a deed of settlement and not a deed of wakf and was not void or inoperative; that they were appointed trustees under the trust deed on August 28, 1925; that they were in possession of the trust property as trustees under the deed and their possession was not permissive as alleged by the plaintiff.

Defendant No. 6 contended similarly and further submitted that defendant No. 8 was not the brother of Jelamboo who died in 1917 but of Jelamboo, the widow of Abdulhussein Essufally who died in 1934; that the trustees had held the property upon the trusts mentioned in the deed in their right and capacity as trustees of the said trusts adversely to the claim, if any, otherwise than as a beneficiary under the deed, of Abdulhussein Essufally and after his death of his heirs and those claiming through or under them; that the trustees had held the properties adversely as aforesaid for a period of forty-four years, and the claim, if any, of Abdulhussein and his heirs to the property otherwise than as beneficiaries under the deed and of those claiming through or under them or any of them was barred by the law of limitation; that the trustees had, in any event, acquired a title to the property by adverse possession for the beneficiaries mentioned in the deed and that they held the property as trustees in trust for them.

Defendant No. 7, Advocate General, put forward similar contentions and submitted himself to the orders of the Court.



*Sir Jamshedji Kanga* and *J. S. Khergamwala*, for the plaintiff.

*E. B. Ghaswalla* and *V. F. Taraporewala*, for defendants Nos. 1, 2 and 3.

*J. C. Forbes*, for defendants Nos. 5 and 8.

*C. K. Daphtary* and *K. T. Desai*, for defendant No. 6.

*K. M. Munshi* and *M. C. Setalvad*, Advocate General, for defendant No. 7.

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KANIA J. This suit is filed by the plaintiff to obtain a declaration that a deed of trust dated October 29, 1895, is void and inoperative, that defendants Nos. 1 to 3 who are the present trustees and holders of the property be ordered to deliver up the property and the deed for cancellation and to render an account of their management of the property. The plaint recites that on October 29, 1895, one Abdulhusein, who was a Shia Mahomedan, executed the deed in question. That deed is annexed to the plaint. According to the plaintiff it is a deed of wakf. The purport of that deed is set out in para. 3 of the plaint. The first object was to pay the income to the settlor during his lifetime. It is contended in the plaint that as the settlor was a Shia Mahomedan the deed was therefore void. The settlor died on June 7, 1897. In para. 7 of the plaint it is stated as follows :

"The plaintiff says that after the death of the said Abdulhusein Issooobhai the trustees under the said deed of trust paid the rents of the said property to the said Jelamboo (widow of the deceased) till her death in 1934 and the said Aminaboo defendant No. 3 abovenamed and the said Kulsumboo and her two daughters Sukhra-boo and Sakinaboo and one son Abdulhusein in proportion mentioned in the said deed of wakf dated October 29, 1895."

The plaint then recites different deaths and marriages resulting in the parties to the suit, other defendants Nos. 1, 2 and 7, being the present descendants of heirs of the deceased settlor. In para. 14 of the plaint it is stated as follows :—

"Defendants Nos. 1, 2 and 3 have been holding the property as trustees and have never put forward any claim to the said property on their own behalf. The plaintiff says that the possession of defendants Nos. 1, 2 and 3 is permissive and the suit is within time."

Defendants Nos. 1, 2 and 3 have filed a written statement in which they denied the allegation in para. 14 of the plaint that their possession of the property was permissive. They contended that they have been in possession of the trust property as trustees under the said deed. In para. 10 of their written statement they have contended that they are entitled to retain possession of the property as trustees under the said deed, and they denied their liability to render accounts of their management of the property to the plaintiff.

The question of the validity of the trust depends on the question whether the deceased was a Shia Mahomedan. That fact is not admitted on the pleadings. The result is that oral evidence, perhaps considerable, will be required to be led to prove that fact. As the point of limitation raised on the pleadings appears to be clear on the authorities, I decided to try that issue first. That includes the decision of the allegation that the trustees' possession was permissive. I should state at once that the plaintiff has made that allegation in the plaint. That is denied in the written statement of defendants Nos. 1, 2 and 3 and also in the written statements of defendants Nos. 6 and 7. The plaintiff has led no evidence to show that the possession

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was permissive. The sixth issue is a question of fact, and as no evidence is led in support of this allegation by the plaintiff, the same must be found against him.

The question of limitation arises also on the averments otherwise found in the plaint. As I have pointed out para. 7 of the plaint contains an admission on the part of the plaintiff that after the death of the settlor the trustees had paid to the parties entitled to receive money under the trust-deed the income in the proportions mentioned in the deed. Reading the plaint as a whole, it is therefore clear that the settlor who was the owner received the income during his lifetime. After his death the trustees applied the income of the trust property in accordance with the trust deed and not on the footing that the heirs were entitled to the property or income. It is not stated anywhere in the plaint that this was done with the consent of the heirs. On the other hand exhibits Nos. 1 to 5 show that after the death of the settlor the two daughters of the deceased, under the power vested in them to appoint new trustees, have appointed fresh trustees. This is, if evidence was needed, sufficient to show that the possession of the trustees was not for and on behalf of the heirs but for and on behalf of the beneficiaries mentioned in the deed of trust. It is clear that the plaint is based on the decision of *Cassamally Jairajbhai v. Sir Currimbhoy Ebrahim*.<sup>1</sup> Beaman J. in that case pointed out that there may be two aspects of the case. The first is where the trust deed itself is wholly bad; the other, where there is a transfer of the ownership to the trustees with a direction to apply the same to beneficial uses some of which may or may not be good. The learned Judge in that case came to the conclusion that in the event of there being a resulting trust, if the claim was made by the settlor's heir's heirs no question of limitation would arise. In support of his conclusion he noticed the observations in *Maulvi Saiyid Muhammad Munawwar Ali v. Razia Bibi*,<sup>2</sup> although he pointed out that so far as their Lordships of the Privy Council were concerned their decision was based on a finding of fact that possession was held by the lower Courts as permissive and not adverse. In my opinion that Privy Council decision which is based on a finding of fact does not help the present plaintiff.

The decision of Beaman J. was dissented from by the Appeal Court in *Mahomed Ebrahim v. Abdul Latiff*.<sup>3</sup> In *Khaw Sim Tek v. Chuah Gnoh Neoh*<sup>4</sup> their Lordships of the Privy Council clearly held that to invoke the application of s. 10 of the Indian Limitation Act the property must be vested in the trustees for a specific purpose. It was held that persons claiming adversely to the trust and on the footing that the trust deed itself was bad cannot contend that the property was held by the trustees for an express purpose, they being one of such purposes. The effect of that decision on the judgment of Beaman J. further came to be considered by the Court of Appeal in *Shirinbai v. Sir Navroji Vakil*.<sup>5</sup> The Court there held that *Khaw Sim Tek v. Chuah Gnoh Neoh* definitely overruled the view of Beaman J. These decisions are binding on me. I may say that I respectfully agree with the conclusion arrived at in those decisions. In view of the Privy Council decision in *Khaw*

1 (1911) I. L. R. 36 Bom. 214,

s.c. 13 Bom. L. R. 717.

2 (1905) L. R. 32 I. A. 86.

3 (1912) 14 Bom. L. R. 987.

4 (1921) 25 Bom. L. R. 121, P.C.

5 (1935) 37 Bom. L. R. 946.

*Sim Tek v. Chuah Gnoh* I find no adequate reason to hold that a person who claims to be an heir of the settlor and claims to be entitled to the property on the ground that the trust deed was void, could be stated to be a person claiming against a trustee holding the property for an express purpose. On the allegations in the plaint itself in this case therefore the plaintiff's claim is time-barred. He does not claim under any of the provisions of the trust deed to recover any property. His case is that the trust deed is void and as a settlor's heir's heir along with the others he is entitled to recover the property from the trustees. To such a case in my opinion s. 10 of the Indian Limitation Act has no application.

Therefore, the facts here are, that ever since the death of the settlor the trustees on the face of the plaint admittedly administered the property as under the trust deed and their possession is of trustees claiming to be so under the trust deed in question. They do not claim to hold the property for anyone except the beneficiaries mentioned in the trust deed and therefore the present claim of the plaintiff as the settlor's heir's heir in my opinion is clearly barred by the law of limitation. The second issue must therefore be found against him and the suit must therefore be dismissed with costs.

Defendants Nos. 5 and 8 have filed no written statement. In law they are therefore deemed to have admitted the statements in the plaint. They must bear their own costs of the suit.

The Advocate General (defendant No. 7) must get his costs from the plaintiff. If he is unable to recover his costs from the plaintiff, his costs taxed as between attorney and client should come out of the trust estate.

Defendant No. 6 has a pecuniary interest in this property which comes into existence only if the trust deed is set aside. Seeing that the trust deed has been in existence for so many years against her own pecuniary interest she has decided to support the trust and challenge the plaintiff's allegations. She is made a party to the suit and is therefore entitled to adopt such attitude as she considers right, irrespective of whether it is to her benefit or against it. It was argued that the Advocate General and the trustees were there to support the trust and there was no reason for her to incur costs. If a party is made a defendant it is at his option to appear and adopt an attitude as he pleases. I find nothing wrong in the attitude of defendant No. 6 in this case. As her interest is different from the plaintiff and the Advocate General, I cannot say that she should have appeared through the same solicitors and counsel. She is therefore entitled to her costs against the plaintiff.

As regards the trustees the plaintiff must pay their costs. The trustees applied that in the event of their costs not being recovered from the plaintiff they should be directed to be paid out of the trust estate. It was argued that they had to put the facts before the Court and submit to the orders of the Court. It is true that in the normal course a trustee supporting his title and succeeding in supporting the trust would be entitled to an order of the kind now applied for. In the present case it is however pointed out on behalf of the Advocate General that the trustees are guilty of misconduct in respect of this suit. It was pointed out that although the suit was filed in March, 1939, the trustees did not file their written statement for many months. Defendant No. 6 moved the Advocate General who called upon the trustees

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O. C. J. to define their position in clear and unequivocal terms. When driven to do  
 1940 so they filed their written statement in March, 1940. Even thereafter they  
 FIDAHUSSEIN would not make their affidavit of documents. Defendant No. 6 obtained an  
 KADERBHAI order against them and it was only on the service of such order that the  
 TYABALLY trustees made their affidavit disclosing therein only the books of account of  
 EUSUFALLY S. 1993 to 1995. When the attention of the Advocate General was called to  
 this fact he called upon them to make a proper affidavit, and it was only then  
 that they produced copies of the books of the previous years. In the course  
 of this discussion the Advocate General ascertained that money was not applied  
 by the trustees to charity according to the deed of trust. The Advocate  
 General therefore called upon them to deposit the proportionate rent in a  
 separate account. When that direction was given defendant No. 3 wrote to  
 the Advocate General a letter dated October 27, 1940, in which he contended  
 that the trust deed was void, that he had applied a far larger sum towards  
 charity than charity was entitled to and he was entitled to a set off. In the  
 concluding portion of that letter he contended that, without prejudice to his  
 other contentions, he maintained that the trust deed was void, that defendants  
 Nos. 1 and 2 were his nominees, that the family property was managed by  
 him according to his pleasure and he had disbursed the income in the manner  
 he thought he was entitled to do. He further added that he had managed  
 that property in that manner for over last twelve years. The last statement  
 is clearly an attempt to go back on his written statement in which the trustees  
 contended that the properties were managed by them in accordance with the  
 trust deed. When the suit was called on the trustees refused to raise any  
 issues which arose on their written statement. They appeared by two counsel  
 although they intimated that they only submitted to the orders of the Court.  
 In discussing the question of limitation they have taken no part. Their  
 attitude throughout has been of not upholding the trust or assist the Court  
 in upholding the trust. They have adopted changing attitudes, and in spite  
 of their written statement ultimately threatened to go back on the same and  
 contended that the trust estate was not managed according to the trust deed  
 but on the footing that the trust deed was void and the property belonged  
 to the heirs alone. Under the circumstances I think they are not entitled to  
 the further order for costs asked by them.

*Order accordingly.*

Attorneys for plaintiff : *Phiroze B. Choksi & Co.*

Attorneys for defendants Nos. 1, 2 and 3 : *Framroze J. Ghadiali.*

Attorneys for defendants Nos. 5 and 8 : *Phiroze B. Choksi & Co.*

Attorneys for defendant No. 6 : *Hasan Baxi & Co.*

Attorney for defendant No. 7 : *C. C. Shah*, Solicitor to the Government  
 of Bombay.

## CRIMINAL REVISION.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

EMPEROR

v.

MAVJI NANJI.\*

1941

March 14.

*Indian Evidence Act (I of 1872), Sec. 114, ill. (a)—Theft—Stolen property found in possession of accused "soon after" theft—"Soon after", interpretation of—Indian Penal Code (Act XLV of 1860), Sec. 411—Practice—Prosecution to prove their case—Conviction cannot be based on statement of accused.*

Illustration (a) to s. 114 of the Indian Evidence Act, 1872, directs that the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The question, what period is covered by the expression "soon after", depends upon the circumstances of each case. The Court is not bound to draw this presumption, and it must always ask itself whether in the circumstances of the particular case the presumption is one which in fairness to the accused can be drawn. When one is dealing with property of some value, and it is very unlikely that the man, from whom the accused got it, had come by it honestly, or when one is dealing with property stolen in a village where there are not likely to be many dealings in it, the presumption may be drawn more readily than in the case of a theft in a big city.

Hence where an old brass bell stolen in the city of Bombay was found in the possession of an old iron dealer in the city thirteen days after the theft, the presumption under s. 114, ill. (a), was not drawn.

It is not open to a Magistrate to convict an accused who pleads not guilty on his own statement. It is for the prosecution to prove their own case.

## RECEIVING stolen property.

On October 13, 1940, an old brass bell was found missing from the compound of the Motlabai Hospital in Bombay. It appeared that one Khimji had stolen the bell on October 12, 1940. It was found on October 25, 1940, in the possession of the accused, who was a dealer in old iron in the Chorbazar in the city of Bombay. The prosecution led no evidence to show how the accused came into the possession of the bell.

At the trial the accused made a statement, under s. 342 of the Criminal Procedure Code, 1898, that he had purchased the bell along with other metal scrap in the course of his business. He was thereupon convicted by the Presidency Magistrate, Second Court, for the following reasons:—

"The accused in his statement denies having any knowledge that the bell was stolen property when he received it by purchasing in a lot of brass, zinc and copper on August 23, 1940. The accused has not called the merchant from whom he states he purchased it. He has however shown an entry in his rojmel. In this entry there is no doubt in my mind the word 'ghanti' (bell) has been interpolated

\* Criminal Application for Revision No. 49 of 1941, from conviction recorded by I. S. Haji, Presidency

Magistrate, Second Court, Mazgaon, Bombay.

A. Cr. J. after erasing the original letter or word. The bell is a brass bell. He gives no  
 1941 reason why he did not include the weight of the bell in the total weight of brass  
 — he purchased on that date... All the entries in the rojmel show the purchases of  
 EMPEROR articles by the weight of their metal. I hold that the entry produced by the  
 v. accused is a fabricated one and it is made to raise a false defence in this case...  
 MAVJI NANJI It is admitted by the accused that he does not write the names of the persons from  
 — whom he purchases the scrap iron or brass articles in his rojmel. He also admits  
 he is unable to trace the person who sold the bell to him. These are in my opinion  
 circumstances which clearly show that the accused knew and had reason to believe  
 that the bell was a stolen property at the time he received it dishonestly."

The Magistrate, in view of the offence of the accused being a first one, directed him to be bound over in a sum of Rs. 50 for a period of six months.

The accused applied to the High Court in revision.

V. N. *Chhatrapati*, for the accused.

R. A. *Jahagirdar*, Government Pleader, for the Crown.

BEAUMONT C. J. This is an application in revision against the conviction of the accused under s. 411 of the Indian Penal Code by the Presidency Magistrate, II Court, and the question, which arises, is one which comes not infrequently before Magistrates in Bombay. The question is when ought a presumption to be drawn that property shown to have been stolen, and found in the possession of the accused, was received by him knowing or having reason to believe that the property was stolen? In other words, when ought the presumption arising under the first illustration to s. 114 of the Indian Evidence Act to be drawn?

The property found with the accused was a bell, and the learned Magistrate has found, and in revision we accept his finding, that the bell was stolen from the Motlabai Hospital on the night of October 12. According to the evidence of the witness Khimji Khoda, he himself stole the bell, and kept it on an *otla* of a house near his room, and somebody removed it. Apparently the suggestion is that somebody stole it from the original thief. It was found with the accused, who keeps a shop in the Chor Bazar in which he sells old iron, on October 25, that is thirteen days after the date of the theft. The accused in his statement said that he bought this particular bell in August, and if that is so, of course, the bell in his shop could not be the bell which was stolen in October. But the learned Magistrate was not prepared to accept that statement and considered that the accused had fabricated his account. I think the learned Magistrate really convicted the accused largely on his own statement. That is wrong. The prosecution must prove their case. The prosecution have proved that the bell was stolen on October 12, and that it was found in the accused's shop on October 25, and the question is whether in those circumstances the Court ought to presume that the accused received the bell knowing or having reason to believe it to have been stolen. Unless that presumption is drawn, there is no evidence which the accused can be called upon to answer.

The first illustration to s. 114 of the Indian Evidence Act directs that the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The answer to the

question, what period is covered by the expression "soon after"; must, I think, vary according to the circumstances of each case. The Court is not bound to draw this presumption, and the Court must always ask itself whether in the circumstances of the particular case the presumption is one which in fairness to the accused can be drawn. When one is dealing with property of some value, and it is very unlikely that the man, from whom the accused got it, had come by it honestly; or when one is dealing with property stolen in a village where there are not likely to be many dealings in it, the presumption may be drawn more readily than in the case of a theft in a city like Bombay, and in the case of property like this old bell. In my opinion, it is not fair to assume that property of this nature was received by the accused knowing it to have been stolen, when he received it as long as thirteen days after the theft, though in different circumstances thirteen days might be deemed soon after the theft. Old iron, like this, may have been dealt with in Bombay half a dozen times before it reached the accused. According to the thief, the property was removed from his custody, and it may very well have been sold to a hawker for a few annas, and the hawker have sold it to the accused. That is at least as likely as that the accused purchased direct from the thief. In my opinion, it is not right to presume in this case, merely because the accused was shown to be in possession of stolen property thirteen days after the theft, that he had reason to believe that it was stolen. If that is so, the accused was not bound to make any statement, and he ought not to be convicted on the strength of his statement.

We must, therefore, set the conviction aside.

MACKLIN J. I agree.

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*Conviction set aside.*

#### ORIGINAL CIVIL.

*Before Mr. Justice B. J. Wadia.*

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v.

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*Defamation—Libel—Newspaper—Publication of disparaging statement in newspaper regarding profession and work of a person—Criticism by journalist—Criticism must be fair—Publication of matter of public interest—How far privileged—Imputation of criminal offence—Distinct charge of offence necessary—Mere suspicion not sufficient.*

A statement which, being published of another in the way of his lawful trade, business, calling, or office, conveys a reflection on him calculated to disparage or injure him therein, is a defamatory statement, even though it may not be calculated to hold him up to hatred, contempt, or ridicule.

\* O. C. J. Suit No. 1776 of 1940.

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Halsbury's Laws of England, 2nd edn., Vol. XX, para. 493, p. 406, referred to.

To publish in a newspaper of a woman, who is an instructress in physical culture and dancing, and who also runs an industrial institution for poor Parsi girls, that she is unfit to carry on her profession or work, and that by carrying it on she would be in a position to ruin the future of the girls taking their training in her classes, is a gross libel.

Newspapers are subject to the same rules as other critics, and have no special right or privilege, and in spite of the latitude allowed to them, they have no special right to make unfair comments, or to make imputations upon a person's character, or imputations upon or in respect of a person's profession or calling.

The range of a journalist's criticisms or comments is as wide as that of any other subject, and no wider.

*Arnold v. The King-Emperor*<sup>1</sup>, referred to.

Even if in a sense newspapers owe a duty to their readers to publish any and every item of news that may interest them, this is not such a duty as makes every communication in the paper relating to a matter of public interest a privileged one.

Any person, whether he is a private individual or a public journalist, has a right to hold any views he pleases on any subject of public interest and to express the same. It is immaterial whether the opinion or the comment is correct or not correct, whether it is just or unjust, or whether it is couched in language which may not err on the side of moderation. What is material and important is that the comment must not go beyond the limits which the law calls "fair."

An imputation of a criminal offence in order to be actionable *per se* must be a distinct charge and must not be a mere statement of suspicion. It may be made in so many words, or it may be made in words from which the charge could be inferred, but the inference must be clear and unequivocal.

*Simmons v. Mitchell*,<sup>2</sup> referred to.

SUIT for damages for defamation.

The plaintiff, Mitha Rustomji Murzban, who was the wife of one of the proprietors of the Jame-e-Jamshed Press, had, in collaboration with her husband and some other members of the Parsi community, started "The Parsi Amateur Dramatic Society" with the object of staging plays, organising concerts, and variety programmes, in aid of charities.

The society conceived an idea of staging a play called *Aflatoon* in aid of a War Fund started by one Bapsy A. Sabawalla. Some twenty-five Parsi ladies and gentlemen were taking part in the rehearsals of the play. The tickets for the performance were not advertised for sale to the public but were sold only to the members of the Parsi community who were friends and relatives of the performers.

The plaintiff was also conducting a charitable institution called "Udyoga Ashram" for imparting instruction in arts and crafts to poor Parsi girls.

The defendant, Nusserwanji Nowroji Engineer, who was the editor of a Gujarati Weekly called *Kom Sevak*, was carrying on agitation in that paper

<sup>1</sup> (1914) L. R. 41 I. A. 149,  
s. c. 16 Bom. L. R. 544,

<sup>2</sup> (1880) 6 App. Cas. 156.



against the staging of the play *Aflatoon* with a cast including some Parsi girls. In its issue of September 22, 1940, he published the following :—

“In the past Mr. Adi Murzban, Mr. Rustom Murzban and Mr. Ratan B. S. N. Cooper used to take part as actors in the play ‘Aflatoon’ and this time they themselves have declined to be actors and have preserved their self-esteem for which the said Mr. Adi Murzban and Mr. Ratan B. S. N. Cooper deserve to be complimented. What we deeply regret is that Mr. Rustom Murzban who was originally going to take part in this play has now, as we understand, got out of it, then why is his wife Mrs. Mitha Murzban obstinately persisting in taking part in this play and thus spoiling the future (moral and spiritual) welfare of the Parsi girls of her own class? Now parents, beware and don’t send your daughters to such classes where their moral and spiritual future may be totally shattered and ruined.

Serious Reminder !

It is necessary to give a serious reminder to Mrs. Mitha Murzban that it has been rumoured that from her ‘Industrial Ashram (Udyoga Ashram)’ at Charni Road Junction, a Parsi Girl by name Gadiwalla who used to stay at Mazgaon and who though married was addicted to gadding abroad, had after being a convert to Mahomedanism eloped with a Moghul leaving her near relations and connections and had married the said Musalman ?

Then we shall only ask this woman Mitha that if such a disastrous result can accrue to a girl attending a class, then has she or have her associates any idea to what extent the future (moral and spiritual) of Parsi girls would be ruined by making them actresses on the theatre stage ?”

The plaintiff alleged that the above words meant that she was a person unfit to conduct any classes inasmuch as the moral and spiritual future of girls attending such classes would be totally shattered and ruined ; that by her action in inviting Parsi ladies to join her in staging the play, the moral and spiritual welfare of such ladies would be ruined and shattered even more than the fate which awaited the girls who attended her classes.

The plaintiff also alleged that the defendant slandered her at a public meeting held in Sir Cowasji Jahangir Hall on September 26, 1940, by uttering the following words :—

“The girls who are going to take part in the play ‘Aflatoon’ are not allowed even to go to their parents’ home. The father of the girl is present here.”

The plaintiff alleged that the above words meant that she was guilty of the criminal offence of wrongfully confining the girl whose father was present, and that she had used physical violence upon the girl in so confining her.

The plaintiff submitted that she had been greatly injured in her credit and reputation and in her profession as a teacher and had suffered considerable damage. She claimed Rs. 5,000 by way of damages and prayed for an injunction restraining the defendant, his servants and agents from further printing, circulating or otherwise publishing the above libel and slander or similar libels or slanders.

The defendant in his written statement contended *inter alia* that he wrote the words complained of by way of admonition and for the public good of the Parsi community by way of warning ; that in so far as the words consisted of expressions of opinion they were fair comments made in good faith and without malice upon facts which were a matter of public importance ; that he did not allege that the plaintiff had anything whatever to do with the conduct of Gadiwalla or with her conversion to Islam and her subsequent

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marriage ; that the statements made by him were in discharge of moral and social duty and on a matter of public importance on which there was an interest common to the writer and to the persons to whom such statement was conveyed ; that the words were not capable of the meaning assigned to them by the plaintiff nor were they understood to mean that the plaintiff was a person unfit to conduct any classes ; that with reference to the alleged slander the words did not mean that the plaintiff was guilty of a criminal offence of wrongfully confining the girl and that the plaintiff had used physical violence upon the girl in so confining her ; that the defendant had made the statement, after making proper inquiries from the father of the girl, in good faith and without malice ; that the words were not actionable without proof of special damage ; and that the plaintiff had not been injured in her credit and reputation and in her profession as a teacher and had suffered no damage.

*J. H. Vakeel*, with *H. R. Pardiwalla*, for the plaintiff.

*Jehangir B. Patel*, with *S. A. Desai*, for the defendant.

B. J. WADIA J. This is a suit for damages for defamation consisting partly of libel and partly of slander, and for an injunction restraining the defendant, his servants and agents and each and every of them from further printing, circulating, distributing or otherwise publishing the said libels and/or slanders or any similar libels and/or slanders affecting the plaintiff.

The words complained of as libel are set out in paragraph 7 of the plaint, and were printed and published by the defendant in the issue of the *Kom Sevak* of September 22, 1940, a weekly journal in Gujarati published every Sunday, which was started by him sometime about the end of 1935. Defendant stated that he and his sons were the owners of the paper in partnership, and that he himself was the editor, printer and publisher. The paper is mostly read by members of the Parsi community, but has a circulation also amongst members of the other communities. The words complained of as slander are also mentioned in para. 7 of the plaint, and were, according to the plaintiff, spoken by the defendant in reference to her at a public meeting held in Sir Cowasji Jehangir Hall, Bombay, on September 26, 1940. The defendant has put in a very long and prolix written statement containing matters which are mostly irrelevant to the issues in the suit. The publication of the words complained of as libel is not denied ; but the defence is that the words are a fair and bona fide comment on a matter of public interest, and also that they were published on a privileged occasion. With regard to the words complained of as slander, the defendant denied that he uttered the words referred to by the plaintiff, and that if he did, they were spoken on a privileged occasion. In any event he contends that they are not actionable *per se*, that is, without proof of special damage.

Plaintiff is a married woman, and gives instructions in physical culture in various institutions in Bombay. She conducts a physical culture and dancing class at her place of residence at Gowalia Tank Road. She also runs the "Udyoga Ashram" for poor Parsi girls over the age of fourteen in two rooms in a house at Charni Road Junction, which have been given to her rent-free. Those classes are run with the help of other honorary Parsi lady teachers,

who give instructions in cutting, sewing, knitting and all kinds of fancy and embroidery works. This instruction is given free of charge to the girls. About April, 1940, plaintiff and several other Parsi ladies and gentlemen started the "Parsi Amateur Dramatic Society" for staging plays, dramas and dramatic entertainments for helping charities, particularly Parsi charities. At present the number of members of the Society is about forty. There were no rules nor any constitution for the Society until the beginning of this year. About this time also one Mrs. Bapsy Sabawalla, a well-known social worker in Bombay, started collecting a fund for purchasing ambulances in aid of the Bombay War Gifts Fund, and the Society thought of staging a Gujarati play in aid of Mrs. Sabawalla's fund. At first it was decided to stage one particular play, but it was given up. The Society then decided to stage the play named *Aflatoon*, which was written by Mr. Phirozeshah Jehangir Murzban, now deceased, the plaintiff's father-in-law. The play was rehearsed from time to time after April, 1940, generally in the plaintiff's class at Gowalia Tank Road, and it was finally staged on September 29, 1940, with a cast of a large number of persons, some of whom were ladies, and was performed before a Parsi audience. Many parts of the original play, which the Society considered were unsuitable for being performed by amateurs and before a modern audience, were cut off and dropped. About the end of August last the defendant, who came to know that the play was about to be staged, started an agitation in the columns of his paper *Kom Sevak*, not against the staging of the play, but against Parsi men and women taking part in acting plays upon the stage, whether as amateurs or professionals. His view is that the appearance of Parsi men and women together on the stage is far from desirable, and even harmful to the interests and welfare of the community, and especially of the women who take part with the men upon the stage. It appears that the Parsi community is divided over the merits of this question, which has been agitated for many years in Bombay, the "orthodox" section of the community, as it is called, being against the appearance of Parsi men and women together on the stage, and the other section called the "reformists" pulling the other way. There is no evidence before me as to which of these sections is the larger, though it is quite probable that it is the orthodox section which has the majority behind it. It was because of this controversy that the Society decided to perform the play of *Aflatoon* before a Parsi audience only, though, according to the plaintiff, there was nothing that was objectionable in the play and nothing to prevent it from being performed on the stage before a cosmopolitan audience. It was decided to stage it only before a Parsi audience, because of the agitation going on in the press. Many affidavits were made on the notice of motion for an injunction against the defendant last October. About the merits of this controversy there are various statements in the written statement; defendant's counsel was full of it, and so was the defendant. The merits of the controversy are, however, not before the Court. It is not a question on which the Court is called upon to express any opinion. The only opinion that the Court can express is that any person, whether he is a private individual or a public journalist, has a right to hold any views he pleases on the subject, and to express the same. It is immaterial whether the opinion or the comment is correct or not correct, whether it is just

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or unjust, or whether it is couched in language which may not err on the side of moderation. What is material and important is that the comment must not go beyond the limits which the law calls "fair".

What the plaintiff complains of is that the words published about her in the *Kom Sevak* of September 22 are defamatory. As pointed out in Halsbury's Laws of England, Vol. XX, Hailsham's edn., para. 493, p. 406 :—

"A statement which, being published of another in the way of his lawful trade, business, profession, calling, or office, conveys a reflection on him calculated to disparage or injure him therein, is a defamatory statement, even though it be not calculated to hold him up to hatred, contempt, or ridicule."

Section 499, Explanation 4, of the Indian Penal Code, attempts a more detailed explanation or description of what a defamatory statement is; but the principle is the same. It is not necessary for the plaintiff to prove that the words are false. If the words are defamatory, they are presumed to be false, and it is for the defendant if he seeks to justify them to prove that they are substantially true. It is not necessary for the plaintiff to prove any malice on the part of the defendant. It is only for the purpose of rebutting the defence of qualified privilege that it becomes necessary to prove express malice in the sense of improper motive on the part of the defendant.

It is in evidence that the defendant began writing about the subject in the columns of the *Kom Sevak* from about September 1, 1940. He wrote again on the 8th, and also on September 15, 1940. It was, however, in the issue of September 22 that he wrote and published the words firstly set out in paragraph 7 of the plaint. Counsel for the defendant objected to the office translations of the passages referred to in the plaint; but there are now official translations before the Court. The first passage, which has been put in as exhibit A, runs as follows :—

"In the past Mr. Adi Murzban, Mr. Rustom Murzban and Mr. Ratan B. S. N. Cooper were working as actors in the drama 'Afiatoon'. And this time they have declined to work as actors and have preserved their self-respect; for which Mr. Adi Murzban and Mr. Ratan B. S. N. Cooper deserve to be congratulated. What we regret most, is this that when Mr. Rustom Murzban who was to take part in this drama, has, according to what we have heard, stayed out, why does his wife Mitha Murzban persist (in her idea) to play her part in this drama, and spoil the future of the poor girls attending her class? Now, parents beware! Do not send your girls to classes of this type, where their future would be ruined."

The person referred to in this passage as Mitha Murzban is the plaintiff, and Mr. Rustom Murzban is her husband. There is nothing objectionable in the first part of this passage ending with the words "persist (in her idea) to play her part in this drama". What the plaintiff complains of as alleged libel are the last words, viz. that by persisting in playing her part, the plaintiff will spoil the future of the Parsi girls attending her class, and the warning to Parsi parents not to send their girls to classes of this type, meaning the type of the plaintiff's class, where their future would be ruined. In the first place, the words "her class", according to the defendant, refer only to the class which the plaintiff conducts at her place of residence, Gowalia Tank Road. According to the plaintiff, she conducts not only that class, but also the classes known as the "Udyoga Ashram". The important words are 'spoil the future of the poor Parsi girls'. A question arose as to what is the correct interpretation

of the Gujarati word for 'future'. The defendant in his explanation first said that it meant the 'fortune' of the girls, and he illustrated it by a reference to exhibit No. 1, which refers rather to their matrimonial prospects.\* Later on he corrected himself and said that the word 'future' was general and comprehensive, and would mean or include social, religious and moral future. The plaintiff alleges that it means and includes moral and spiritual future also. By spiritual future or religious future is meant the religious faith or the religion of the Parsi girls. It is this last part of the passage to which objection is taken. To say of a person in respect of her profession or calling—and the profession or calling of the plaintiff is that of an instructress in physical culture and dancing,—that she is unfit and incompetent for the purpose is, in my opinion, defamatory; but to say that the future including the social, religious and moral future of the girl would be spoiled by attending classes of the type of classes which the plaintiff conducts is to impute to the plaintiff an unfitness which is worse than attributing mere incapacity.

The second passage appears in the same issue, though not continuously with the first. It is headed "A grave reminder", the first part of which refers to an incident, which happened in the year 1939 in connection with one Mrs. Gadiwala, who was attending the "Udyoga Ashram" at Charni Road Junction. She was a married woman about twenty-seven years old. Sometime about July or August, 1939, she ceased to attend the "Udyoga Ashram", and it was afterwards discovered that she had been converted to Islam and had married a Moghul. These are facts, or, at any rate, are not disputed by the plaintiff. The writer goes on to say: "Is it necessary to give to Mrs. Mitha Murzban a grave reminder of that?" He continues as follows:—

"We would put this question only to this Bai Mitha; if so dire is the consequence in connection with a girl attending a class, have you as well as the people concerned any idea as to the extent to which the future of the Parsi girls would be spoiled by making them act as actresses on the stage?"

The last words 'act as actresses on the stage' are printed in bold type in the passage. It is really difficult to see the connection between a woman who attended the "Udyoga Ashram", and who afterwards left it and became a Mahomedan and married a Moghul, and the performance by Parsi girls upon the stage. In order to explain this connection, defendant stated in his evidence that what is meant is that if a girl like Mrs. Gadiwala came to grief merely by attending the class, viz. the "Udyoga Ashram", in the sense that she had only a restricted freedom of movement, how much worse would be the consequence for girls, appearing on the stage who, according to the defendant, would have unrestricted freedom. Why the girls appearing on the stage should, after the performance is over, have unrestricted freedom has not been explained. In fact reading the words of the passage in their plain ordinary meaning there is no reference to the restricted freedom of the one, and the unrestricted freedom of the other, either expressly or even by suggestion. The words used are that 'the future of the Parsi girls would be spoiled'. In this case also the word 'future' means and includes their social, religious and moral future. The defendant stated that he did not suggest that Mrs. Gadiwala's conversion and marriage were the results of her attending the "Udyoga Ashram"; but the suggestion is that if a girl attending a class like the plain-

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tiff's class, "Udyoga Ashram", came to such a result, the girls appearing with the plaintiff upon the stage would come to a result far worse than that of Mrs. Gadiwala. The only connection between the two, or the only common link between the two, viz. Mrs. Gadiwala's attendance of the "Udyoga Ashram" and girls appearing with the plaintiff upon the stage, is the plaintiff herself. To my mind it is rather far-fetched, if not fanciful, to suggest that the distinction sought to be drawn was between some imaginary restricted freedom and an equally imaginary unrestricted freedom. Another explanation that was given was that the attack, if any, is on the classes, and not upon any one conducting the class. This is another fanciful explanation. As pointed out by Halsbury in the same volume in paragraph 494,

"...a statement which in form is only a criticism of goods may, nevertheless, involve a reflection on the seller or maker, and thus be the foundation of an action of libel or slander properly so called,"

Similarly a statement may appear in the form of a comment upon classes that may nevertheless involve a reflection upon the fitness of the person conducting the classes, and be the foundation of an action for libel.

Both these passages suggest that the plaintiff is unfit to carry on her classes for poor Parsi girls, because by attending the classes their future would be ruined. She is therefore unfit to discharge the duties of her profession, or the duties in respect of her calling; and the imputation would have a tendency to prejudice her in the way of her profession or calling. The statements are therefore defamatory of the plaintiff and constitute a libel.

No action, however, lies against a defendant if he can prove that the words complained of are a fair and bona fide comment on a matter of public interest. The onus is upon the defendant to show that the subject commented upon is a matter of public interest, that the statements of fact relating thereto are true, and that the comment based upon the facts is a fair and bona fide comment. It is the expression of the criticism that has to be fair. It is not necessary to prove malice on the part of the defendant, though malice may sometimes be proved to show that the comment is not fair. Nor is it a defence to allege that the defendant bona fide believed that his statements were true. There is no exact definition of what a matter of public interest is. Matters of public interest are numerous, and are usually grouped under certain heads; but generally speaking, they are subjects which invite public attention, and are open to public discussion or criticism. There is also no definite standard of what a fair and bona fide comment is. In *Merivale v. Carson*<sup>1</sup> Lord Esher M. R. as far back as 1887 proposed the following test (p. 280):—

"What is the meaning of a 'fair comment'? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case."

It is further stated at page 281 that a comment may be independent, bold and even exaggerated, and that mere exaggeration, however gross the exaggeration may be, would not make the comment unfair. The question for consideration is : whether "any fair man, however prejudiced he may be, however exaggerated or obstinate his views, would have said that which this criticism has said of the work which is criticised. If it goes beyond that, then you must find for the plaintiff ; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all." The same test, in my opinion, would apply to every comment, including a defamatory imputation as to character or profession or calling, unless the imputation is a correct or reasonable inference warranted by the facts commented upon : see the remarks of Lord Justice Fletcher Moulton in *Hunt v. Star Newspaper Company, Limited*<sup>1</sup> ; the remarks of Lord Atkinson in *Hunt v. Star Newspaper Company, Limited*,<sup>2</sup> and the remarks of Lord Justice Kennedy in *Peter Walker & Son, Limited v. Hodgson*.<sup>3</sup> Newspapers are subject to the same rules as other critics, and have no special right or privilege, and in spite of the latitude allowed to them, it does not mean that they have any special right to make unfair comments, or to make imputations upon the character of a person, or imputations upon or in respect of a person's profession or calling : see *Arnold v. The King-Emperor*,<sup>4</sup> where it was pointed out by the Privy Council that the range of a journalist's criticisms or comments is as wide as, and no wider than, that of any other subject. This controversy, which gave rise to the agitation, is no doubt, in my opinion, a subject of public interest ; but it cannot be said to be a reasonable inference warranted by the facts to say that the plaintiff who was one of the performers in the play would ruin the future of the Parsi girls attending her class or classes, and was therefore unfit to carry on her profession. As the imputation is not warranted by the facts, it takes the statements out of the sphere of fair comment.

The other defence is that the words were published on a privileged occasion. No action lies for a communication made upon an occasion of qualified privilege and fairly warranted by it, unless it is proved by the plaintiff to have been made maliciously, that is, with an improper motive ; malice, it has been said, destroys the privilege. Communications are made upon occasions of qualified privilege if made (a) by a person in discharge of a public or private duty whether legal, moral or social to a person who is interested in receiving it, or (b) by a person who has an interest to be protected communicating information relevant to that interest to a person honestly believed to have a duty to protect it, or (c) by a person in matters when a common interest or a reciprocal duty or interest arises in respect of the subject-matter of the communication between the person and the person or persons to whom the communication is made. It is essential that there should be reciprocity of either a duty to communicate and an interest to receive, or an interest to communicate and a duty to receive, or a common interest or reciprocal duty to communicate and to receive the information. It is incumbent upon the defendant to prove : (a) that the words were published on a privileged occa-

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1 [1908] 2 K. B. 309, 320.

2 [1908] 2. K. B. 325, 329.

3 [1909] 1 K. B. 239, 256.

4 (1914) L. R. 41 I. A. 149, 169,  
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sion, and (b) that the communication was relevant or pertinent to the occasion. It is not enough for him to prove that he honestly believed in his duty or interest and in the corresponding duty of his readers; or that he believed honestly in the relevancy of what he said. It is necessary that the Court should be satisfied that what he communicated was something, which a reasonable person could have done.

The occasion for the communication of the words complained of is described in paragraph 7 of the written statement as follows: namely, that the statements were made in discharge of a moral or social duty and on a matter of public importance on which there was an interest common to the writer and to the persons to whom such statement was conveyed. The defendant must also show that what he communicated was relevant or pertinent to the privileged occasion. Any attack or personal imputation upon a person's calling or profession cannot be said to be relevant to, or fairly warranted by, the occasion; nor can it be said to be a mere incidental reference. In some cases the whole public or a section of the public may have an interest in being informed, as, for instance in the case of a controversy on a matter of public interest carried on in the press such as this particular controversy was. Even in such cases the communication must be relevant to the occasion, that is relevant to the discharge of the duty or the protection of the common interest. The statements made by the plaintiff are not, in my opinion, relevant or pertinent to the controversy about Parsi girls generally appearing upon the stage. It was pointed out by Lord Justice Romer in *Chapman v. Ellesmere (Lord)*<sup>1</sup> that it may be true in one sense to say that the newspapers owe a duty to their readers to publish any and every item of news that may interest them. But this is not such a duty as makes every communication in the paper relating to a matter of public interest a privileged one.

The second part of the plaintiff's case is that the defendant slandered her at a public meeting of the Parsis convened by the Parsi Federal Council in the Sir Cowasji Jehangir Hall on September 26, 1940, to protest against the appearance of Parsi girls along with men on a public stage. The words complained of by the plaintiff are set out about the end of paragraph 7 of the plaint. They are as follows:—

"The girls who are going to take part in the play 'Afiatoon' are not allowed even to go to their parents' home. The father of this girl is present here. (At this stage a Parsi gentleman named Mr. Pestonji Mehta which is a mistake for Jamsetji Mehta who is the father of the girl entered the stage and supported the facts published (mentioned) by Mr. Nusserwanji)" Mr. Nusserwanji there meaning the defendant.

Plaintiff admitted that she herself was not present at the meeting; and it was therefore incorrect for her to say in the verification clause that all that was stated in para. 7 including these words was true to her own knowledge. She, however, alleges that these words were spoken in reference to her and that is not specifically denied by the defendant in his written statement. Defendant has also not specifically denied that these were the words spoken, but has done so impliedly by setting out in his written statement what accord-



ing to him were the words he spoke. His version of what he spoke is as follows :

"I have come to learn that some of the Parsi girls are going to take part in this play (Aflatoon) against the wishes of their parents. Since the agitation in my paper against this movement one of such girls has been staying away from her parents' house for a month. As an instance I shall call the father of the girl who is sitting here and he will bear me out."

The plaintiff's counsel argued that the words quoted in paragraph 7 were substantially the words used by the defendant, or were words which are the same in effect. It was formerly essential for the plaintiff to prove the actual words pleaded ; but it has now been held that it is enough to prove the substance of the words set out in the statement of claim of the plaintiff : see the remarks of Lord Coleridge, Chief Justice, in *Harris v. Warre*.<sup>1</sup> In *Tournier v. National Provincial and Union Bank of England*<sup>2</sup> Lord Justice Atkin pointed out at page 488 that—

"No slander of any complexity could ever be proved if the ipsissima verba of the pleading had to be established."

Whatever the words used were, plaintiff has to prove as she alleges that those words meant and were understood to be meant that she had been guilty of the criminal offence of wrongfully confining the girl Mani Jamshedji Mehta, and that in confining her the plaintiff had used physical force or violence, in order to compel her to take part in the performance of the play against the wishes of her parents. There is no reference to the use of physical force or to any illegal detention in the words set out in the plaintiff. What is alleged by the plaintiff is that the defendant said that the girls who were to take part in the play of *Aflatoon* were not even allowed to go to their parents' home, and Mani Mehta was one of such girls. Mani Mehta and her parents were called, and they denied this allegation. The girl's father, Mr. Jamshetji Mehta, an old man of about seventy-five, was also present at the meeting ; and he said that he was too confused to follow what the defendant said ; but at the defendant's instance he got up on the stage and then sat down. If, however, the plaintiff contends that even these words, viz. that the girls are not allowed even to go to their parents' home, were understood to mean that she had committed a criminal offence, it is for her to prove that the words were capable of conveying, and in fact did convey, that meaning ; and the evidence must be sufficiently strong and cogent for the purpose.

Besides the girl's father who denied what the defendant had said, plaintiff called three other witnesses : Dara Kapadia, a reporter of the *Jame-Jamshed*, one Ibrahim Haji Mahomed Mistry, who calls himself a free-lance journalist and who writes to the press, and one Hirjibhai Byramji Warden, who is related to the plaintiff, being her maternal uncle. Kapadia and Warden made a joint affidavit on the Notice of Motion for Injunction, and both stated in their affidavit, as they stated here, that the defendant did say in his speech that Parsi girls were made to take part in the play against their parents' wishes. Kapadia stated that the defendant also said that one girl was wrongfully confined. Warden stated that the defendant said that girls were detained by force both

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1 (1879) 4 C. P. D. 125, 128.

2 [1924] 1 K. B. 461.

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by the plaintiff and her husband, and that the same night after the meeting was over he went up to the plaintiff to enquire about the serious charge that had been made against her. Ibrahim Mistry only stated that the defendant said that the girls had not been allowed to see their parents for a month, and Mani Mehta was one of them. He stated that he asked the plaintiff's husband over the phone whether any girl was detained in his house, and that he received a reply that it was not true. On the other hand defendant denies that he spoke about any wrongful or possible detention at all, or made any such allegation. He says he did not even refer to the plaintiff. Three witnesses were called on his behalf who were present at the meeting, two of whom actually spoke at the meeting. The man who did not speak was Framroze Banker ; but he said that he was a great admirer and friend of the defendant, and he always took whatever the defendant said as correct. He further stated that at the end of the meeting he saw Jamshedji Mehta, who spoke to him of his own accord, and told him that his daughter Mani was about to take part in the play against his and his wife's, i.e. her mother's wishes. When Mr. Mehta was confronted in the box with Banker, he said that he had not seen or met Banker at all that evening. I entirely agree with counsel's comment upon Mr. Banker that he was a partisan witness of the defendant, and I place no reliance upon his evidence. There are, however, two independent witnesses, who belong, no doubt, to what is called the "orthodox" section, and are friends of the defendant, but who cannot be said to be partisan witnesses. One of them was Mr. Cawasha Manekshaw Talyarkhan, who was until 1937 a practising advocate of this Court. He stated what according to him happened at the meeting, when defendant called the old man on the stage, and the old man nodded and raised up his hands as if to approve of what the defendant had stated. This is slightly a modification of the words used in his affidavit that the old man "corroborated" what the defendant said. All the witnesses were, however, agreed that no particular reference was made to the plaintiff. Mr. Talyarkhan stated that the words 'shame, shame' that came from the audience were directed against one Pestonji Kapadia. Mr. Banker said that the words 'shame, shame' were directed against the organisers of the performance, and amongst its organisers plaintiff would be included ; but he did not say that the plaintiff was referred to by name. Mr. Dadachanji, however, stated in his evidence that nobody ever said 'shame, shame' at all at the meeting. One thing is significant namely that Mr. Talyarkhan, who was once a practising lawyer, should have referred in his speech to "habeas corpus proceedings." Mr. Warden was right when he too said that habeas corpus proceedings were referred to, though Warden went further and said that they were referred to in connection with Mani Mehta and her illegal detention by the plaintiff. Mr. Talyarkhan in his evidence however stated that he did refer to habeas corpus proceedings ; but he said he put the case in the alternative to the audience. He said that he knew nothing as to what had happened ; but if the girls, including Mani Mehta, were absent from their parents voluntarily, nothing could be done ; but if they were kept back by force, then a writ of habeas corpus can issue. I doubt very much whether such an elaborate explanation, which a lawyer gives to his client, was given in that heated atmosphere

of the meeting to an excited audience. At the same time he stated that he did feel a doubt as to what the defendant said, and the defendant corroborated what Mr. Talyarkhan said. It is very strange for Mr. Dadachanji, who is also a journalist and social worker, to say that he did not understand what habeas corpus meant, and he thought even Mr. Talyarkhan did not understand what it meant. This is again another exaggeration. It seems to me that it is quite probable that the speakers having come to know that the plaintiff was an organiser, for the matter of that the main organiser of the performance of this play, wanted to drive home their remarks against her; but the evidence is conflicting and not clear as to whether she was referred to specifically and in connection with any illegal detention by her. The onus is upon the plaintiff to show that the words either contained a direct charge of having committed a criminal offence or that they clearly indicated and suggested the commission of such an offence. I have considered all the evidence together on both sides as carefully as I can, and I have come to the conclusion that plaintiff has not discharged that onus. An imputation of a criminal offence in order to be actionable *per se*, which is a drastic remedy, must be a distinct charge and must not be a mere statement of suspicion: see *Simmons v. Mitchell*.<sup>1</sup> It may be made in so many words, or it may be made in words from which the charge could be inferred; but the inference must be clear and unequivocal. In view of my opinion I do not think it is necessary for me to go into the question whether the words were spoken on a privileged occasion. If the words were defamatory, and did impute the commission of a criminal offence, an imputation of having committed a criminal offence would not be relevant or pertinent to that privileged occasion. However, that is a question which need not be gone into at length, because, in my opinion, the plaintiff has not proved the slander.

The only question is: what is the relief which the plaintiff is entitled to? She claims Rs. 5,000 by way of damages. I have already held that to say of a person, and especially of a woman, that as an instructress she is unfit to carry on her work or her profession, and that by carrying it on she would ruin the "future" of Parsi girls in the sense in which that word was used, is grossly defamatory; and I order the defendant to pay the plaintiff a sum of Rs. 1,000 as and by way of damages. The plaintiff also claims an injunction against the defendant; but there is no evidence before me of any threat to repeat the libel complained of. Even in para. 8 of the plaint the only allegation was that having regard to the campaign which had been carried on, the defendant would continue to further publish the defamatory matters affecting her, unless he was restrained. There is no allegation that he had threatened to do so, and there is no evidence either. I cannot, therefore, order an injunction to issue against the defendant.

I have heard counsel on the question of costs. The usual rule is that the plaintiff must get the costs of those issues on which the plaintiff has succeeded, and the defendant must get the costs of those issues on which the plaintiff has lost. No doubt, there was considerable evidence led on the question of slander; but the more important part of the defamation was the libel, which

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O. C. J. question was argued at considerable length. Taking all the circumstances, including the defendant's conduct in relation to this case, into consideration, I order the defendant to pay three quarters of the plaintiff's taxed costs in the suit. Costs to be taxed on the basis of two counsel being allowed.  
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 Decree for the plaintiff for Rs. 1,000, three-fourths taxed costs of the suit and interest on judgment at six per cent. per annum till payment.  
*Suit decreed.*

B. J. Wadia J. Attorneys for plaintiff : *Lam & Co.*  
 Attorneys for defendant : *Asrut E. Gandhi & Co.*

### APPEAL FROM ORIGINAL CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

1941  
 March 12.

CHANDRAKANT DEVJI

v.

NAROTTAMDAS AMARCHAND.\*

*Presidency-towns Insolvency Act (III of 1909), Sec. 68(1)(d)—“Suit relating to property of the insolvent”—Meaning of—Money-decree passed against appellant—Appellant becoming insolvent subsequently—Whether Official Assignee could continue appeal—Civil Procedure Code (Act V of 1908), O. XXII, r. 8—“Might maintain,” meaning of—Appeal whether abates where Official Assignee has no power to maintain it—Poverty of appellant whether ground for passing order for further security.*

A suit “relating to the property of the insolvent”, within the meaning of s. 68 (1) (d) of the Presidency-towns Insolvency Act, 1909, means a suit which, if successful, will increase the assets distributable amongst the creditors or the defence of which may prevent the assets being diminished. A right to institute an appeal, which merely relates to a money claim against an insolvent, is not a legal proceeding relating to the property of the insolvent and does not fall within the powers given by s. 68 to the Official Assignee.

A Court of Appeal will not direct an appellant to give further security for the costs of the appeal merely on the ground of his poverty.

The appellant was declared insolvent after he had filed an appeal against a money decree passed against him. The respondent applied for an order dismissing the appeal under O. XXII, r. 8, Civil Procedure Code, 1908, contending that by reason of the insolvency of the appellant the appeal abated :—

*Held*, that the words “might maintain” in O. XXII, r. 8, Civil Procedure Code, meant that the Official Assignee had the power or was entitled to maintain the appeal ; and that as in the present case the Official Assignee could not maintain such an appeal, the appeal did not abate.

*Mul Chand-Ganga Bishan v. R. M. Downie and Co., Ltd.*,<sup>1</sup> distinguished.

\* O. C. J. Appeal No. 35 of 1940 :  
 Suit No. 285 of 1940.

1 (1928) I. L. R. 10 Lah. 208.

NOTICE of motion.

The facts appear in the judgment.

*N. P. Engineer*, with *M. M. Desai*, for the respondents (in support).

*C. K. Daphtary*, for the appellant (to show cause).

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BEAUMONT C. J. This is a motion in appeal No. 35 of 1940 asking, in the first instance, that the appeal may be dismissed under O. XXII, r. 8, Civil Procedure Code, 1908, and, in the alternative, that the appellant may be ordered to give further security for the costs of the appeal. The appeal is against a money decree passed against the appellant. After the passing of the decree, the decree-holders got the debtor adjudicated insolvent. There is, we are told, an appeal against the order of adjudication, but at the moment the order of adjudication stands.

The contention of the respondents on this motion is that the right to appeal against the money decree is vested in the Official Assignee, and that the appeal has abated under O. XXII, r. 8, and ought to be dismissed under sub-r. (2). Mr. Engineer for the respondents has relied on a decision of this Court in *Rustomji v. Byramji*,<sup>1</sup> but, in my opinion, that decision is not in point. The Court there was considering whether a right to sue to set aside a money decree on the ground of fraud vested in the Official Assignee, and the Court held that it did so vest. But the question here is whether a right to appeal against a money decree is affected by the insolvency of the appellant debtor, and that question must be determined by a reference to the Civil Procedure Code. At the moment when this appeal was filed, it was a well constituted appeal. That is not in dispute. The question is whether it ceased to be a well constituted appeal by reason of the insolvency of the appellant. That question turns on O. XXII, r. 8, Civil Procedure Code, which provides in sub-r. (1) that the insolvency of a plaintiff in any suit, which the Assignee or the Receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such Assignee or Receiver declines to continue the suit or to give security for the costs thereof as therein mentioned. I agree with the view expressed by the Lahore High Court in *Mul Chand-Ganga Bishen v. R. M. Downie and Co., Ltd.*<sup>2</sup> that the plain implication of that section is that the suit does abate, if the Assignee declines to continue the suit or to give the security, although that is not expressed in terms. Sub-rule (2) enables the Court to dismiss the suit where it has abated under sub-r. (1). Rule 8 is made applicable to appeals by r. 11.

Now, the only question to my mind on this motion is whether it can be said that the Official Assignee might maintain this appeal for the benefit of the insolvent's creditors. The case in Lahore, to which I have referred, was also a case of a money decree, but the question whether the appeal might be maintained by the Official Assignee was not discussed, so far as the report shows. In my judgment, the words "might maintain" mean has the power, or is entitled, to maintain, and one has to look at the Presidency-towns Insolvency Act in order to see what powers the Official Assignee has in the matter. By s. 68(1)(d) of the Act the Official Assignee has power to institute, defend or continue any suit or legal proceeding relating to the property

O. C. J. of the insolvent. A suit relating to the property of the insolvent, in my opinion, means a suit which, if successful, will increase the assets distributable amongst the creditors, or the defence of which may prevent the assets being diminished. A right to institute an appeal, which merely relates to a money claim against an insolvent, is not, in my view, a legal proceeding relating to the property of the insolvent and does not fall within the powers given by s. 68 to the Official Assignee. I think, therefore, that the Official Assignee could not maintain the appeal for the benefit of the insolvent's creditors, and consequently the appeal has not abated under O. XXII, r. 8. The Official Assignee is not bound by the judgment appealed from, and can in insolvency decline to admit the debt.

The question then arises whether we ought to direct the appellant to give further security for costs. He has made the ordinary deposit of Rs. 500 under the High Court Rules. It is said that he has got no money, that this suit was fought at considerable length in the Court below, and that he can produce money if he wants to do so, but has not produced anything towards paying the amount of this decree. However, the general principle on which the Courts act is not to order further security to be given merely on the ground that the appellant is poor. So far as I can judge from the statement made by counsel, the appeal raises a question of law, which is arguable, and in the circumstances I do not think that we ought to order the appellant to give any further security for costs.

The motion, therefore, fails and must be dismissed with costs.

MACKLIN J. I agree.

*Motion dismissed.*

Attorneys for appellant : *Thakoredas & Co.*

Attorneys for appellant : *Ambubhai & Diwanji.*

#### APPELLATE CIVIL.

*Before Mr. Justice Divatia.*

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JAIJIBAI PESTONJI MODI

*v.*

January 28.

BHIKHIBAI CHANDULAL CHHOTALAL.\*

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Suit—Withdrawal—Permission to file fresh suit—Such permission terminates the suit—Procedure when permission asked for.*

Where the plaintiff, under O. XXIII, r. 1, of the Civil Procedure Code, 1908, simply wishes to withdraw from a suit, he can do so without asking for any permission from the Court. Where, however, he wishes to withdraw it with liberty to institute a fresh suit in respect of the same subject-matter,

\* Civil Revision Application No. 374 of 1940, against an order passed by M. I. Patel, Joint First Class Sub-

ordinate Judge at Nadiad, in Suit No. 15 of 1938.

he should ask for permission from the Court, which could be given on such terms as it thinks fit. The permission relates not to the withdrawal from the suit but to the filing of another suit.

When once an order is made permitting the withdrawal of a suit on certain conditions, it is not open to the plaintiff to ask the Court to modify or annul those conditions, because the suit has already ended when the order is made.

In applying for withdrawal of a suit, the plaintiff should request the Court to acquaint him with the terms which it wishes to impose, before the final order is made. It is also open to the Court without any such request to indicate such terms to the plaintiff, and after hearing the plaintiff it may modify them or even allow him to withdraw his application for withdrawal and proceed with the suit. All this, however, must be done before the order of withdrawal is formally made.

*Shidramappa v. Mallappa*,<sup>1</sup> followed.

*Rachhpal Singh v. Sheo Ratan Singh*,<sup>2</sup> explained.

*Jaimala Kumwar v. Collector of Saharanpur*<sup>3</sup> and *Seethai Achi v. Meyyappa Chetti*,<sup>4</sup> referred to.

APPLICATION to withdraw from a suit with permission to file a fresh suit for the same subject-matter.

The applicant Jaijibai and one Hirabai filed a suit in the Court of the Joint First Class Subordinate Judge at Nadiad for a declaration that the inam village of Ralej having been granted to their ancestor for maintenance and prosperity of the family was not liable to be attached and sold in execution of a decree obtained by the defendant Bhikhibai. The other creditors of the plaintiffs were not made parties to the suit.

On February 15, 1940, Jaijibai (Hirabai having died in the meantime) applied to the Court for permission to withdraw the suit with liberty to file a fresh suit. The Court passed on the same day the following order :—

“I am satisfied that in the ends of justice the plaintiff may be allowed permission to withdraw the suit with liberty to institute a fresh suit in respect of the same subject matter on condition that the plaintiff pays in cash full costs of the defendant in this suit before institution of a fresh suit.”

On February 16, 1940, the plaintiff applied to the Court that the condition imposed upon her was very onerous and that it should be modified. This application was dismissed by the Court on April 6, 1940.

On April 6, 1940, the plaintiff again applied to the Court stating that she had not withdrawn her suit in view of the harsh and inequitable condition imposed upon her and that the Court should take up the hearing of the suit at the stage where it was left. This application too was dismissed by the Court on April 13, 1940, for the following reasons :—

“The learned pleader for the plaintiff on the authority of *Shidramappa v. Mallappa* (33 Bom. L. R. 278) wants the relief claimed in this application. That very authority is against him. In fact at p. 282 it is mentioned that when once the suit has been withdrawn it is no longer pending and the permission given by the Court relates to the bringing of a fresh suit. At p. 288 it is mentioned that the withdrawal of the suit does not require permission of the Court. It must be taken that the suit is withdrawn when the order is passed, and the permission granted refers to the filing of the subsequent suit on certain conditions .... The Court passed order both

A. C. J.,  
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1 (1930) 33 Bom. L. R. 278.

2 [1929] A. I. R. All. 692,

3 (1933) I. L. R. 55 All. 825.

4 (1934) I. L. R. 57 Mad. 892,

A. C. J. on the application for leave to withdraw this suit and the plaint on 15-2-1940  
 1941 and from that day the suit has come to an end, so far as this Court is concerned.  
 — The Court has signed this decree on 21-2-1940. It bears also the signature of the  
 JAJIBAI defendant's pleader and the learned pleader of the plaintiff has not yet signed it.”  
 MODI The plaintiff applied to the High Court in revision.  
 v.  
 BHIKHIBAI A. G. Desai, with C. K. Shah, for the applicant.  
 CHANDULAL P. B. Shingne, with Wadia, Ghandy & Co., for the opponent.

DIVATIA J. This revision application is filed by the plaintiff in a suit for a declaration that certain property was not liable to be sold in execution of a decree obtained by the defendant, who is the opponent here, against one Bapuji.

After issues were framed the plaintiffs applied to the Court for permission to withdraw the suit with liberty on the ground that the property was in possession of the receivers in another suit filed by the other creditors of Bapuji, that in their absence this suit might fail for want of necessary parties and that a fresh suit was, therefore, necessary impleading all proper parties. The application was presented on February 15, 1940, and on the same day the learned Judge passed an order to the effect that he was satisfied that in the ends of justice, the plaintiffs may be allowed permission to withdraw the suit with liberty to institute a fresh suit in respect of the subject-matter on condition that the plaintiffs pay in cash full costs of the defendant in this suit before the institution of a fresh suit.

On the next day, i.e., the 16th, the plaintiffs applied to the Court that the condition of paying the full costs imposed by the Court was not legal or in any case equitable, as even if the suit failed for want of necessary parties, i.e., on a preliminary ground, without being decided on merits, the costs payable to the other side would be only one-fourth of the full costs. The plaintiffs further stated that the condition being very heavy, they had not withdrawn the suit and that they would do so after it was revised. After hearing the other side, the Court dismissed that application on April 6. It appears that in the meanwhile, on February 21, the learned Judge had signed the bill of costs which was drawn up in pursuance of the order of the 15th. The defendant's pleader countersigned it, but the plaintiffs' pleader did not.

After the dismissal of their application on April 6, the plaintiffs on the same day applied again that the dismissal of their application was wrong, they had not withdrawn the suit which was still pending and that the Court should proceed with its further hearing. The Court dismissed that application also on the ground that the suit had been already withdrawn and had, therefore, come to an end on February 15 when the plaintiffs' first application for leave to withdraw was granted and that the bill of costs was also signed on February 21. The learned Judge relied on the decision in *Shidramappa v. Mallappa*,<sup>1</sup> for holding that once the suit had been withdrawn, it was no longer pending, that it must be taken to have been withdrawn when the order for withdrawal was passed and that the permission granted referred only to the filing of a fresh suit on certain condition. It is this order which is challenged by the plaintiffs in this revision application.



Order XXIII, r. 1, of the Civil Procedure Code, provides :—

"Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds. ...

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit ... with liberty to institute a fresh suit in respect of the subject-matter of such suit ..."

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It is clear that if the plaintiff simply wishes to withdraw from a suit, he can do so without asking for any permission from the Court. But if he wishes to withdraw it with liberty to institute a fresh suit in respect of the same subject-matter, he has to ask for permission from the Court, and it could be given on such terms as it thinks fit. It is further clear that the permission relates not to the withdrawal from the suit but to the filing of another suit.

There is a difference of opinion among the High Courts as to whether, after the Court grants permission to withdraw with liberty on certain conditions, the suit must be regarded as pending till the second suit is brought. So far as our High Court is concerned, the view taken in *Shidramappa v. Mallappa* is that when once a suit has been withdrawn, it is no longer pending, and the permission given by the Court relates to the bringing of the fresh suit. A suit should be regarded as having been withdrawn when an order is made by the Court on the application to withdraw : see *Jaimala Kunwar v. Collector of Saharanpur*<sup>1</sup> and *Seethai Achi v. Meyyappa Chetti*.<sup>2</sup> This order, therefore, terminates the suit, although it is not a decree within the meaning of the Civil Procedure Code as held in *Patloji v. Ganu*<sup>3</sup> and *Kulandavelu Nachier v. Ramaswami Pandia Thalan*.<sup>4</sup> It, therefore, follows that after the order is made permitting the withdrawal of the suit on certain conditions, it is not open to the plaintiff to ask the Court to modify or annul those conditions, because the suit has already ended when the order is made.

It is, however, contended on behalf of the petitioner that the Allahabad High Court has held in *Rachhpal Singh v. Sheo Ratan Singh*<sup>5</sup> that a suit is withdrawn after the plaintiff has accepted the terms imposed by the Court, and that it is, therefore, open to the plaintiff to ask for a modification of the terms or even to withdraw the application for the withdrawal of the suit even after the order of withdrawal is made by the Court. It is further contended that this decision has been quoted with approval in the case of *Shidramappa v. Mallappa*. It is true that this decision is referred to both by Patkar J. as well as Baker J. in *Shidramappa's* case. It is observed by Patkar J. as follows (p. 284) :—

"The question has been considered in the case of *Rachhpal Singh v. Sheo Ratan Singh*,<sup>6</sup> in which the view of the Calcutta High Court in *Shital Prosad's* case<sup>7</sup> was not accepted, and it was held that once the plaintiff has accepted the terms imposed by the Court, the case is declared to be withdrawn and is no longer pending, and the plaintiff must comply with those terms strictly or take the consequences of being barred from filing a second suit."

1 (1933) I. L. R. 55 All. 825.

2 (1934) I. L. R. 57 Mad. 892.

3 (1890) I. L. R. 15 Bom. 370.

4 (1927) I. L. R. 51 Mad. 664.

5 [1929] A. I. R. All. 692.

6 [1929] A. I. R. All. 692.

7 (1914) 19 C. L. J. 529.

A. C. J. Baker J. observes as follows with regard to that decision (p. 288) :—

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*Divatia J.*

“That judgment refers to all the authorities, and his conclusion, with which I agree, is that once the plaintiff has accepted the terms imposed by the Court the case is declared to be withdrawn and is no longer pending, and the plaintiff must comply with those terms strictly or take the consequences by being barred from filing a second suit.”

These passages do not, in my opinion, indicate that our Court took the view that even after the order permitting the withdrawal of the suit on certain conditions was passed, it was open to the plaintiff to apply to the Court to modify the conditions or to proceed with the suit on the ground that he did not wish to accept the conditions imposed. On the contrary this view would be inconsistent with the decision in *Shidramappa's* case that the withdrawal takes place and the suit ceases to be pending when the order for its withdrawal is made. In fact, another passage in the judgment of the Allahabad High Court in *Rachhpal Singh v. Sheo Ratan Singh* is to the effect that the Court will intimate to the plaintiff whether it is willing at all to give permission to file a fresh suit and if so on what, if any, terms; if the plaintiff accepts those terms, the order of withdrawal with those terms will be passed and the suit will cease to be a pending suit. It would thus appear that even according to that decision the non-acceptance of the terms by the plaintiff should take place before and not after the order of withdrawal is passed. In my opinion, therefore, once the order of permission to withdraw is made and the suit has ceased to exist, it is not open to the plaintiff to ask the Court to revive the suit on the ground of non-acceptance of the terms. No doubt cases may occur where it would be a hardship on the plaintiff if the Court imposes such terms for withdrawal as would be very difficult to fulfil, and the plaintiff might prefer to proceed with his suit in spite of its defect rather than to comply with the terms which he feels very hard. To obviate this result the plaintiff, while applying for withdrawal, might request the Court to acquaint him with the terms which it wishes to impose, before the final order is made. It is also open to the Court without any such request to indicate such terms to the plaintiff, and after hearing the plaintiff it may modify them or even allow him to withdraw his application for withdrawal and proceed with the suit. But all this must be done before the order of withdrawal is formally made.

The order of the lower Court is, therefore, correct, and the rule is discharged with costs.

*Rule discharged.*

Before Mr. Justice Divatia.

JINA MAGAN PAKHALI

v.

BAI JETHI.\*

1941

February 3.

*Hindu law—Custom—Divorce whether recognised among Pakhali caste of Ahmedabad—Consent of party against whom divorce sought—Consent given in presence of caste panch—Whether such divorce permissible under Hindu law.*

The custom of granting divorce exists among Hindus of the Pakhali caste of Ahmedabad, and a divorce obtained according to it would not be contrary to Hindu law if the party against whom the divorce is sought has given his or her consent to the divorce in the presence of the caste panch.

*Keshav Hargovan v. Bai Gandi*,<sup>1</sup> distinguished.

*Rahi v. Govind*,<sup>2</sup> *Reg. v. Sambhu Raghu*,<sup>3</sup> *Emperor v. Bai Ganga*,<sup>4</sup> *Sankaralingam Chetti v. Subban Chetti*<sup>5</sup> and *Gopi Krishna Kasaudhan v. Musammat Jaggo*,<sup>6</sup> referred to.

SUIT for restitution of conjugal rights.

One Jina Magan (plaintiff) and Bai Jethi (defendant) who belonged to the Pakhali caste of Ahmedabad were married when they were children. On August 17, 1935, there was a meeting of the caste panch when a divorce was granted with the consent of the plaintiff and the defendant and two mutual documents were executed by the brothers of the plaintiff and the father of the defendant as the parties were considered to be minors.

On December 23, 1935, the plaintiff filed the present suit against the defendant for restitution of conjugal rights. The defendant contended that she was divorced by the plaintiff on August 17, 1935, according to the custom of the caste and therefore the plaintiff was not entitled to claim his marital rights. The trial Judge decreed the plaintiff's suit observing as follows :—

"The custom of divorce alleged by the defendant is that the husband and wife by mutual consent before a caste meeting divorce each other on the payment of Rs. 155 by the wife's father. According to *Shankerangham Chetti v. Subhan Chetti*, 17 Mad. 479, 'There is nothing immoral in a caste custom by which divorce and remarriage are permissible by mutual agreement.'

Hence if there is mutual consent and the above custom is proved there is nothing wrong in recognizing it. That the consent must be mutual is made clear in *Keshav Hargovan v. Bai Gandi*, 17 Bom. L. R. 584 where it is held that 'The caste custom which authorizes a minor wife to divorce her husband against his will and with or without any assignable reason on payment of a sum of money fined by the caste from time to time must be regarded as immoral or opposed to public policy within the meaning of s. 322 of the Indian Contract Act.' It may be noted that this case reported (*sic*) to the same caste as in our case.

\* Second Appeal No. 695 of 1939, against the decision of I. C. Munsif, Assistant Judge at Ahmedabad, in Appeal No. 335 of 1937, reversing the decree passed by J. D. Kapadia, Assistant Judge at Ahmedabad, in Civil Suit No. 25 of 1937.

1 (1915) I. L. R. 39 Bom. 538,

s. c. 17 Bom. L. R. 584.

2 (1875) I. L. R. 1 Bom. 97.

3 (1876) I. L. R. 1 Bom. 347.

4 (1916) 19 Bom. L. R. 56.

5 (1894) I. L. R. 17 Mad. 479.

6 (1936) L. R. 63 I. A. 295,

s.c. 38 Bom. L. R. 751.

A. C. J. Thus there can be no divorce in our case without the consent of the husband. If  
 1941 the consent is not proved the divorce even if we accept the custom becomes legally  
 — void. •Even if we fully believe the defendant's story, what it comes to in our case  
 JINA MAGAN is that as the parties were minors the divorce was by the consent of the guardians of  
 v. the minors who signed the divorce deeds (exhibits 31 and 32). The guardians of  
 BAI JBETHI the husband were his brothers and the guardian of the wife was her father.

— Can such a custom be legally recognized? Can two married minors be divorced at the sweet will of their guardians without any assignable reason by merely the payment of a certain amount? I am not clear whether such a custom would be recognizable under the Hindu Law and whether such a custom is not opposed to public policy. Fortunately in our case it is not necessary to decide that issue.

According to Jina Magan (the husband) he never consented to the divorce, nor had he authorized his brothers to grant any divorce. Besides he was a major at the time of the divorce and his brothers had no business to consent for him."

On appeal the Assistant Judge held that the defendant had been validly divorced by the plaintiff according to the custom of the caste and that therefore the plaintiff was not entitled to the relief prayed for. He observed as follows in his judgment :—

"But the learned pleader for the respondent laid great stress on the ruling in *Keshav v. Bai Gandi* (17 Bom. L. R. 584) and emphasised that it was a ruling of the High Court with respect to this very caste. A glance at the ruling however will show that it is not applicable to the facts of this case. That was a case in which the caste gave *fargat* to the wife and there was no consent of the husband. On the contrary, in this case the husband's consent has been established by exhibit 49 who is the patel of the caste and whose evidence deserves weight ... The custom of giving divorces by the guardians with or without the consent of the minor husband and wife may appear immoral in civilised society but in the caste of Pakhalis where infants are married by their parents such a custom cannot at all be looked upon as immoral and so long as the Hindu law recognises the force of the custom, there is no reason why the Court should not enforce it in proper cases."

The plaintiff appealed to the High Court.

*Purshottam Tricumdas* and *C. M. Trivedi*, with *C. S. Trivedi* for *Ramnath Shivalal*, for the appellant.

*I. I. Chundrigar*, with *K. T. Pathak*, for the respondent.

DIVATIA J. This appeal arises in a suit by the plaintiff-appellant against his wife for restitution of conjugal rights. The only question in the appeal is whether the plea of the defendant that she has already been divorced from the plaintiff has been established. The lower appellate Court has held, differing from the trial Court, that the defendant had been validly divorced by the plaintiff according to the custom of the caste and that the latter was not, therefore, entitled to the relief prayed for.

The finding of the lower appellate Court on the evidence is that both the parties belonging to the Pakhali caste of Ahmedabad were married to each other when they were children, that on August 17, 1935, there was a meeting of the caste panch where a divorce was granted with the consent of both the parties and two mutual documents were executed by the brothers of the plaintiff and the father of the defendant as the parties were considered to be minors. On the question of minority there is some confusion in the judgment of the lower Court where at one place they are described as minors and at another place the husband is described as a major. It appears from the certificates of birth produced in evidence that the husband as well as the wife

had finished eighteen years of age when the divorce was granted. In the eye of law, therefore, they must be treated as majors. The defendant had, however, pleaded in the written-statement that according to the custom of the caste if either the husband or the wife had not attained the age of twenty-one, a petition was made to the caste on their behalf by their guardians and that the guardians can ask for or give a divorce on behalf of the minors. That point, however, is not material in view of the fact that on the finding of the lower Court the husband, who was above eighteen years of age and capable of giving consent, was present at the meeting and did give his consent asked for by the defendant's father on her behalf. The evidence of the headman of the caste, which has been believed by the lower Court, shows that the husband duly gave his consent, but he said that the writing would be signed by his elder brothers who were present there. It is true that there is no specific finding as to whether the wife gave her consent, but there would be no question of that in view of the fact that the defendant was also present in the caste meeting and her father himself wanted the divorce for his daughter on account of desertion as well as on the ground of the marriage being ill-matched. The learned Judge, therefore, on this evidence as well as on the several instances of custom relied upon on behalf of the defendant, held that the custom had been proved and that the wife having been validly divorced from the husband, the plaintiff was not entitled to restitution. On behalf of the plaintiff much reliance was placed in the lower Court on the decision of this Court in *Keshav Hargovan v. Bai Gandi*.<sup>1</sup> That was a case of parties of the same caste in the same town. It was held there that a custom stated to exist among Hindus of the Pakhali caste by which the marriage tie can be dissolved by either husband or wife against the wish of the divorced party, the sole condition attached being the payment of a sum of money fixed by the caste, cannot be recognised by the Court as it was immoral or opposed to public policy as well as repugnant to Hindu law. The previous case law on this point was reviewed, and the ground of the decision is that the caste cannot give a divorce without the consent of the party which is going to be divorced. Undoubtedly that is a correct principle. The caste has no jurisdiction to force a divorce upon an unwilling party. But the case would be otherwise where the party against whom divorce is sought according to custom gives his or her consent and the consent is given in the presence of the caste panch. All the previous cases discussed in *Keshav Hargovan v. Bai Gandi*, and relied upon here also were either civil or criminal cases in which the wife remarried without a valid divorce in the sense that it was not granted with the consent of the husband. But it seems to me that in those castes where the custom of divorce exists and where the consent of the spouse, who is to be divorced, has been proved, it would be permissible for the other spouse, if she is the wife, to remarry, and such custom of divorce cannot, in my opinion, be regarded as contrary to Hindu law.

Mr. Purshottam on behalf of the appellant contends that the institution of divorce itself is opposed to the spirit of Hindu law, and that there is no decision of any Court in India which holds a custom of divorce as valid. I think that

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would be going too far. As observed in Tagore Law Lectures, 1908, on Customs and Customary Law in British India, "divorce is not contemplated by the Hindu law but it is not repugnant to its principles, and if there be a well established custom in its support, it may override the general provisions of that law." Sir William Strange in his treatise on Hindu law also says that in the lowest classes divorce is attainable between a husband and wife provided it is allowed by the custom of the caste. There have been many cases in our Courts arising out of divorce in the lower castes. In all these cases even where it is held that the divorce had not been properly granted, it has been taken for granted that the custom of divorce can validly exist in a particular community, especially if it is a *shudra* community, but that divorce could not be forced by the caste against the unwilling person. In *Rahi v. Govind*<sup>1</sup> it was held that a *shudra* woman, who was married to another person by *pat* marriage, without having received a *chhor chiti* (i.e. release) from her first husband, could not validly remarry another person because there was no valid divorce. At page 114 of the judgment there is a quotation from Steele's Law and Customs of Hindu Castes to the effect that "all the lower castes admit the second marriage of wives in particular instances, and of widows, the ceremonies at which differ in many respects from those at a first marriage." There is also a reference therein to instances in which it was allowed, in the cases of women whose husbands were living; but in such cases the proper course would appear to be for the first husband to give the wife a *chhor chithi*, or a writing of divorcement, and generally the concurrence of the caste was required, but not invariably. On the particular facts of that case, it was held that the consent of the husband had not been obtained, and that, therefore, the divorce was invalid, but it was observed that in the lower castes especially the custom of divorce by giving a *chhor chithi* was in existence. Similarly, the decision in *Reg. v. Sambhu Raghu*<sup>2</sup> also proceeds on the ground that the consent of the husband had not been obtained, and it was observed:—"The Court does not recognize the authority of the caste to declare a marriage void, or to give permission to a woman to re-marry." The decision in *Emperor v. Bai Ganga*<sup>3</sup> also proceeds on the same ground. There the husband was absent in South Africa and it was held that the caste had no authority to grant divorce without his consent. On the other hand, it has been held in *Sankaralingam Chetti v. Subban Chetti*<sup>4</sup> that there is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage. I may state that there is a recent decision of the Privy Council in *Gopi Krishna Kasaudhan v. Musammat Jaggo*,<sup>5</sup> in which their Lordships confirmed the finding of the trial Court to the effect that in the community of the parties, *who were vaishyas*, it was proved that abandonment or desertion of the wife by her husband dissolves the marriage tie, and sets her free to contract another marriage. It is true that it was not contended there that the custom, especially in the regenerate classes, was against Hindu law. Nevertheless, it is remarkable that such a plea had not been taken if that custom was supposed to be

1 (1875) I. L. R. 1 Bom. 97.

2 (1876) I. L. R. 1 Bom. 347.

3 (1916) 19 Bom. L. R. 56.

4 (1894) I. L. R. 17 Mad. 479.

5 (1936) L. R. 63 I. A. 295,  
s. c. 38 Bom. L. R. 751.

against the spirit of Hindu law.

In my opinion, the lower Court has rightly distinguished the decision in *Keshav Hargovan v. Bai Gandi*, on the ground that there the consent of the husband was not taken by the caste and here the consent has been proved. It would have been another matter if it had been proved that the caste procured the husband's consent by pressure or coercion, but there is no evidence to show that, and it seems to have been a free and voluntary consent.

It is next argued that the lower Court was wrong in holding the custom proved in this particular community. It is not clear on the evidence as to whether the persons belonging to the Pakhali caste are *shudras* or *kshatriyas*. Some have described themselves as Rajput Pakhalis. In Borrodaile's Gujarat Caste Rules, Vol. II, there appears to be a statement to the effect that in this Pakhali caste there was no system of *natra*, i.e. re-marriage, during the husband's life-time, and that it is not the practice for a wife to dissolve the marriage tie during the husband's lifetime. In the book on Tribes and Castes of Bombay by R. E. Enthoven, Vol. I, there is a reference to the Pakhali caste. It is there observed as follows with regard to this community (p. 180):—

"A husband can divorce a wife on the ground of her misconduct. A wife can divorce a husband if he ill-treats her. A divorced woman has to pay a fine of from Rs. 100 to 200 to the caste-people in order to remain in the caste."

In the present case, the learned Judge has held, relying upon the instances adduced by the defendant, that the custom of granting divorce in this community does exist, and as the consent of the husband has been given, it would not be against the spirit of Hindu law.

In my opinion, therefore, the lower Court was right in holding that in the present case the custom of divorce has been proved, that the consent of the husband has also been proved, and that therefore the divorce being legal and valid, the plaintiff is not entitled to the relief of restitution of conjugal rights.

The decree of the lower appellate Court is, therefore, confirmed and the appeal is dismissed with costs.

*Appeal dismissed.*

#### APPEAL FROM ORIGINAL CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice B. J. Wadia.*

P. D. SHAMDASANI

*v.*

THE CENTRAL BANK OF INDIA, LIMITED.\*

1941

March 18.

*Costs—Taxation—Rules of the High Court of Bombay, 1936, rr. 563 and 567, and items 14, 40 and 41 in the Table of Fees to be taken by Attorneys—Whether fees for instructions for brief on chamber summons adjourned into Court are allowable—"Matter", meaning of, in r. 563—"Final trial," meaning of, in item 14—Discretion of Taxing Master as to quantum of costs when interfered with by Court—Length of time occupied in hearing matter—Whether it can be taken into*

\* O. C. J. Appeal No. 19 of 1940 : Suit No. 564 of 1925.

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*account in assessing fee for instructions for brief—Mode of reckoning fees for hours of attendance—Whether mid-day adjournment to be reckoned as attendance in Court—Refreshers in chamber summons adjourned into Court—Discretion of Taxing Master to allow additional brief fee—Taxing Master not asked to increase brief fee—Whether Court has power to do so.*

In the Rules of the High Court of Bombay, 1936, item 14 of the "Table of Fees to be taken by the Attorneys", which relates to "instructions for brief", is not confined either to suits or to matters in Court. The wording of the item does not draw a distinction between chamber matters and matters heard in Court. The essential thing is that there should be a final trial of a suit or matter. The words "final trial" are not confined to a final trial of a suit. The Taxing Master has, therefore, jurisdiction to allow a sum as an item of instructions for brief on a chamber summons which originated in chambers but was adjourned to be heard in Court.

The Court normally does not interfere with the discretion of the Taxing Master as to the quantum of costs allowed, unless he has misdirected himself or not properly exercised the discretion vested in him. If the Taxing Master takes into account merely the length of time occupied by the hearing in assessing fee for "instructions for brief", or attaches undue importance to it, he misdirects himself. The words "instructions for brief" do not mean the same thing as "instructions for counsel." Instructions given orally to counsel in the course of hearing cannot be included in "instructions for brief."

*Parashuram Shamdasani v. Tata Industrial Bank*<sup>1</sup> and *Gorakhram v. Pirozsha* (No. 1),<sup>2</sup> referred to.

Rule 563 of the High Court Rules gives a wide discretion to the Taxing Master to take various factors into consideration in respect of suits as well as other matters, and the word "matter" in the rule cannot be construed as referring only to appeals, arbitrations, accounts and motions, being the four matters expressly mentioned in item 14.

Dictum in *Parashuram Shamdasani v. Tata Industrial Bank*,<sup>1</sup> considered to be too wide and distinguished.

In the Rules of the Bombay High Court, 1936, under items 40 and 41 in the "Table of Fees to be taken by Attorneys," the Taxing Master has to reckon the number of hours of attendance, irrespective of whether they took place on the same day or not. Having completed the first hour, for which a sum of Rs. 15 is allowed, all subsequent hours are to be allowed at the rate of Rs. 10.

*H. H. Wadia v. Haji Mahomed Ismail Ashraf*,<sup>3</sup> overruled.

In counting hours of attendance of attorneys, under items 40 and 41, referred to above, the time taken up by the midday adjournment of Court is not to be reckoned.

*Walter Campbell v. A. Trevor Robinson*,<sup>4</sup> overruled.

Rule 567 of the Rules of the High Court of Bombay, 1936, only authorises the payment of refreshers on the hearing of a suit or appeal which extends to more than a day. There is no express power to allow refreshers on a summons adjourned into Court. Refreshers in matters other than suits or appeals do not come within the words "all reasonable disbursements" in item 60 of the "Table of Fees to be taken by the Attorneys."

1 (1925) 27 Bom. L. R. 1195.

2 (1932) 35 Bom. L. R. 93, 101.

3 (1935) O. C. J. Suit No. 1363 of 1929, decided by Rangnekar J., on

April 15, 1935 (Unrep.).

4 (1934) O. C. J. Suit No. 39 of 1931, decided by Kania J., on November 16, 1934 (Unrep.).



It is open, however, to the Taxing Master in his discretion to allow an additional brief fee, if he thinks that for some reason or another the solicitor has not been able to calculate and has not, in fact, correctly calculated, the length of time the case was likely to last.

*Easton v. London Joint Stock Bank*,<sup>1</sup> and *Parashuram Shamdasani v. Tata Industrial Bank*,<sup>2</sup> followed.

On a review of taxation no increase of charges are allowed over those charged in a bill of costs.

Where the Taxing Master has not been asked to allow additional brief fee, having regard to the unexpected length of time the case has taken, and where no application is made to the chamber Judge to have the matter sent down to the Taxing Master to consider whether an extra allowance should not be made, the Appeal Court will not increase the fee or ask the Taxing Master to do so.

*Parashuram Shamdasani v. Tata Industrial Bank*,<sup>2</sup> followed.

#### TAXATION.

The appellant, P. D. Shamdasani, had filed a suit (No. 564 of 1925) against the respondents, the Central Bank of India, Ltd. The suit had been dismissed on August 21, 1931, and on appeal, the appeal (No. 41 of 1931) had been dismissed on April 14, 1932. The appellant's petition for leave to appeal to the Privy Council had been dismissed on August 29, 1932. The respondents' solicitors lodged one bill of costs on February 27, 1932, and another on October 30, 1933. The bills of costs were taxed by the Taxing Master in August, 1934. The appellant's objections to the taxation of the bills of costs were dismissed. The appellant took out a chamber summons for review of taxation on February 15, 1935. It was adjourned for hearing into Court and was dismissed with costs by Blackwell J. on April 8, 1936.

The respondents' solicitors lodged on September 28, 1938, their bill of costs of the chamber summons for review of taxation. The Taxing Master completed the taxation of the bill of costs on February 15, 1939.

The appellant filed on March 10, 1939, his objections to the allowances made in respect of the following items:—

1. The allowance of Rs. 1,000 for instructions for brief on behalf of the respondents to show cause against review of taxation.

2. The allowances of—

Rs. 45-0-0 for brief fee (3 g.ms.) to Mr. Engineer.

Rs. 30-12-0 for drawing observations.

Rs. 49-4-0 for engrossing brief.

Rs. 135-0-0 for brief fee (9 g.ms.).

Rs. 585-0-0 for refresher fees for 27½ hours at 7 g.ms. for each of 5 refreshers plus Rs. 60 for the 6th refresher for 2½ hours.

Rs. 30-0-0 for brief fee for judgment.

Rs. 45-0-0 for 9 attendances with 2 brief fees and 6 refreshers.

3. The allowances of Rs. 445 for attendances in Court on February 24, 25, 26, 27 and 28, 1936, and March 2, 3, 4, 6, 10, 11, 12, 13, 18 and 19, 1936, for altogether 37 hours.

After hearing the appellant and Payne & Co., solicitors, who appeared for

1 (1888) 38 Ch. D. 25.

2 (1925) 27 Bom. L. R. 1195.

O. C. J. 1941 the respondents, the Taxing Master (A. F. Siqueira) gave the following judgment on June 12, 1939, disallowing all the objections :—

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The appellant has filed objections to the taxation of the bill of costs of the respondents and defendants of and incidental to the chamber summons for review of taxation and adjourned into Court and the order made thereon to be taxed between party and party pursuant to the order dated April 8, 1936, and between attorney and client.

Objection No. 1. The appellant objects to the allowance of the sum of Rs. 1,000 on the item of "Instructions for Brief" on behalf of the respondents and defendants to show cause against the review of taxation. The appellant objects to the allowance in the first instance on the two grounds that the allowance is "inadmissible for an interlocutory application" and, secondly, it is "inadmissible in chamber matters." I hold that this is not an interlocutory application in any sense of the expression. Further it is also not a chamber matter. It is a matter adjourned into Court under r. 78 of the High Court Rules. The matter appears as a Court matter and court-fees are paid as such. A further point taken is that the allowance is inadmissible under item 14 at page 414 of the High Court Rules. It may be stated that an allowance under this item is made generally in all matters which are heard in open Court. The appellant objects in the alternative that the quantum is "excessive being out of all proportion to the work actually done." The appellant adds "the work was priced at Rs. 800 in the first instance, then at Rs. 1,000 in the original bill. The same work was now priced at Rs. 1,750 more than double the original amount of Rs. 800." The attorney for the respondents replies that it is absolutely wrong to state that Rs. 800 was first charged. He also submits that no bill previously taxed should be referred to and that he has absolute discretion to place any charge. The appellant refers to the oral judgment of Kemp J. delivered on April 9, 1925, in suit No. 3643 of 1923, *P. D. Shamdasani and anr. v. The Tata Industrial Bank* and also to 27 Bom. L. R. pp. 1195, 1201.

The attorney has specified in detail the work that he has done on behalf of the respondents on pp. 2 and 3 of the bill of costs. It will also be relevant to refer to the record of proceedings in appeal No. 20 of 1936 as in this matter there was an appeal from the judgment of Blackwell J. to the Court of appeal. The judgment of Blackwell J. is printed on pp. 22 to 29 of the appeal paper book. In r. 563 of the High Court Rules it is stated that "In dealing with fees or allowances which are discretionary, the Taxing Master, in exercise of such discretion, shall take into consideration the other fees and allowances to the attorney and counsel, if any, in respect of the work to which any such allowance applies, the nature or importance of the suit or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and cost of the proceedings and all other circumstances." This matter lasted for 33½ hours and was called on about fifteen times. Taking all the above matters into consideration I consider the sum of Rs. 1,000 as a fair and proper allowance on the item of instructions for brief.

Objection No. 2. The appellant objects to the allowance of 3 gms. as brief fee to Mr. Engineer on the ground that the charge is inadmissible, because the cases mentioned in r. 548 (ii) do not include this case for the employment of counsel. Rule 548 (ii) states that the costs of one counsel only shall be allowed on taxation between party and party in the following cases (a) short causes etc. (b) long causes etc. and so forth. I hold that this rule is not exclusive and has no application to the present case. Counsel's fee has to be allowed in every matter in which counsel has been certified by the Judge in chambers. The appellant in the alternative objects to the allowances re. brief fees on the ground that the original brief fee was 6 gms. only and that an increase of 6 gms. was made (12 gms. in all) after the brief fee had in fact been worked out. The attorney for the respondents states that the fee of 6 gms. had been altered to 12 gms. and initialled by him before the appellant closed his arguments in the opening roughly after about five hours hearing. The attorney also refers to Kemp J. on Costs, pp. 52 and 53. I hold that the attorney was justified in increasing the brief fee especially as the supplemental briefs were

delivered during the course of the case. The appellant next objects to the allowance of Rs. 30-12-0 for drawing observations, Rs. 49-4-0 for engrossing brief, and Rs. 135 (9 gms.) for brief fee. I consider these to be proper allowances and I disallow the objection. Further objections are taken to the allowance of Rs. 585 for refresher fees for 27½ hours at 7 gms. for each of the 5 refreshers plus Rs. 60 for the sixth refresher for 2½ hours, to Rs. 30 for brief fee for hearing judgment, and Rs. 45 for 9 attendances with 3 brief fees and 6 refreshers.

I can only refer to the judgment of Kemp J. dated April 9, 1925, in suit No. 3643 of 1923, *P. D. Shamdasani v. The Tata Industrial Bank*, which runs as follows: "Under the circumstances, the plaintiff objects to the costs of refresher fees which have been allowed to counsel on the summons. The rule relating to refreshers is r. 525 (now r. 567) of the High Court Rules. According to that rule a refresher is allowed in the hearing of a suit or appeal. These words do not, in my opinion, cover the case of a hearing of a summons. The corresponding English rule, Order 65, r. 27, Regulation 48, uses the words "Cause or matter" and it has been held under that rule that the word "matter" would cover the case of a summons adjourned into Court to be heard on oral evidence and in such a case the Taxing Officer would have power to allow refreshers if he sees fit to do so. (In re *Anglo-Austrian Printing and Publishing Union* [1894] 2 Ch. 622)." Rule 567 only lays down the standard for allowing a refresher fee on the hearing of a suit or appeal that has been heard for over five hours and does not debar the Taxing Master from allowing a refresher in any matter heard in Court. In fact there is no specific rule under which a brief fee can be allowed. Item No. 60 of the Table of Fees (page 417, High Court Rules) also empowers the Taxing Master to allow all reasonable disbursements excluding conveyance and coolie hire. I therefore hold that the payment of refresher fees on a chamber summons adjourned into Court is in order. I confirm the allowance of 7 gms. as a refresher fee. I confirm the brief fee of 2 gms. for hearing judgment as this is a very usual allowance as also the brief fee of 3 gms. to Mr. Engineer as it is a proper allowance. As for the Rs. 45 paid for nine attendances with 3 brief fees and 6 refreshers, this matter is concluded by the judgment of the Honourable the Judge sitting in chambers, Kania J., delivered on November 16, 1934, in High Court Suit No. 39 of 1931, *Walter Campbell v. A. Trevor Robinson*. His Lordship has allowed Rs. 5 on each such attendance. This objection is, therefore, disallowed with costs.

Objection No. 3. The appellant objects to the allowance of Rs. 445 for attendances of the solicitors in Court for altogether 37 hours on the ground that the words "for the first hour or part of an hour" and the words "for every additional hour" in rr. 40 and 41 respectively cannot mean "for first hour or part of an hour *each day*" and "for every additional hour *each day*." The appellant further submits that the non-attendance of the attorney in Court during the mid-day adjournment cannot be treated as "attendance of attorney in Court" within the meaning of r. 40. This matter has been decided by the Honourable the Judge sitting in chambers, Mr. Justice Rangnekar, on April 15, 1935, in High Court Suit No. 1363 of 1929, *H. H. Wadia v. Haji Mahomed Ismail Ashraf*. The second point has also been disposed of by the Honourable the Judge sitting in chambers, Mr. Justice Kania, on November 16, 1934, in High Court Suit No. 39 of 1931, *Walter Campbell v. A. Trevor Robinson*, on a chamber summons to vary the judgment of the Taxing Master, dated June 11, 1934. The decision of the Judge in chambers binds the Taxing Master and as such the objection is disallowed with costs.

All the objections are disallowed with costs.

The appellant took out, on June 26, 1939, a chamber summons to review taxation of the bill of costs. The summons came on for hearing before Blackwell J. who adjourned it into Court on December 1, 1939. His Lordship confirmed the decision of the Taxing Master as to objections Nos. 1 and 3. And as to objection No. 2, the appellant in the course of the hearing withdrew his objections as to certain items, and his Lordship upheld the objection

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BLACKWELL J. This is a chamber summons for a review of taxation taken out by Mr. Shamdasani which was adjourned into Court. Mr. Shamdasani abandoned prayer (a) of the summons. In a chamber summons for review of taxation in Appeal No. 62 of 1926—Suit No. 3643 of 1923—I held that it was not competent to Mr. Shamdasani to take out one chamber summons in respect of two separate judgments delivered by the Taxing Master in respect of two separate bills of costs relating to two distinct and separate matters. Having regard to that decision Mr. Shamdasani applied for leave to amend the summons in the present case by deleting prayers (c), (d) and (e). Mr. Banaji, for the respondents, did not object, and I granted leave to amend the summons accordingly. That left for decision only prayer (b) of the summons, and prayer (f), which relates to costs.

The first objection arising out of prayer (b) is to the allowance of the sum of Rs. 1,000 on the item of "Instructions for brief on behalf of the Respondents and Defendants to show cause against the Review of Taxation." Mr. Shamdasani had taken an objection to an item of instructions for brief in similar terms to the objection taken by him in this matter in the review arising out of Appeal No. 62 of 1926—Suit No. 3643 of 1923. In my judgment in that matter I gave my reasons for holding that the objection to an item of instructions for brief on a chamber summons adjourned into Court was unsustainable. In view of that judgment Mr. Shamdasani informed me that he could not carry the matter further upon this chamber summons. I hold that this part of objection No. 1 fails for reasons similar to those given by me in the previous review which I need not repeat.

Next Mr. Shamdasani objected that the quantum of Rs. 1,000 was "excessive and out of proportion to the work actually done." As appears from the judgment of the Taxing Master Mr. Shamdasani brought to his notice that the amount charged in respect of the item of instructions for brief upon an earlier taxation in the same matter which was afterwards set aside was, as Mr. Shamdasani contended, Rs. 800 in the first instance which was subsequently altered to Rs. 1,000 in the original bill, and he complained that for the same work detailed in precisely the same manner in the bill the subject-matter of the present taxation Rs. 1,750 had been sought to be charged. As appears from the judgment of the Taxing Master the attorney for the respondents denied that Rs. 800 was the amount originally charged in the bill and further submitted that no bill previously taxed should be referred to, and that he had an absolute discretion to charge any amount he thought proper. I have myself looked at the original bill, and although it is impossible now to say what the charge originally made was it is quite clear that it was a charge different from the sum of Rs. 1,000 which now appears in the bill. I have been informed by both parties that the Assistant Taxing Master allowed Rs. 1,000 in respect of instructions for brief on the original bill. The Taxing Master states in his judgment that the attorney specified in detail the work that he had done on behalf of the respondents on pages 2 and 3 of the

bill of costs. I have myself looked at the bill of costs, and it is in my opinion plain that a great deal of work was imposed upon the attorneys in preparing a brief in such a form as to put counsel in possession of all the numerous facts and matters which it would be essential for counsel to grasp in order to deal with the review of taxation. The magnitude of the work involved becomes manifest when it is realised that the matter lasted for thirty-three hours and a half, and was called on about fifteen times. In his judgment the Taxing Master refers to High Court Rule 563, which contains the various matters which the Taxing Master should have regard to in respect of fees or allowances which are discretionary. In the exercise of his discretion he cut down the charge of Rs. 1,750 to Rs. 1,000. If the Taxing Master had allowed more than had been allowed by the Assistant Taxing Master when the bill was originally taxed in respect of this very item, I think that Mr. Shamdasani might have had some grievance upon the ground that it would not be easy to understand why the attorneys in their first bill fixed the amount which they sought to recover at Rs. 1,000, and yet in a second bill increased it to Rs. 1,750. The Taxing Master however has not given effect to the attorneys' endeavour to obtain in respect of this item more than they sought to obtain in the first bill. I have no reason whatever to suppose that the Assistant Taxing Master did not exercise his discretion properly in allowing Rs. 1,000 in respect of the first bill. I am quite satisfied that the Taxing Master had all the materials before him and in no way misdirected himself in considering what it was proper that he should allow under this item. In my opinion he came to a right decision in respect of this objection and this objection fails.

Objection No. 2 consists of various items which it is necessary to refer to separately. These items are set out conveniently one after another in the objections carried in before the Taxing Master by Mr. Shamdasani. The first item, viz., Rs. 45 relates to a brief fee of three Gms. paid to counsel on the hearing of the chamber summons in chambers, counsel being certified. Mr. Shamdasani gave up his objection to this item. The third item appearing in the objections is one of Rs. 135 for a brief fee. Mr. Shamdasani gave up this objection. The next item in the objections is Rs. 585 for refresher fees. The question whether refresher fees could be allowed on a chamber summons adjourned into Court arose in the review of taxation of Appeal No. 62 of 1926—Suit No. 3643 of 1923. In that matter I held that the Taxing Master has no power to allow refreshers except refreshers in a suit or appeal, and I gave my reasons for so holding. I need not repeat them. I refer to my judgment in that matter.<sup>1</sup> Mr. Shamdasani informed me that he repeated, by reference, his arguments, and Mr. Banaji adopted the same attitude, realising that in view of my previous judgment he could not contest the matter further upon this review.

The next item in the objections is Rs. 30 for brief fee for hearing judgment. Mr. Shamdasani gave up that objection. The next item in the objection is Rs. 45 for nine attendances with three brief fees and six refreshers. Mr. Sham-

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<sup>1</sup> The material portion of the judgment in that matter is set out at

the end of this judgment.

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dasani gave up his objection to the attendances with the three brief fees, which comes to the sum of Rs. 15, and confined his objection to Rs. 30 attendances in respect of six refreshers. In view of my previous judgment that refresher fees are not permissible, it follows that the allowance of Rs. 30 in respect of the attendances must go, Mr. Banaji not arguing the matter in view of my previous decision.

The items which survive in respect of objection No. 2 are Rs. 30-12-0 for drawing observations and Rs. 49-4-0 for engrossing brief. The first charge was originally Rs. 36. The Taxing Master disallowed Rs. 3-12-0 and Rs. 1-8-0 was made attorney and client leaving the item of Rs. 30-12-0. The second charge was Rs. 55. The Taxing Master made Rs. 15-12-0 attorney and client leaving Rs. 49-4-0. No reasons were given against these allowances by Mr. Shamdassani in his objections taken in before the Taxing Master as required by r. 571. The Taxing Master in his judgment said that he considered those charges to be proper allowances, and he disallowed the objection to them. I see no reason whatever for differing from the decision of the Taxing Master in respect of these items.

The result with regard to objection No. 2 is that Mr. Shamdassani has withdrawn his objections to the various items which I have enumerated, the objection as to Rs. 585 for refresher fees succeeds, the objection to Rs. 30 part of item Rs. 45 succeeds, and the objections to the items of Rs. 30-12-0 and Rs. 49-4-0 fail.

Objection No. 3 relates to the allowance of Rs. 445 for attendances of the solicitors in Court for thirty-seven hours. The reasons given by Mr. Shamdassani in his objections taken in before the Taxing Master are as follows :—  
 “The words” ‘for the first hour or part of an hour’ and the words ‘for every additional hour’ in rr. 40 and 41 respectively cannot mean ‘for first hour or part of an hour each day’ and ‘for every additional hour each day.’”  
 Mr. Shamdassani took the same point before me and contended that the omission of the words “each day” after the last words in items 40 and 41 was not unintentional. Items 40 and 41 are in the following terms :—

- “40. Attendance of attorney in Court on motion or on hearing of any suit, cause or matter including insolvency or criminal matters for first hour or part of an hour . . . . . Rs. 15-0-0  
 41. For every additional hour . . . . . Rs. 10-0-0”

These items came into operation for the first time on March 1, 1933. Before that the items relating to attendance of solicitors in Court were 33 and 34, which were in the following terms :—

- “33. Attendance in Court on the hearing of a cause or further hearing and final disposal or at the hearing of testamentary intestate, matrimonial or criminal causes . . . . . Rs. 20-0-0  
 34. The like if occupied the whole day . . . . . Rs. 25-0-0”

I am informed by Mr. Banaji that when those rules were in operation the attorneys were allowed either Rs. 20 or Rs. 25 if the matter occupied the whole day for each separate attendance and the attendances on subsequent days were in no way considered to be a continuation of the previous atten-

dances, but were treated as separate attendances. It appears that when items 40 and 41 came into operation the Taxing Master adopted a compromise and allowed Rs. 15 for the hearing on the first day, if it occupied an hour or part of an hour, and Rs. 10 for every additional hour, if the matter lasted for more than one hour on the first day and was continued on the next day, but if there was an interruption in the hearing he treated the further hearing as a fresh commencement and allowed Rs. 15 for the first hour or part of an hour. I am unable to see any justification for such a compromise. Reading the words as they stand I should myself have been disposed to hold that those items entitle the attorney to Rs. 15 in respect of the first hour or part of an hour when the suit commenced to be heard, and Rs. 10 for every additional hour on the first day, if it lasted more than one hour, and only Rs. 10 for every additional hour in respect of the next day, if the case went over, and any succeeding days. I have however been informed that this point came up for consideration by Mr. Justice Rangnekar in Suit No. 1363 of 1929—*H. H. Wadia v. Haji Mahomed Ismail Ashraf*.<sup>1</sup> The Taxing Master disallowed the charges on the basis of Rs. 15 for the first hour of each day. Objections were carried in by the defendant's attorneys on July 5, 1934, to this disallowance, the objection which is before me being in these terms :—

"It is respectfully submitted that the disallowances made from the items mentioned under this objection should be allowed between party and party."

The objection in question was No. 14(c). The Taxing Master in his judgment, which is before me, stated that he allowed Rs. 15 for the first hour of the hearing and Rs. 10 for every additional hour of the hearing for the reasons which had been stated by him under objections 3 and 5. As regards those objections he said in his judgment that the charge of Rs. 15 would be allowed only on isolated dates of hearing, and not when the hearing of a suit or matter went on from day to day, and that Rs. 15 would be allowed for the first hour of the hearing and Rs. 10 for every subsequent hour of the hearing though on different days, and he stated further that the item does not state that the charge of Rs. 15 has to be allowed for the first hour's hearing on each day of the hearing. This judgment appears to have been based on the compromise attitude to which I have previously referred. A chamber summons dated April 10, 1935, was then taken out by the defendant, prayer 1(c) relating to this item. The matter came before Mr. Justice Rangnekar. No judgment was delivered but the order made by the learned Judge dated April 15, 1935, is before me, and as appears from that order Mr. Justice Rangnekar allowed among other things the defendant's objection No. 14 (c). I am informed that since that date the Taxing Master, as he would be bound to do, has acted on that decision. Although I might myself have come to a different decision had the matter been *res integra*, I feel bound to follow the decision of Mr. Justice Rangnekar given as long ago as April 15, 1935, although he delivered no judgment in respect of the matter. Accordingly, I think that this part of the objection to the allowance of Rs. 445 fails.

A further objection to this allowance is given in reasons (b) and (c) of

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<sup>1</sup> (1935) O. C. J. Suit No. 1363  
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the objections taken in by Mr. Shamdasani before the Taxing Master, viz., that the attendances cannot be held to cover the period of the mid-day adjournment and any allowances for alleged attendances during the mid-day adjournment are inadmissible under item 40, allowances for actual attendance only being permissible. This point came before Mr. Justice Kania in suit No. 39 of 1931—*Walter Campbell v. A. Trevor Robinson*.<sup>1</sup> The Taxing Master disallowed the amounts charged during the luncheon interval. The defendant took in objections and item No. 7 relates to the charge of attending Court. The reason given against item No. 7 in the objections is that "Defendant's attorneys are entitled to recess interval being calculated under item No. 40. The same principles on which refreshers are allowed to counsel apply to charges for attendance appearing in Court by an attorney." The Taxing Master having disallowed the charges in question the defendant took out a chamber summons, and on November 16, 1934, Mr. Justice Kania delivered a judgment, which is before me, in which he allowed among other objections 7, 10 and 12 which all related to the same matter for the reasons given by him. This judgment is binding upon me. I think that the Taxing Master's decision as to objection No. 3 was right. This objection fails.

As regards costs, Mr. Shamdasani must pay to the respondents the costs properly incurred by them in preparing for the hearing of prayers (a), (c), (d) and (e). As regards prayer (b), Mr. Shamdasani has failed entirely as regards objections Nos. 1 and 3. As regards objection No. 2 he has succeeded as to the item of Rs. 585 for refresher fees and the item of Rs. 30 for attendances in respect of those refresher fees, but otherwise he has failed even as to that objection. Accordingly, I think the fair order will be that Mr. Shamdasani should pay to the respondents three-fourths of the costs of the summons relating to prayer (b). When the matter was before me in chambers on December 1 last and I adjourned it into Court, I reserved the question whether counsel should be certified in chambers until the matter was heard in Court, and the importance or otherwise of the matter was determined. Having heard the matter I am perfectly satisfied that it was a fit matter for briefing counsel for the respondents, and I certify accordingly.

[The following is the material portion of the judgment delivered on March 28, 1940, at the hearing of chamber summons to review taxation in Appeal No. 62 of 1926 (Suit No. 3643 of 1923) referred to at p. 661, *supra*.

BLACKWELL J. Objection 2 was taken up first. Mr. Shamdasani objected to the allowance of two items, viz. Rs. 96 and Rs. 51 marked and paid by way of refreshers on the ground that the allowance was "*ultra vires* and inadmissible under High Court Rule 567 in matters other than a suit or appeal". The Taxing Master in his judgment referred to an unreported judgment of Mr. Justice Kemp dated April 9, 1925, in Suit No. 3643 of 1923, *P. D. Shamdasani v. The Tata Industrial Bank, Ltd.* I have looked at that judgment. In my opinion it throws no light upon the matter which is before me. That judgment related to a summons for discovery which as Mr. Justice Kemp clearly pointed out was not adjourned into Court, but simply stood

<sup>1</sup> (1934) O. C. J. Suit No. 39 of 1931, decided by Kania J., on No-

vember 16, 1934 (Unrep.).



over for disposal by the trial Judge. The matter before me relates to a chamber summons which was adjourned into Court, and I have to consider it quite independently of the observations made by Mr. Justice Kemp in the judgment referred to by the Taxing Master. The view of the Taxing Master given by him in his judgment is that r. 567 only lays down the standard for allowing a refresher fee and does not debar the Taxing Master from allowing a refresher in any matter heard in Court. He points out that there is no specific rule under which a brief fee can be allowed and he says that item No. 60 of the Table of Fees, which appears at page 417 of the High Court Rules, also empowers the Taxing Master to allow all reasonable disbursements excluding conveyance and cooly hire. He, accordingly, held that the payment of refresher fees on a chamber summons adjourned into Court was permissible.

Rules 567 and 568 of the High Court Rules deal in terms with the allowance of refreshers at the hearing of a suit or appeal. The wording of these rules is different from the wording of the rule which deals with the allowance of refreshers, viz., O. 65, r. 27, Regulation 48, which appears in the Annual Practice. That rule permits the allowance of refresher fees "when any cause or matter is to be tried or heard upon *viva voce* evidence in open Court". The words "cause or matter" are not to be found in either r. 567 or 568 of our High Court Rules, the words there being merely "suit or appeal". Mr. Shamdasani drew my attention to the fact that in the former High Court Rule 551 corresponding with the present rule 568 the words "or other matter" were to be found after the words "suit or appeal", but that those words had been deleted and do not appear in the present r. 568, and he invoked that in aid of his argument that refreshers ought to be restricted to the hearing of either a suit or appeal. Mr. Banaji on the other hand contended that it was open to the Taxing Master to allow a refresher upon a chamber summons adjourned into Court by reason of item 60 of the Table of Fees, which appears under the heading "Disbursements" and permits the allowance of all reasonable disbursements excluding conveyance and cooly hire. Mr. Shamdasani does not object to the allowance of counsel's fee on the brief on a chamber summons adjourned into Court. He concedes that such an allowance would be permissible under High Court Rule 541, but he contends that inasmuch as rr. 567 and 568 deal specifically with the allowance of refreshers the Court ought to take the view that refreshers are only intended to be allowed as provided by those rules, and not otherwise. In my opinion Mr. Shamdasani's argument is right. Where there are rules dealing in terms with the allowance of refreshers I think it would not be proper to hold that it was open to the Taxing Master to allow refreshers at his unfettered discretion in any matter in Court other than a suit or appeal the refreshers as to which are specifically provided for and limited by rr. 567 and 568. I am of opinion that item 60 was not intended to cover any such case. In *Walker v. Crystal Palace District Gas Co.*<sup>1</sup> Mr. Justice Denman said (p. 301) :

"It is quite clear that the master, as between party and party, has no right to

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O. C. J. 1941 allow a refresher except under an Act of Parliament, or under rules which are equivalent to an Act of Parliament; he cannot allow one as a mere matter of discretion".

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Blackwell J. In *Easton v. London Joint Stock Bank*,<sup>2</sup> the question arose whether refreshers could be allowed on the hearing of an appeal from the Chancery Division. The Appeal Court decided that they could not having regard to the rules. Lord Justice Cotton in the course of his judgment said (p. 34):—

"As far as I understand, both in the Court of Appeal in Chancery and before the Exchequer Chamber, it has been the practice not to allow daily refreshers of a fixed amount, but if the Taxing Master in either Division is satisfied that the fee originally marked on the brief of counsel is not sufficient, then he allows an addition to be made to it, and allows it in taxation as against the opponent, and, of course, also as between the solicitor and his own client who has instructed him. Where there are no witnesses, it is the duty of the solicitor, as far as possible, to form an opinion, before the case begins, what, having regard to the importance of the case and the probable length of the argument, will be the proper fee to mark on the brief of counsel, and the Taxing Master, unless satisfied that there has been some mistake made, would not allow any addition to be made afterwards to that fee."

In Court matters where refreshers are not permissible, having regard to rule 567, it seems to me that the solicitors should act in accordance with the observations of Lord Justice Cotton and make up their mind before the hearing what is the proper fee to be marked on the brief having regard to the length of time which the matter is likely to take in Court. In a proper case it may well be that if the Taxing Master came to the conclusion that there had been a mistake made by the solicitors in marking the fee owing to circumstances which they could not foresee, he would be justified, not in allowing a refresher, but in allowing an increase in the fee originally marked on the brief.

Objection No. 1 relates to the allowance of Rs. 350 on the item of instructions for brief for hearing of the summons on the ground that the allowance is "*ultra vires* and inadmissible in chamber matters." The Taxing Master held, and in my opinion quite properly, that this is not a chamber matter, and that it is a matter adjourned into Court under r. 78 of the High Court Rules. He pointed out in his judgment that the matter appeared as a Court matter and that court-fees were paid as such. Mr. Shamdasani objected before the Taxing Master, and before me, that this item was *ultra vires* having regard to item 14, which appears at page 414 of the High Court Rules. The Taxing Master overruled this objection and said in his judgment that an allowance under this item is made generally in all matters which are heard in open Court.

Item 14 is in these terms:—

"Instructions for brief (including perusing of papers and examining witnesses) whether on final disposal at first hearing, settlement of issues, final trial or on appeals, arbitrations, accounts, or on motions."

Mr. Shamdasani contended that the words "final disposal at first hearing, settlement of issues, final trial" should be construed as referring and referring

only to the trial of a suit. He contended that that item could not, as far as those words were concerned, refer to matters other than suits. In this connection reference may be made to High Court Rule 563 which deals with discretionary fees and allowances and among other matters to which the Taxing Master must have regard are the nature or importance of the suit or matter. The word "suit" does not appear in item 14. In my opinion the words "final disposal at first hearing" and "final trial" in item 14 are applicable to any matter tried in Court as a Court matter. In addition to suits there are many matters tried in Court, such as, misfeasance summonses, matters under the Companies Act, matters under the Land Acquisition References, petitions under the Lunacy Act and Guardians and Wards Act, petitions under the Trusts Act and under the Patents and Designs Act, and under the Specific Relief Act, and many other matters which need not be referred to in detail. If item 14 is to have the limited scope placed upon it which Mr. Shamdasani contends for, the Taxing Master would be debarred from allowing instructions for brief in respect of many long and difficult matters heard in Court such as I have indicated. I have come to the conclusion that the Taxing Master is right in his opinion that he is entitled to allow an item of instructions for brief on chamber summons adjourned into Court upon the ground that it has ceased to be a chamber summons heard in chambers and has become for all purposes a Court matter.

Mr. Shamdasani drew my attention to *In re Anglo-Austrian Printing and Publishing Union*.<sup>1</sup> That was a taxation matter which arose out of a misfeasance summons taken out under s. 10 of the Companies (Winding Up) Act, 1890. The bill of costs taken in for taxation included an item of instructions for the special report of the Official Receiver under r. 78 of the Companies Winding Up Rules, and also instructions for brief on the hearing. The Registrar disallowed the instructions for the special report of the Official Receiver upon the ground that the application was a summons in the winding up, adjourned into Court, accompanied with a statement of the facts and that he allowed drawing at 8d., and copy at 4d., a folio respectively and disallowed instructions and he disallowed the instructions for brief on the ground that the application was not the hearing or trial of an action upon notice of trial or notice of judgment given, and that accordingly instructions for brief could not be allowed. Mr. Justice Vaughan Williams expressed the opinion that the Registrar was right in disallowing both the instructions for the report made by the Official Receiver and the instructions for the brief on the hearing. The question as to the instructions for the brief on the hearing turned upon the wording of item 81 of Appendix (N) to the Rules of 1883, which was in the following terms:—

"Instructions for brief on hearing or trial of action upon notice or trial or notice for judgment given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages."

It is to be observed that the words in that item are "trial of action" followed by the words "upon notice of trial". Those words are very different

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from the words in item 14 of the Table of Fees upon which the matter before me depends. Consequently I do not find that the case in *In re Anglo-Austrian Printing and Publishing Union*<sup>1</sup> assists me in the construction which I have placed upon item 14.]

The appellant appealed against the judgment and order of Blackwell J. so far as the following items were concerned.—

1. Item for instructions for brief on behalf of the respondents to show cause against the review of taxation, amounting to Rs. 1,000.

2. Items under dates February 24, 25, 26, 27 and 28, 1936 and March 2, 3, 4, 6, 10, 11, 12, 13, 18 and 19, 1936, for attendances of attorney in Court for 37 hours, amounting to Rs. 445.

The respondents filed cross-objections against the judgment and order as regards two items in objection No. 2—

1. Rs. 585—Refreshers paid to counsel for 27½ hours after the first five hours at the rate of 7 g.ms. for 5 refreshers of 5 hours each and 4 g.ms. for the last refresher of 2½ hours.

2. Rs. 30—for attendance on counsel in respect of 6 refreshers.

Appellant, P. D. Shamdassani, in person.

*Sir Jamshedji Kanga*, with *H. D. Banaji*, for the respondents.

*N. P. Engineer, amicus curiae*, for the Bombay Incorporated Law Society.

P. D. Shamdassani. This appeal raises the questions as to (1) the jurisdiction of the Taxing Master to make certain allowances in the bills of costs of attorneys lodged for taxation between party and party, and (2) principles of taxation of certain items therein. These items relate to allowances for (1) "Instructions for brief", (2) "Attendances of attorney in Court" and (3) "Refresher fees to counsel."

As regards the jurisdiction of the Taxing Master to make an allowance for "Instructions for brief" on a chamber matter adjourned into Court, the substantial question which arises for determination is:—whether the words (1) "final disposal at first hearing", (2) "settlement of issues" and (3) "final trial" appearing in item 14, namely, "Instructions for brief (including perusing papers and examining witnesses) whether on final disposal at first hearing, settlement of issues, final trial or on appeals, arbitrations, accounts or on motions—'Discretionary'" at page 414 in the Table of Fees attached to the Rules of the High Court of Bombay, 1936, should be construed as referring only to "suit" or referring to any matter tried in Court as a Court matter.

The words "final disposal at first hearing" in item 14 have reference to the words "Disposal of the suit at the first hearing" appearing in O. XV of the Civil Procedure Code, 1908, and the words "settlement of issues" therein have reference to the words "Settlement of issues and determination of suit on issues of fact or on issues agreed upon" appearing in O. XIV of the Code. That being the case, the words "final disposal at first hearing" and the words "settlement of issues" in this item must be construed as referring only to "suit". The words "final trial" therein should be read as being *ejusdem*

*generis* with the preceding words therein. Accordingly the words "final trial" must also be construed as referring only to "suit".

The learned Judge ought to have placed upon the words in this item such construction as the words therein in their plain meaning imported. His decision that the words "final disposal at first hearing" and "final trial" in this item are applicable to "any matter tried in Court as a Court matter" is wrong. Such a liberal construction was placed by him upon the ground that the strict construction would operate harshly or unjustly in particular cases referred to in his judgment.

The learned Judge acted upon a wrong principle in taking something into consideration which he ought not to have. The duty of a judicial interpreter is to interpret the law as he finds it and not as he wishes it to be. The rule is clearly established that the Judge cannot on equitable grounds enlarge the scope of any words in any Act or rules made thereunder or Table of Fees prescribed thereunder or introduce matters not recognized by it.

The learned Judge ought to have put a construction upon these words with due regard to the words "suit or matter" in r. 563, which promotes and not defeats their respective objects, which suppresses the mischief and advances the remedy and which best accords with the public benefit.

Item 14 has reference to items 81 and 82 in Appendix "N" under O. 65, rules 8 and 9, of the Rules of the Supreme Court, 1883. It will be seen from those items and the precedents of bills of costs in Porter and Wortham's Guide to Costs, 13th edn, (1932), that "Instructions for brief" are discretionary in witness actions. They are principally intended to cover the trouble and expense incurred in collecting evidence for the trial of an action. This then shows the real character of the item of "Instructions for brief." The decision in *Parshuram Shamdassani v. Tata Industrial Bank*,<sup>1</sup> is founded upon this view.

Rule 563 of the Rules of the High Court has reference to item 14. The word "matter" in this item should be construed as referring only to "appeals" or "arbitrations" or "accounts" or "motions" the only four matters expressly provided for in this item after its amendment on March 1, 1933, by the insertion of the words "or on appeals, arbitrations, accounts" before the words "or on motion" in the original item and by the substitution of the word "motions" for the word "motion" in the original item, and the words "final disposal at first hearing, settlement of issues, final trial" in this item should be construed as referring to "suit" in r. 563. The true construction of these words is also founded upon the true construction of the items preceding item 14 which by their very intendment refer only to "suit" in r. 563. In the result the charge for "Instructions for brief" in chamber matters heard in Court was certainly not discretionary as was held in *Parashuram Shamdassani v. Tata Industrial Bank*.<sup>2</sup> Accordingly the Taxing Master had no jurisdiction to make any allowance for "Instructions for brief" on a chamber matter adjourned into Court not for taking *viva voce* evidence but for convenience sake. An adjournment into Court is merely a continuation

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<sup>1</sup> (1925) 27 Bom. L. R. 1195,  
1201, 1202.

<sup>2</sup> (1925) 27 Bom. L. R. 1195,  
1202.

O. C. J. of the hearing in Chambers. See *Leads v. Lewis*.<sup>1</sup>  
 1941 An application to review taxation by chamber summons was an inter-  
 SHAMDASANI locutory application with respect to matters of procedure. No allowance  
 v. should be made for "Instructions for brief" on any interlocutory applica-  
 CENTRAL tion. See Masters' Practice Notes (1902) known as the "Blue Book" issued  
 BANK OF under Order 65, rule 27(37), of the Rules of the Supreme Court, 1883, in the  
 INDIA Annual Practice, 1940, page 1903—Notes 19, 67 and 126 at pages 1905, 1911  
 and 1918. See also Appendix "N" under O. 65 rr. 8 and 9 at page 1854, and  
 general notes as regards "Documents and proceedings for which no fees for  
 Instructions are allowed" under the heading "Instructions" at page 1866.

In any event the quantum of costs allowed was excessive being out of all proportion to the work actually done. The work was priced at Rs. 800 in the first instance, then at Rs. 1,000 in the original bill. The same work was now priced at Rs. 1,750 more than double the original amount of Rs. 800. The allowance of Rs. 1,000 was in violent contrast with the allowance of Rs. 15 for perusing papers including objections taken by the appellant on August 15, 1934, for the review of taxation before the Taxing Master which was made by him against Rs. 45 claimed therefor and with the further allowance of about Rs. 35 in respect of perusal of (1) chamber summons dated February 15, 1935, (2) affidavit dated February 15, 1935, in support thereof, (3) Taxing Master's certificate dated February 1, 1935, and (4) Taxing Master's judgment dated January 26, 1935, (being Annexure A to the said certificate). The same is in utter disregard of the other allowances to the attorneys and counsel aggregating Rs. 565 and Rs. 165 respectively.

The Taxing Master misdirected himself in (1) taking into consideration the length of time, namely, 33½ hours including mid-day adjournments, occupied in the hearing and final disposal of the chamber summons, and (2) thinking that "Instructions for brief" mean the same thing as "Instructions to counsel." The Taxing Master erred in not following the ruling in *Parashuram Shamdassani v. Tata Industrial Bank*,<sup>2</sup> to the effect that the foundation for the charge for "Instructions for brief" is the preparation for the brief and that the length of the trial will not necessarily correspond with the work done in the preparation of the brief. Accordingly "Instructions for brief" would be completed before the brief was delivered. If the Taxing Master had directed himself properly, he would have noticed from the particulars delivered in respect of this item in the bill of costs that there was practically no work to be done by the attorneys for and on behalf of their client in respect of the preparation of the brief beyond perusing the papers and that the attorneys were fighting for their own object and interests ostensibly in the name of their client. He would have further noticed that the attendances of attorneys in Court during the time, namely, 33½ hours including mid-day adjournments, occupied in the hearing and final disposal of the chamber summons were for the only purpose of giving "Instructions to counsel" as and when required or found necessary and that all such attendances had been separately charged for and allowed under items 40 and 41 at page 416 in the

1 (1857) 3 Jur. N. S. 1290.

2 (1925) 27 Bom. L. R. 1195, 1207.

Table of Fees attached to the High Court Rules.

As regards attendance of attorney in Court, the objection is founded upon two grounds, namely, (1) that under item 40 in the Table of Fees the allowance of Rs. 15 is for the first hour of the hearing, irrespective of the day, and after that first hour is finished only Rs. 10 can be allowed for the subsequent hour or hours under item 41, (2) that in counting the hours of attendance of attorney in Court the mid-day adjournment, which at present is three-fourths of an hour, cannot be included. The words "each day" which do not appear after the words "for first hour or part of an hour" in item 40 and the words "for every additional hour" in item 41 cannot be read into them. The words "attendance of attorney in Court" can only mean attendance of attorney when the Court is sitting and not when the Court is not sitting. The learned Judge would have upheld the appellant's contentions but he felt himself bound by the decision of Rangnekar J. in *H. H. Wadia v. Haji Mahomed Ismail Ashraf* to the contrary on the first point and by the decision of Kania J. in *Walter Campbell v. A. Trevor Robinson* to the contrary on the second point. Both these decisions are wrong.

*Sir Jamshedji Kanga.* As regards the jurisdiction of the Taxing Master to make an allowance for "Instructions for brief" we submit that the Taxing Master has such jurisdiction. The words "final disposal at first hearing" and "final trial" in item 14 at page 414 in the Table of Fees attached to the High Court Rules must be construed as applicable to "any matter tried in Court as a Court matter", otherwise the Taxing Master would be debarred from allowing "Instructions for brief" in respect of many long and difficult matters heard in Court such as misfeasance summonses, matters under the Companies Act, matters under Land Acquisition References, petitions under the Lunacy Act and Guardians and Wards Act, petitions under the Trusts Act and under the Patents and Designs Act and under the Specific Relief Act and many other matters. In India there is no difference between witness and non-witness action. See judgment of Blackwell J. on this point at page 24 of the Appeal Paper Book in Appeal No. 20 of 1936 in Suit No. 564 of 1925. In England there are different rules and scales for the chancery and common law sides.

As regards *quantum*, the Taxing Master's decision is final. The Court will not as a general rule interfere with the decision of the Taxing Master upon a mere question of *quantum*: *Ogilvie v. Massey*.<sup>1</sup> Without meaning any disrespect to the Court we rely upon the observations of Cozens-Hardy M. R. at page 244. After referring to the general rule laid down in *Alsop v. Lord Oxford*<sup>2</sup> and in *In re Catlin*<sup>3</sup> to the effect that in matters of taxation Court can only be called upon to determine on the propriety of allowing or disallowing items which involve some principle, and not where a question only of *quantum* arises, the Master of the Rolls says "I should be very sorry if any doubt were cast on that, for I can scarcely imagine a tribunal more unfit than a Judge of the High Court to deal with questions of *quantum* on the taxation of costs." We also rely upon the observations of Sir Amberson

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1 [1910] P. 243.

3 (1854) 18 Beav. 508.

2 (1833) 1 My. & K. 564.

O. C. J. Marten C. J. in *Shamdasani v. Tata Industrial Bank*,<sup>1</sup> at pages 1097 and 1941 1098 which are in our favour.

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*H. D. Banaji.* We submit that the decision of Rangnekar J. to the effect that under item 40 the allowance of Rs. 15 is for the first hour each day and under item 41 the allowance of Rs. 10 is for every additional hour each day is correct. Such a construction was placed on the ground that the attorneys do in practice prepare their bills on the basis of the work done for each day. The above decision was given on April 15, 1935, and has been followed by the Taxing Master all these years. The long established practice should not be disturbed.

We further submit that the decision of Kania J. that in counting hours of attendance the time taken up by mid-day adjournment should be included is correct. The learned Judge says that if a matter is part-heard, it is natural for counsel to contemplate and think about the part-heard matter and how he proposes to make further progress. The attorney who is more saturated with the details will have to prepare the necessary materials for the hearing after the mid-day adjournment, and there is no reason why a difference should be made between the work of an attorney and a counsel so far as the mid-day adjournment is concerned. This decision was given on November 16, 1934, and has been followed by the Taxing Master all these years. The long established practice should not be disturbed.

Our cross-objections are in respect of the allowances of Rs. 585. Refreshers were paid to counsel for 27½ hours after the first five hours and Rs. 30 for attendances on counsel in respect of the said 6 refreshers. We submit that it was open to the Taxing Master to allow refreshers to counsel in matters other than "suit or appeal" by reason of item 60 of the Table of Fees, which appears under the heading "Disbursements excluding conveyance and cooly hire." Counsel's fees are disbursements. See Notes under the heading "What disbursements may be included in a bill of costs for delivery" in Porter and Wortham's Guide to Costs, 13th edn., p. 1010. On a proper construction of rules 567 and 568 of the High Court Rules, the said rules merely lay down a standard for the guidance of the Taxing Master in the exercise of his discretion in allowing refreshers to counsel in a suit or appeal as a disbursement under item 60 of the Table of Fees.

If item 60 does not cover refreshers to counsel, additional fees by way of daily allowances may be allowed and the original brief fee of 9 g.m.s. increased accordingly, as it is inadequate for a matter the hearing of which occupied 27½ hours after the first five hours. We rely on the observations of Cotton L. J. in *Easton v. London Joint Stock Bank*<sup>2</sup> at page 33.

[Beaumont C. J. to Shamdasani: Should we send the bill back to the Taxing Master to increase the brief fee?

Shamdasani. On a review of taxation no increase of charges could be allowed over those charged in the bill of costs as was held in *Parasuram Shamdasani v. Tata Industrial Bank*.<sup>3</sup>]

1 (1927) 29 Bom. L. R. 1093.  
2 (1888) 38 Ch. D. 25.

3 (1925) 27 Bom. L. R. 1195,  
1200.



*N. P. Engineer.* I ask for leave to appear as *amicus curiae* for the Bombay Incorporated Law Society. We are only concerned with the proper construction to be placed upon items 14, 40, 41 and 60 in the Table of Fees attached to the Rules of the High Court, and r. 567. The words "final disposal at first hearing" and "final trial" in item 14 are applicable to "any matter tried in Court as a Court matter." "Instructions for brief" do not stop when the brief is delivered. If restricted to the first instructions given, it may keep out very important instructions taken or given. The point is covered by the decision in *Shamdasani v. Tata Industrial Bank*.<sup>1</sup> Attendance is charged every day, and it would be Rs. 15 for the first hour and Rs. 10 for an additional hour each day. The framers of the rule had before them the practice of charging each day's fees separately. Rule 254 shows that the time of the mid-day adjournment was not to be deducted. The Taxing Master has to take into account the time between the calling of the suit and the rising for the day. In theory the Court is sitting during the time of the mid-day adjournment. As to refreshers, there is no provision apart from item 60 for the refreshers. Even without a rule refreshers have been allowed all these years. If item 60 allows brief fee, then refreshers are also allowable under it. Rule 567 merely quantifies the refreshers in suits and appeals. Therefore it follows that in matters not being suits or appeals it shall not be more than those under r. 567.

BEAUMONT, C. J. This is an appeal by the appellant against a decision of Mr. Justice Blackwell on a summons to review taxation of costs. The costs were incurred on an earlier summons to review. There are three items which arise in this appeal. The first two arise strictly in the appeal, and the third on cross-objections.

The first matter, which arises on the appeal, is an item of Rs. 1,000 allowed for "Instructions for brief." The appellant contends, first, that the Taxing Master had no jurisdiction to allow anything for that item, and, secondly, that if he had jurisdiction, he allowed too high a figure. As I have said, the costs were incurred on a summons to review, which had been adjourned into Court, so that we are dealing with the costs on an adjourned summons. The item "Instructions for brief" is dealt with in Item 14 of the Table of Fees to be taken by the attorneys of this Court. That item reads as follows :

"Instructions for brief (including perusing of papers and examining witnesses) whether on final disposal at first hearing, settlement of issues, final trial or on appeals, arbitrations, accounts, or on motions."

As the item formerly stood, it did not include the words "or on appeals, arbitrations, accounts." So that it only dealt with "Instructions for brief whether on final disposal at first hearing, settlement of issues, final trial or on motions," motions being generally interlocutory. Mr. Shamdasani contends that the item down to the words "final trial" only deals with instructions for brief in suits. He points out that the words "on final disposal at first hearing" appear to have reference to O. XV, which deals with the disposal of a suit at the first hearing, and the words "settlement of issues" appear to have reference to O. XIV, which deals with the settlement of issues in a suit, and he

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<sup>1</sup> (1927) 29 Bom. L. R. 1098.

O. C. J. argues, therefore, that "final trial" must also refer to the final trial in a suit.  
 1941 The subsequent words "or on appeals, arbitrations, accounts, or on motions" may cover matters of such nature arising otherwise than in a suit, but the  
 SHAMDASANI "final trial", according to his argument, must be in a suit. I must confess  
 v. that I think that the item is not happily worded. "Final trial" is not a very  
 CENTRAL apt expression to use for the hearing of a chamber summons. The word  
 BANK OF apt expression to use for the hearing of a chamber summons. The word  
 INDIA "hearing" would be more appropriate than the word "trial," but at the same  
 time it is not inaccurate to say that a summons is tried, and there is nothing  
 Beaumont C.J. in the wording of the item which in terms confines "final trial" to the final  
 trial of a suit. There is no other item in the Table of Fees, which covers  
 "instructions for brief," and there are many matters which may come before  
 the Court, which are not suits, but which may involve the taking of oral  
 evidence, and require the preparation of elaborate instructions for counsel.  
 Lunacy matters, matters relating to minors, references under the Land Acquisition Act, company matters, and so forth, may require instructions to counsel, and it is difficult to suppose that the Table of Fees was not intended to include cases of that nature, and that no fee was to be payable for instructions in such matters. In my opinion, there is no sufficient reason for confining the words "final trial" to the final trial of a suit.

Mr. Shamdasani has further contended that this must be regarded as a chamber matter, because the summons originated in chambers and was adjourned to be heard in Court merely for the sake of convenience. I do not myself think that it makes any difference whether it is to be regarded as a chamber matter or a Court matter, so long as it is the final trial of the matter. We were referred to a dictum of Sir Norman Macleod in *Parashuram Shamdasani v. Tata Industrial Bank*,<sup>1</sup> in which he said that this item would not apply to chamber matters, but he gives no authority or reason for that opinion, and the wording of the item does not draw a distinction between chamber matters and matters heard in Court. The essential thing is that there should be a final trial. No doubt, most chamber matters do not involve a final trial, and many of them are not of sufficient importance to justify instructions to counsel. But as I have already indicated, there are many matters, other than suits, which require instructions to counsel, and some of those matters are normally dealt with in chambers, e.g. disputes about minors, disputes about permission to trustees to compromise, and kindred matters. I think myself that there is no sufficient reason for confining Item 14 either to suits or to matters in Court. In my opinion, therefore, the Taxing Master was right in allowing a fee for "instructions for brief."

With regard to the quantum allowed, the Court normally does not interfere with the discretion of the Taxing Master as to quantum, unless he has misdirected himself. On the face of it a fee of Rs. 1,000 for "instructions for brief" on a summons to review taxation seems to me difficult to justify. There must already have been a review before the Taxing Master, and the solicitors would not have to peruse many documents for the purposes of the application to the Court, nor is it likely that they would have to examine witnesses. They might, no doubt, have to tabulate the facts for the benefit of counsel,

and instruct him as to the view which they wished to put forward. But it is difficult to see how work of that nature could be worth the sum allowed. When we asked to see the brief which the Taxing Master had valued in this way, the only substantial brief produced, which was that delivered to senior counsel, contained *in extenso* copies of the summons, affidavits and other documents in the case, and involved no work at all except for the copying. There were also concise observations for counsel, which cannot, I think, be valued as highly as the Taxing Master thinks. The learned Taxing Master in his reasons says that he has considered all the matters mentioned in r. 563, and taking those matters into account and also the fact that the hearing of the summons lasted for thirty-three and a half hours he thinks Rs. 1,000 a fair allowance. I think that in taking into account the length of time occupied by the hearing, the learned Taxing Master has misdirected himself. No doubt, as was pointed out by this Court in *Shamdasani v. Tata Industrial Bank*,<sup>1</sup> instructions to counsel may go on during the hearing, but the words of Item 14 are not "instructions for counsel" but "instructions for brief." The delivery of a brief is a formal act. It confers upon counsel authority to appear in the case, and vests in him the responsibility of conducting the case in the way he thinks right. It also fixes the fee which he is to be allowed, and I cannot agree that the words "instructions for brief" mean the same thing as "instructions for counsel." Prima facie, instructions for brief must have been completed before the brief was delivered, although I do not dispute that matters might come to light after the brief was delivered, which might involve the delivery of a supplementary brief, a fee for which could be allowed under Item 14. But there is no evidence in this case of the delivery of a supplementary brief. I am not prepared to agree that instructions given, probably orally, to counsel in the course of the hearing can be included in "instructions for brief." It is difficult for us to say what the Taxing Master ought to have allowed. We are satisfied that in taking into account the length of time the hearing occupied he misdirected himself, and we think that a fair order will be to allow half the item. So we reduce the Rs. 1,000 to Rs. 500. That disposes of the first point.

The second point raised on the appeal is as to the attendance of attorneys in Court, and two points are taken with regard to that. The Taxing Master allowed Rs. 15 for the first hour of each day and Rs. 10 for subsequent hours and parts of an hour on that day. It is objected that under Item 40 the allowance of Rs. 15 is for the first hour of the hearing, irrespective of the day, and after that first hour is finished, only Rs. 10 can be allowed for subsequent hours. Mr. Justice Blackwell was disposed to agree with the argument of the appellant on that point, but he felt himself bound to follow an unreported decision of Mr. Justice Rangnekar, in which that learned Judge seems to have held that under Item 40 solicitors were entitled to Rs. 15 for the first hour on each day of the hearing. Now, the item reads :

"Attendance of Attorney in Court on motion or on hearing of any suit, cause or matter including insolvency or criminal matters for first hour or part of hour—Rs. 15."

Item 41 reads : "For every additional hour—Rs. 10." It seems to me that

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the meaning of those items is perfectly plain. All that the Taxing Master has to do is to reckon the number of hours of attendance, irrespective of whether they took place on the same day, or in the same week, or in the same month. Having completed the first hour, for which a sum of Rs. 15 is allowed, all subsequent hours are allowed at the rate of Rs. 10. I cannot see the slightest justification for saying that a sum of Rs. 15 is to be allowed for the first hour on each day. The only argument in favour of that construction, which was suggested, is that attorneys do in practice prepare their bills on the basis of the work done for each day, but the existence of that practice affords no reason for giving to the words of the item a meaning which they do not bear. In my opinion, that objection must be allowed.

The other objection in respect of attendance is that in counting the hours of attendance the Taxing Master has included the mid-day adjournment of three-fourths of an hour. Mr. Justice Blackwell decided that that practice was right on the authority of a decision of Mr. Justice Kania in suit No. 39 of 1931—*Walter Campbell v. A. Trevor Robinson*,<sup>1</sup>—which has not been reported. In my opinion, it is impossible to say that an attorney is attending Court at a time when the Court is not sitting. This Court takes an adjournment of three-fourths of an hour in the middle of the day, and a working day consists of five hours apart from that adjournment. The length of the adjournment might be curtailed or extended, if the Judges thought fit, but whatever the period of adjournment may be, it seems to me quite impossible to say that an attorney is entitled to be paid for attendance in Court when the Court is not sitting. Mr. Justice Kania based his decision upon the analogy of refreshers to counsel, but the wording of r. 567, which deals with refreshers, is quite different from the wording of Item 40, and I express no opinion upon the question whether refreshers are allowable for the mid-day adjournment. This objection also must be allowed.

The point taken on the cross-objections is with regard to refreshers to counsel. This summons lasted, according to the Taxing Master, thirty-three and a half hours, and the brief fee marked for counsel was nine G. Ms. If the appellant chose to take over six days to argue a summons, which could probably have been disposed of adequately in a few hours, I see no good reason why he should not pay for the privilege, but we have to see whether refreshers to counsel, which the Taxing Master allowed, are permitted by the rules.

Rule 567 of the Rules of the High Court of Bombay in terms only authorises the payment of refreshers on the hearing of a suit or appeal which extends to more than one day. So that there is no express power to allow refreshers on an adjourned summons. Mr. Banaji for the appellants on the cross-objections relies on Item 60 of the Table of Fees, which reads :

“All reasonable disbursements excluding conveyance and cooly hire.”

He argues that counsel's fees are disbursements, which no doubt is so, but the regular rule is that counsel's fee must be marked on the brief before he goes into Court. If counsel is to be entitled to a refresher, which means an additional fee calculated by the day, to my mind, there must be a special rule

<sup>1</sup> (1934) O. C. J. Suit No. 39 of 1931, decided by Kania J., on Novem-

ber 16, 1934 (Unrep.).

conferring that right, and if there is no such rule, I do not think that a refresher fee can be regarded as a reasonable disbursement.

The origin of refreshers was discussed by the Court of Appeal in England in *Easton v. London Joint Stock Bank*,<sup>1</sup> and it was there pointed out that the practice of allowing refreshers had originated, because in actions heard with witnesses it was impossible for a solicitor, when he was delivering his brief to counsel, to estimate within reasonable limits the length of time the case was likely to last. Therefore, it was unreasonable to expect him to arrive at a fee for counsel which would prove to be fair, and so, in cases heard with witnesses, the practice had grown up of allowing counsel to receive extra remuneration at so much per day, and that practice was embodied in a rule in England, and is covered by our rule 567. But the Court pointed out that even if there was no authority to allow refreshers to counsel, it was open to the Taxing Master in his discretion to allow an additional brief fee, if he thought that for some reason or another the solicitor had not been able to calculate, and had not in fact correctly calculated, the length of time the case was likely to last. I quite agree with that latter proposition, and I think that in this case if the Taxing Master had been asked to do so, he could properly have allowed a further brief fee, because the solicitor could not have supposed that a summons to review taxation would be likely to last for more than thirty-three hours; but the Taxing Master was not asked to deal with the matter in that way. Fees to counsel were claimed as refreshers allowed by the rules, and the Taxing Master allowed refreshers, and the learned Judge in review disallowed them. I think that the learned Judge was right on that point, and that the refresher fees must be disallowed.

Then the only question is whether we are entitled to send the case back to the Taxing Master to consider whether he ought to allow something by way of an additional brief fee on the principle indicated above. This Court held in *Parashuram Shamdasani v. Tata Industrial Bank* (*supra*) that such a course could not be adopted. In that case the learned Judge, who heard the summons to review, had taken the view of the matter which we take, namely, that refreshers on a summons are not allowable, but that the brief fee might be increased, and he had increased the brief fee. In the Court of Appeal the Court held that the summons, which had been adjourned to the hearing, had merged in the hearing, a view which, if I may say so, seems to me a curious one; but the Court then went on to say that, on the footing that costs were payable as costs of a summons, the Judge was wrong in increasing the brief fee from twenty to thirty G. Ms., thus diminishing the effect of his disallowance of the refreshers by ten G. Ms., and that no increase of charges could be allowed on a review of taxation over those charged in the bill of costs. Sir Norman Macleod, who delivered that judgment, had himself, I believe, been at one time Taxing Master, and he was no doubt familiar with the practice of the office, and I think that we ought to follow his view, although technically it was only a dictum. The proper course for the solicitors was to ask the Taxing Master to increase the brief fee, having regard to the unexpected length of time the case had taken; but as that course was not adopted, I think

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O. C. J. we cannot now increase the fee or ask the Taxing Master to do so.

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The result, therefore, is that the appeal is allowed as to half the brief fees, though it fails on the question of jurisdiction to allow instructions for brief. It succeeds as to the two points relating to the attendance of attorneys, and the cross-objections fail.

B. J. WADIA J. I agree. With regard to the first objection raised by the appellant I think that a chamber summons adjourned into Court cannot be described merely as an interlocutory application or as a chamber matter. It becomes really a Court matter, and it appears on the daily Board as a Court matter, and Court fees are payable for it as such. With regard to the further point that an allowance for Instructions for Brief is inadmissible under the terms of 'item 14' at page 414 of the Rules of the High Court of Bombay, it is true to say in the first place that that item has not been very happily worded. It should in my opinion be recast. It does not, however, appear to me as if it was the intention of the framers to restrict the words "final trial" only to the final trial of a suit. Ordinarily we do not speak of the final trial of a chamber summons even when the summons is adjourned into Court; we generally refer to the final hearing of a summons. But an inappropriate word or expression in the 'item' ought not in my opinion to override the intention and meaning of all the words taken as a whole. It was conceded in argument that the word "appeals" in the same 'item' included appeals from orders made on chamber summonses, and it would be somewhat anomalous if an allowance for instructions could be given for an appeal from an order on a chamber summons adjourned into Court and not for the hearing of the summons itself. Moreover, there are in addition to chamber summonses adjourned into Court many matters which are tried in Court as Court matters, e.g. misfeasance summonses, matters under the Companies Act, Land Acquisition References, petitions under the Lunacy Act and Guardians and Wards Act, petitions under the Trusts Act and under the Patents and Designs Act, under the Specific Relief Act, and also other matters. If 'item 14' is to have the limited scope placed by the appellant upon it, for which he contended before the Taxing Master and in Court, the Taxing Master would be debarred from allowing instructions for brief in respect of many of these matters heard in Court which sometimes take up a long time and involve difficult questions both of law and of fact. Rule 563 of the High Court Rules gives a wide discretion to the Taxing Master to take various factors into consideration in respect of suits as well as matters, and I do not agree with the appellant's contention put forward in his memorandum of appeal that the word "matter" in r. 563 of the High Court Rules should be construed as referring only to appeals, arbitrations, accounts and motions, being the four matters expressly mentioned in 'item 14'. We were referred to the dictum of the Appeal Court in *Parashuram Shamdasani v. Tata Industrial Bank*,<sup>1</sup> where the learned Chief Justice observed that the charge for instructions in chamber matters was certainly not discretionary. In my opinion that statement has been put rather too wide, but in any event it does not apply to the matter before us, because in that case the summons was not adjourned into Court, but was merely ad-

journeyed to the hearing of the suit itself.

In my opinion the learned Chamber Judge was right in disallowing the appellant's objection as to the allowance for Instructions for Brief to the respondents under 'item 14'.

With regard to the question of the quantum, I have held in a case that was argued at great length before me, namely, *Gorakhram v. Pirozsha* (No. 1),<sup>1</sup> that as a rule the Chamber Judge does not interfere with the discretion of the Taxing Master, except in extreme cases where there has been gross abuse, or a serious mistake, or when the Taxing Master has acted on a wrong principle, or applied an altogether wrong construction. That the Court has a right to interfere with the discretion of the Taxing Master is not denied, and it has been held in the case which I have referred to before in 27 Bom. L. R. 1195, following the English rules of taxation, that the decision of the Taxing Master is not final even on the question of the quantum. It was in my opinion a mistake to unduly insist on considering in a discretionary item the length of the hearing of the summons in Court. That is a matter along with other matters which may be taken into consideration, because it often happens that when a matter is heard in Court for a considerable length of time, questions do crop up for further elucidation during the hearing which necessitate sometimes the handing of further instructions in supplemental briefs to counsel. We have not been referred in this case to any such supplemental briefs. Before the Taxing Master takes such supplemental briefs into consideration, he has to satisfy himself that there were new matters which required further "instructions for brief", using the expression mentioned in 'item No. 14'. I think that the allowance of Rs. 1,000 was excessive, and the discretion vested in the Taxing Master has not been in my opinion justifiably exercised. I, therefore, agree with the learned Chief Justice that a fair and reasonable amount to allow for instructions would be a sum of Rs. 500.

With regard to the third objection as to the allowance for solicitors' attendance in Court and the question of the mid-day adjournments, I entirely agree with what has been said by the learned Chief Justice, and I have nothing to add.

With regard to the cross-objections on the question of refreshers which were allowed by the Taxing Master to the extent of Rs. 585, I may mention that when the matter went up before the learned Chamber Judge on a review of taxation, the only argument that was advanced was that that amount was covered by item 60 which deals with "reasonable disbursements". I do not think that if it was the intention to include refreshers in matters other than suits or appeals in the expression "reasonable disbursements", it would have been left to be implied, and not referred to more definitely. No application was made to the learned Chamber Judge to have the matter sent down again to the Taxing Master to consider whether an extra allowance should not be made, not on the ground of allowing "refreshers", which, as Lord Justice Cotton pointed out in *Easton v. London Joint Stock Bank*,<sup>2</sup> was an unfortunate term, but on the ground that the extra costs incurred after the first five hours might be allowed as additional or increased fee over and above that

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<sup>1</sup> (1932) 35 Bom. L. R. 93, 101.

<sup>2</sup> (1888) 38 Ch. D. 25, 35.

O. C. J. marked originally on counsel's brief, as was pointed out in that case. It does  
 1941 happen at times that there is a miscalculation by the attorney and the fee is  
 under-marked at the inception of the trial. No such application was made,  
 SHAMDASANI and I do not think that we should now at this stage, following the observations  
 v. of the Appeal Court in 27 Bom. L. R. 1195, allow the matter to be sent back  
 CENTRAL to the Taxing Master. I quite agree that r. 567, which refers to refreshers and  
 BANK OF the amount of refreshers in the case of suits or appeals, may often work hard-  
 INDIA ship in matters other than suits or appeals which take up a very long time in  
 B. J. Wadia J. hearing. This is more an argument for reconsideration of the rule in the  
 future rather than for allowing the cross-objections at present. In my opinion  
 the learned Chamber Judge was right, and the cross-objections must be dis-  
 missed.

PER CURIAM. With regard to costs, the appellant succeeded in one or two matters in the Court below, but failed on a majority of the points raised, and the learned Judge directed him to pay the costs of certain items which had not been fought, and to pay three-fourths of the costs of the items which had been fought. In this Court he has succeeded on most of the points, but has failed on one point, and he has succeeded on the cross-objections. Cross-objections would have to be dismissed with costs, if we made a strict order. We are very reluctant to make a complicated order for taxation, giving the costs of certain items to one party and of other items to the other party. From such figures as the parties have supplied to us, rough figures, no doubt, as to what they expect to get under the orders which stand and possible orders, we think that the two sides would about balance each other on a strict order for taxation of costs of separate items. Therefore, we propose to make no order as to costs in the Court below and in this Court. Each party to bear their own costs in the lower Court and in this Court both of the appeal and cross-objections. There is to be no payment on either side in respect of the whole matter.

*Appeal allowed in part : cross-objections dismissed.*

Attorneys for respondents : *Payne & Co.*



## FULL BENCH—APPELLATE CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice Divatia, and  
Mr. Justice Macklin.*

GUDDAPPA CHIKKAPPA KURBAR

v.

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February 6.

*Fraud—Fraudulent conveyance of lands to defeat creditor—Benami transaction—  
Suit by benamidar for possession of lands—Whether defendant can set up and  
prove joint fraud of himself and plaintiff—Applicability of maxim ex turpi causa  
non oritur actio.*

A Court will not allow itself to be used as an instrument of fraud, and by the application of rules of evidence or procedure it will not allow its eyes to be closed to the fact that it is being used as an instrument of fraud. Once the Court finds that the plaintiff is seeking its assistance to enable him to get the benefit of what is a fraud, it refuses to assist him. If, as a result of such refusal, the defendant is left in possession of some advantage derived from the common fraud of the plaintiff as well as the defendant, that is not due to any action on the part of the Court, but on the principle that the Court will not assist either party to the fraud.

Where a plaintiff is relying upon a deed, the defendant is entitled to give evidence of the circumstances under which it came into existence. When those circumstances include an allegation of a joint fraud by both the plaintiff and the defendant, the particulars of that fraud must be pleaded. The duty of the Court then is to look into the matter, and if it comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff and that of the defendant, it will not assist either party. It is the Court's duty to dismiss the plaintiff's claim because it knows that it has before it two persons equally guilty of fraud and it will not assist either of them.

*Vilayat Husain v. Misran*,<sup>1</sup> approved.

*Siddingappa v. Hirasa*,<sup>2</sup> overruled.

*Luckmidas Khimji v. Mulji Canji*,<sup>3</sup> *Babaji v. Krishna*,<sup>4</sup> *Raghupati v. Nrishinga*,<sup>5</sup> *Qadir Bakhsh v. Hakam*,<sup>6</sup> and *Ma Naw Chou v. Ma E*,<sup>7</sup> followed.

*Kotayya v. Mahalakshamma*,<sup>8</sup> dissented from.

*Per Divatia J.*—The law on the subject of fraud by plaintiff and by defendant can be summarized as follows:—

I. In all cases of unilateral or bilateral fraud which has not been successfully effected, either party can repudiate the fraudulent transaction and can recover or maintain his possession by proving his real title.

\* Second Appeal No. 840 of 1938, from the decision of N. K. Dravid, Assistant Judge at Dharwar, in Appeal No. 116 of 1937, reversing the decree passed by J. R. Nazareth, Subordinate Judge at Haveri, in Long Cause Civil Suit No. 629 of 1935.

1 (1923) I. L. R. 45 All. 396.

R. 86.

2 (1907) I. L. R. 31 Bom. 405, s. c. 9 Bom. L. R. 542.

3 (1880) I. L. R. 5 Bom. 295.

4 (1893) I. L. R. 18 Bom. 372.

5 (1922) 36 C. L. J. 491.

6 (1932) I. L. R. 13 Lah. 713, F.B.

7 (1926) I. L. R. 4 Ran. 429.

8 (1933) I. L. R. 56 Mad. 646:

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II. In cases where fraud is accomplished—

(1) Where only one party acts fraudulently, he cannot be allowed, either as plaintiff or as defendant, to plead his fraud, on the principle that no man shall be heard to plead his own fraud;

(2) Where both parties are equally fraudulent, the Court will refuse to enforce the fraudulent transaction on the principles that where each party is equal in fault, the law favours him who is actually in possession, and will give relief to neither, and that a right of action cannot arise out of fraud, with the result that—

(a) where the plaintiff seeks relief on the allegation and on the basis of joint fraud, his suit will be dismissed; and

(b) where he seeks relief by suppressing the fraud, the defendant can plead and prove the common fraud to defeat the plaintiff's claim.

Plaintiff sued to recover possession of certain lands from the defendants alleging that he had purchased them from the defendants and had leased them for cultivation to the defendants who refused to deliver possession. The defendants contended that the sale-deed was passed without consideration, that the transaction was part of a fraudulent attempt to defeat their creditor who sought to attach the lands in execution of his decree, that the plaintiff was a benamidar and party to the fraud perpetrated on the creditor, and that he could not take advantage of it:—

*Held*, dismissing the suit, that it was a fraud for the plaintiff to claim beneficial title under a deed in respect of which he was a mere benamidar, and that the defendants were entitled to prove the benami nature of the transaction, even though in doing so they might have to rely on their own fraud.

SUIT to recover possession of lands.

In 1921, one Kasimsaheb obtained a decree against Guddappa (defendant No. 1) and his father Chikkappa (defendant No. 2). The decree was confirmed in appeal on November 17, 1923.

On March 22, 1924, defendants mortgaged some of their lands to a devasthan.

On July 24, 1925, Kasimsaheb applied to execute his decree and recovered part of the decretal amount. He again applied on August 11, 1927, to execute the decree, but without success.

On January 3, 1928, defendants sold their lands for Rs. 600 to the plaintiff Balaji, who paid Rs. 400 in cash to defendants and kept the balance of Rs. 200 with him. On the same day, defendants sold their other properties to one Guddappa (Ex. 54), and also sold their cattle to one Mariyappa.

On January 16, 1928, the plaintiff satisfied the mortgage of 1924 by paying Rs. 151-12-0 to the devasthan, and on January 17, 1928, he paid to the defendants Rs. 48-4-0, the balance of Rs. 200 which were kept with him.

On February 6, 1928, the sale was recorded and mutation of names effected in the record of rights. The possession of the lands sold, however, remained with the defendants.

On March 7, 1929, Kasimsaheb applied for the third time to execute his decree alleging that the sale deed passed in favour of the plaintiff was a fraudulent transaction entered into merely with the object of defeating his claim. He failed to prove the allegation and the darkhast was dismissed.

On December 4, 1935, the plaintiff sued to recover possession of the lands

with mesne profits from the defendants. He alleged that he was the owner of the lands and had leased them to defendant No. 1 on an oral agreement in 1930, that defendant No. 1 denied his title and refused to hand over possession of the lands to him.

Defendants in their written statement contended that the sale deed in respect of the lands was executed by them in favour of the plaintiff on January 3, 1928, with a view to save the lands from attachment and sale in execution of the decree obtained by Kasimsaheb against them, that the sale deed was passed without consideration and was not intended to convey any title to the plaintiff, that the amount of Rs. 400 produced before the Sub-Registrar by the plaintiff was taken back by him, that possession of the lands had always been with them, that the plaintiff knew of the fraudulent nature of the transfer and being party to it he could not take advantage of it, and that the plaintiff was estopped from claiming possession of the lands.

The Subordinate Judge found that the sale was hollow and meant to defraud the decree-holder Kasimsaheb, and, therefore, dismissed the suit. He observed in the course of his judgment.—

"The last point which needs some consideration is whether defendants can resist the plaintiff's claim for possession as they were admittedly parties to the fraud. The law on the point is clear. It has been held that if the transferor remained in possession of the property in spite of the execution of the sham conveyance, the transferee will not be permitted to bring a suit for possession of the property on the strength of the conveyance, *vide* Notes under s. 53, p. 234, of the Transfer of Property Act by Mitra, 6th edn., 1930; see also *Yaramati v. Chundru*, 20 Mad. 326, 332. Hence in spite of the fact that the plea of the defendants involves an acknowledgment of their own turpitude, they can still resist a claim for possession of the transferee of the property fraudulently transferred."

On appeal, the Assistant Judge, relying on the decision in *Sidlingappa v. Hirasa*,<sup>1</sup> reversed the decree of the trial Court on the ground that the defendants could not plead their own fraud as an effective answer to a claim to property conveyed by them to a benamidar, and ordered the defendants to give possession of the lands to the plaintiff. He observed in his judgment.—

"It was argued as a point of law that when plaintiff and defendants are both parties to a fraudulent transfer and fraud has been perpetrated against the transferor's creditors, as in the present case, the Court should not assist plaintiff to recover possession, but should allow the estate to lie where it falls. This point was specifically considered in 31 Bom. 405 (*Sidlingappa v. Hirasa*). I must respectfully follow the ruling of our High Court in the above case which accepted the proposition that a deed cannot be avoided on the ground of fraud by a party to the fraud: that is to say, that a defendant cannot plead his own fraud as an effective answer to a claim to immovable property conveyed by him to a benamidar. This was followed in *Sayad Nahannu v. Sabiribibi*, 37 Bom. 217. The trial Court has relied on *Yaramati v. Chandru*, 20 Mad. 326. In that case, however, it was plaintiff who pleaded the fraud and not the defendant and the Court refused to assist plaintiff; while in the present case plaintiff pleads no fraud, but defendants plead it to avoid the sale. The observation of Benson J. in that case at p. 332, 'If the defendants were now seeking the assistance of the Court to obtain possession of the land from plaintiff, it may well be that the Court would allow the plaintiff to plead the true rights of the parties, even though the plea involved a declaration by the plaintiff of his own turpitude' is merely *obiter*. This is clear from the later case, *Koppula v. Chitrapu*, 56 Mad. 646, which is parallel to the above Bombay cases."

<sup>1</sup> (1907) I. L. R. 31 Bom. 405; s. c. 9 Bom. L. R. 542.

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F. B. The defendants appealed to the High Court.

1941 The appeal came on for hearing before Divatia J. on January 24, 1941, when his Lordship referred it to a full bench of three Judges.

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Accordingly a full bench consisting of Beaumont C. J., Divatia J. and Mac-  
klin J. heard the appeal on February 6, 1941.

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R. A. *Jahagirdar*, Government Pleader, for the appellant. The point in dispute is covered by the general principle of law that where both parties to a suit have committed fraud and the fraud is carried out, the Court should help neither party, and allow the estate to fall where it lies. This principle is not accepted in *Sidlingappa v. Hirasa*<sup>1</sup> and *Sayad Nahannu v. Sabrinibibi*<sup>2</sup>. There is another general principle of equal importance to the effect that a party to a fraud should not be allowed to take advantage of his own fraud. In *Lakshman v. Vasudev*<sup>3</sup> the case of *Sidlingappa v. Hirasa* was distinguished, though it was decided on a different ground.

My submission is that *Sidlingappa's* case is not correctly decided. That case has been consistently followed in the Madras High Court; but all the other High Courts have taken a different view and are of opinion that the estate should lie where it falls.

There is an analogous provision in s. 84 of the Indian Trusts Act, 1882, but it applies only when the fraud is not carried out. Where, however, the fraud is carried out, the Court should help neither party and allow the estate to lie where it falls.

The facts in *Sidlingappa v. Hirasa* were somewhat peculiar. The real owner conveyed his property in *benami* to another person, who sold it to plaintiffs' father. The property was attached in execution of a money decree against the owner, but the attachment was raised at the instance of the plaintiffs' father. Subsequently, when the plaintiffs sued to recover possession of the property from the real owner, he pleaded his own fraud as an answer to the claim. It was found that both deeds of conveyance were sham transactions. The owner succeeded under them to cheat his decree-holder out of his just rights. Dealing with this position Jenkins C. J. said (p. 411) : "He (owner) now seeks to plead his fraud as a defence to the plaintiffs' claim to recover possession of this property ... for the plaintiff it is urged that the rule is that a deed cannot be avoided on the ground of fraud by a party to the fraud; *Allegans turpitudinem suam* shall not be heard. ... It is a sounder policy to accept the rule, which will be most apt to deter persons from frauds of this kind; for, experience shows that they are by no means uncommon. We prefer the rule for which the plaintiff contends". Then later on, the Chief Justice adds (p. 412) : "Though we have dealt with the case as if both parties to this litigation had been equally culpable, it is to be noticed that it was the plaintiffs' father and not the plaintiff, who joined the defendant in the fraud, and it is a question whether it can be said that the plaintiff and the defendant are *in pari delicto*." The above case failed to consider the earlier rulings of our High Court, and was itself

1 (1907) I. L. R. 31 Bom. 405,  
s. c. 9 Bom. L. R. 542.  
2 (1911) I. L. R. 37 Bom 217,

s. c. 13 Bom. L. R. 1011.  
3 (1930) 33 Bom. L. R. 356.

doubted and distinguished in the later case of *Lakshman v. Vasudev*<sup>1</sup> which was disposed of on the ground of s. 41 of the Transfer of Property Act, 1882. There Madgavkar J. said (p. 359) : "The decision of Sir Lawrence Jenkins is entitled to the greatest respect. But, as pointed out by Mookerjee J. in *Raghupathi v. Nrishingha*,<sup>2</sup> the authority of the case in *Deo dem Roberts v. Roberts*,<sup>3</sup> on which it is based, must be deemed to have been considerably weakened by the subsequent ruling in *Prole v. Wiggins*.<sup>4</sup> The circumstances in *Sidlingappa v. Hirasa* were peculiar. It was not merely a case of fraud between the parties but fraud had been practised on the Courts in execution. Under these circumstances, although the Court there accepted the maxim 'Let the estate lie where it falls' or in other words *in pari delicto potior est conditio possidentis*, it held that on the very application of that rule the plaintiff was entitled to a decree".

The earliest case in Bombay on the subject of fraud is of *Luckmidas Khimji v. Mulji Canji*<sup>5</sup>. It was not brought to the notice of Jenkins C. J. in *Sidlingappa's* case. The facts in that case were that in order to screen his property from execution the defendant had mortgaged his house with power of sale, and the mortgagee sold the house under the power to the plaintiff who was the defendant's uncle. The defendant attorned to the plaintiff, but remained in possession of the house. In a suit by the plaintiff to recover possession of the house the defendant pleaded that the mortgage, the sale and the attornment were all merely colourable. Westropp C. J. said (p. 304) : "Actual possession, either manual or by payment of rent, it is admitted that the plaintiff never had... The plaintiff's counsel has relied on *Doe d. Roberts v. Roberts*<sup>6</sup> to the contrary ... but ... it seems doubtful that even in a Court of common law that case would now be followed ... Where, however, a contract or deed is made for an illegal or immoral purpose, a defendant, against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff, and a Court of Justice will decline its aid to enforce a contract thus wrongfully entered into." The same view was taken in the later case of *Babaji v. Krishna*<sup>7</sup>, where Sargent C. J. said (p. 374) : "The judgments of the Privy Council in *Ram Surun Singh v. Mussamut Pran Peary*<sup>8</sup> and of the Calcutta High Court in *Sreemutty Debia Chowdhraïn v. Bimola Soonduree Debia*<sup>9</sup> as delivered by Sir Richard Couch show that it is open to the defendant to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or the defendant's creditors generally."

In *Honapa v. Narsapa*<sup>10</sup> the Court was dealing with a converse case. The real owner had conveyed his property to defendant with the object of defrauding his creditors and the fraud had been carried out. The owner was held not entitled to recover possession from the defendant. In that case Farran C. J., after an exhaustive review of case-law, remarked (p. 413) :

1 (1930) 33 Bom. L. R. 356, 359.

2 [1923] A. I. R. Cal. 90.

3 (1819) 2 B. & Ald. 367.

4 (1836) 3 Scott 601.

5 (1890) I. L. R. 5 Bom. 295.

6 (1819) 2 B. & Ald. 367.

7 (1893) I. L. R. 18 Bom. 372.

8 (1870) 13 M. I. A. 551.

9 (1874) 21 W. R. 422.

10 (1898) I. L. R. 23 Bom. 406.

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"Where a defendant in possession proves that he is the real owner and that the deed under which the plaintiff is claiming is fraudulent and collusive, he is left in possession, because the plaintiff has no just claim to the property. He owes his safety, not to the Court's action, but to the fact that he is in possession, and the plaintiff cannot establish a right to turn him out... Where the fraud is not completed, it may well be contended that as the collusive transaction has not really frustrated justice, the original owner still retains a good claim to the property." The above case shows that if the real owner is the defendant in possession then the plaintiff will not be helped by the Court in recovering possession. If the real owner comes to Court for recovering possession of the property, he will not be helped either. If the fraud is carried out, the real owner gets no help from the Court.

In *Shripadgouda Venkangouda v. Govindgouda Narayangouda*<sup>1</sup> it was held that where both parties to a suit practise fraud on Court and obtain a collusive decree, it is not open to either of them to impeach the judgment on the ground that it was collusively procured. The plaintiff who brought a suit to set aside a decree which was collusively obtained against him was non-suited on the ground that he was a party to the fraud.

The case of *Sidlingappa v. Hirasa*<sup>2</sup> was dissented from by the Allahabad High Court in *Vilayat Husain v. Misran*,<sup>3</sup> in which the Court assisted neither party, both parties being *in pari delicto*. As regards *Sidlingappa's* case the Court said (p. 399) : "If one studies that case, one will see that no attention was concentrated upon the question with which we are concerned here, which is whether a defendant can in a pleading, raise facts which show that he and the plaintiff were *in pari delicto*."

In the Lahore High Court in the full bench case of *Quadir Baksh v. Hakam*,<sup>4</sup> Tek Chand J. said with reference to *Sidlingappa's* case (p. 377) : "The judgment in this case was delivered by Lawrence Jenkins C. J. and like everything else which bears the *imprimatur* of that great Judge, is entitled to the highest respect. I have, therefore, given much anxious thought and careful consideration to it, and though I find that it has been dissented from already in our own Court as well as in Calcutta and Allahabad, it is not without considerable hesitation and diffidence that I have decided not to follow it."

In Madras the view taken in *Sidlingappa's* case has prevailed, but the decisions there have proceeded on the rule of *stare decisis*, and not on merits : *Kotayya v. Mahalakshamma*.<sup>5</sup> The Madras view is criticised in *Quadir Baksh v. Hakam* at p. 740.

Story on Equity (3rd Edn.), p. 123, § 298 has it : "In general (for it is not universally true), where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participators in a common crime, will not interpose to grant any relief ; acting upon the known maxim, *In pari delicto potior est conditio defendentis, est possidentis*."

The Privy Council in *Petherpermal Chetty v. Muniandi Servai*<sup>6</sup> quote

1 (1940) 42 Bom. L. R. 1185.

2 (1907) I. L. R. 31 Bom. 405,

s. c. 9 Bom. L. R. 542.

3 (1923) I. L. R. 45 All. 396.

4 (1932) I. L. R. 13 Lah. 713.

5 (1933) I. L. R. 56 Mad. 646.

6 (1908) L. R. 35 I. A. 98,

s. c. 10 Bom. L. R. 590.

with approval a passage from Mayne on Hindu Law, which says (p. 102) : "But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies. 'In pari delicto potior est conditio possidentis'. The Court will help neither party. 'Let the estate lie where it falls.'"

In *Jadu Nath Poddar v. Rup Lal Poddar*<sup>1</sup> the Calcutta High Court is of opinion that where the intention to commit fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him is benami and that the plaintiff is entitled to recover.

The general rule is that a person who commits fraud is not allowed to plead his own fraud in support of his case, either as plaintiff or defendant. Where fraud is actually carried out the Court should help neither party. When fraud is not carried out the Court should assist the real owner in getting his property. In the present case the plaintiff has not come to the Court with clean hands. It must be held that both parties were privies to the fraud and the plaintiff should be non-suited.

S. R. Joshi, for the respondent. I submit that the case of *Sidlingappa v. Hiras*<sup>2</sup> is correctly decided.

Where a plaintiff can make out his title to the property in dispute on independent evidence, the defendant should not be allowed to defeat such plaintiff by pleading his own fraud. Fraud has been allowed to be pleaded by the defendant only in three classes of cases :—

- (1) where the fraud has not been carried out
- (2) where the consideration for the agreement is executory and in a suit by the plaintiff to enforce the performance of the promise, the defendant resists the enforcement by pleading common fraud, and
- (3) where plaintiff seeks to repudiate any illegal transaction after it is carried out and seeks to recover back the money paid under it.

The case of *Sidlingappa v. Hiras*<sup>2</sup> does not fall under any one of them.

The judgment in *Vilayat Husain v. Misram*<sup>3</sup> mainly relies on two English cases : *Taylor v. Chestor*<sup>4</sup> and *Herman v. Juchner*.<sup>5</sup> In *Taylor v. Chestor* the plaintiff had deposited with the defendant the half of a £ 50 bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch. The plaintiff having brought an action to recover the half-note, it was held that the maxim, *in pari delicto potior est conditio possidentis*, applied, and that as the plaintiff could not recover without showing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. The test laid down in the case is that where a plaintiff cannot succeed without showing the true character of the transaction he cannot succeed. In this case Mellor J. said (p. 314) : "The true test for deter-

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1 (1906) I. L. R. 33 Cal. 967.

2 (1907) I. L. R. 31 Bom. 405,  
s. c. 9 Bom. L. R. 542.

3 (1923) I. L. R. 45 All. 396.

4 (1869) L. R. 4 Q. B. 309.

5 (1885) 15 Q. B. D. 561.

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mining whether or not the plaintiff and the defendant were in *pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." Hence, where the plaintiff comes to the Court with a *prima facie* title and he is not obliged to plead fraud at all, the principle of in *pari delicto* does not apply. I submit this case is not inconsistent with *Sidlingappa's* case and does not support the other side. It was not a case where the plaintiff was obliged to plead his own fraud.

In *Herman v. Jeuchner* the plaintiff had deposited money with the defendant in order to induce the latter to stand surety for him, and it was held that he was not entitled to sustain an action to recover back the money, although he had not committed any default and although the defendant had not been compelled to pay the amount for which he had become bound. Brett M. R. said (p. 564) : "The contract between the plaintiff and the defendant is tainted with illegality. . . . if the contract is illegal and has been performed, then the person vouching the illegality cannot recover. In this case the illegal purpose has been wholly performed, and therefore the plaintiff cannot recover." This would fall under the three classes of cases mentioned above.

In *Raghupati v. Nrisingha*<sup>1</sup> the benamidar lost his suit, the fraudulent purpose having been carried out. Mukerji J. observed therein that the authority of *Doe dem. Roberts v. Roberts*<sup>2</sup> was shaken by *Prole v. Wiggins*.<sup>3</sup> But *Doe dem. Roberts's* case has been cited by Tindal C. J. in *Prole's* case and distinguished. In *Prole's* case the suit was to recover money on a bond passed under a contract by which it was intended to defeat certain provisions of a statute. Here the consideration was executory. It falls under class 2. Moreover *Raghupati's* case is opposed to the ruling of our Court in *Shripadgouda Venkangouda v. Govindagouda Narayangouda*,<sup>4</sup> as even after a decree the transaction was allowed to be disputed.

The case of *Chenvirappa v. Puttappa*<sup>5</sup> was followed in *Shripadgouda Venkangouda v. Govindgouda Narayangouda*<sup>6</sup> with the remark (p. 1190) : "The plaintiff (in *Chenvirappa's* case) could not get the judgment set aside which defendant had obtained against him by his own contrivance even if the trust was enforceable in his favour for it arose *ex turpi causa*." This case is in my favour.

The case of *Doe dem. Roberts v. Roberts*<sup>2</sup> is an authority for the proposition that no man can be allowed to allege his own fraud to avoid his own deed. This case was relied upon by Jenkins C. J. in *Sidlingappa v. Hirasa*, which is not inconsistent with *Prole v. Wiggins*.<sup>7</sup> The full bench case of *Qadir Bakhsh v. Hakam*<sup>8</sup> relies mainly on *Raghupati v. Nrisingha* and *Vilayat Husain v. Misran*.

It is contended on the other side that the early Bombay rulings are not considered in *Sidlingappa's* case. To take the earliest case, in *Luckmidas Khimji v. Mulji Canji*<sup>9</sup> the sole question was whether the Small Cause Court

1 (1922) 36 C. L. J. 491.

2 (1819) 2 B. & Ald. 367.

3 (1836) 3 Scott 601.

4 (1940) 42 Bom. L. R. 1185.

5 (1887) I. L. R. 11 Bom. 708.

6 (1940) 42 Bom. L. R. 1185.

7 (1836) 3 Scott 601.

8 (1932) I.L.R. 13 Lah. 713, F.B.

9 (1880) I. L. R. 5 Bom. 295.



in Bombay had jurisdiction to entertain the case. A suit to recover possession of immoveable property can be brought in the Court of Small Causes only if the defendant is a tenant. As soon as the defendant is shown to be a trespasser the jurisdiction of that Court is ousted. The defendant there was pleading his own title. There is nothing to show that the fraud there was actually carried out. The cases of *Chenvirappa v. Puttappa*<sup>1</sup> and *Shripadgouda Venkangouda v. Govindagouda Narayangouda*<sup>2</sup> are in my favour. The plaintiff having allowed a collusive decree to be passed against him was held not entitled to recover possession of the property. *Chenvirappa's* case is in conflict with *Raghupati v. Nrisingha*.<sup>3</sup> In the case of *Babaji v. Krishna*<sup>4</sup> there was no finding that fraud was committed; and the case is not inconsistent with *Sidlingappa's* case, as pointed out in *Qadir Bakhsh v. Hakam*.<sup>5</sup> *Honapa v. Narsapa*<sup>6</sup> was a case in which it was the owner of property who sued to recover its possession after the fraud was carried out. Such is not the case here. None of these cases is in conflict with *Sidlingappa's* case.

The case of *Deo dem. Roberts v. Roberts*<sup>7</sup> was relied upon in *Sidlingappa's* case. According to it, no man can be allowed to plead his own fraud. Abott C. J. said (p. 368): "The plaintiff, at the trial, produced a proper deed of conveyance, and proved its execution, and by that he established his title to the premises. The defendant endeavoured to defeat this, by showing that the deed was delivered for the fraudulent purpose of giving to the plaintiff a colourable qualification to kill game; but in the case of *Montefiori v. Montefiori*,<sup>8</sup> Lord Mansfield expressly said, 'that no man shall set up his own iniquity as a defence, any more than as a cause of action'. Here that is attempted to be done; but the defendant cannot be allowed to be heard upon this matter." The above case was followed in *Phillpotts v. Phillpotts*<sup>9</sup> and *Bessey v. Windham*.<sup>10</sup> It was also followed in *Kamayya v. Mamayya*,<sup>11</sup> where Coutts Trotter J. has reviewed English cases on the point and has pointed out that the case *Doe dem. Roberts v. Roberts* is not inconsistent with *Prole v. Wiggins*; and in *Sayad Nahammu v. Sabinibibi*.<sup>12</sup>

The decision in *Sidlingappa v. Hirasa*<sup>13</sup> does not proceed so much on English cases as on the application of the test of public policy (p. 411).

*Ram Surun Singh v. Mussamut Pran Peary*<sup>14</sup> was not a case in which the defendant was trying to avoid his own deed by pleading his own fraud.

The remarks in *Lakshman v. Vasudev*<sup>15</sup> are obiter. There *Sidlingappa's* case is only distinguished.

The case of *Sidlingappa v. Hirasa* is treated in this Court as a leading case. It has been consistently followed in subsequent cases: *Kondi v. Chumilal*,<sup>16</sup>

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1 (1887) I. L. R. 11 Bom. 708.

2 (1940) 42 Bom. L. R. 1185.

3 (1922) 36 C. L. J. 491.

4 (1893) I. L. R. 18 Bom. 372.

5 (1932) I. L. R. 13 Lah. 713, F.B.

6 (1898) I. L. R. 23 Bom. 406.

7 (1819) 2 B. & Ald. 367.

8 (1762) 1 W. Black. 363.

9 (1850) 20 L. J. C. P. 11.

10 (1844) 14 L. J. Q. B. 7.

11 (1916) 32 M. L. J. 484.

12 (1911) I. L. R. 37 Bom. 217,

s. c. 13 Bom. L. R. 1011.

13 (1907) I. L. R. 31 Bom. 405,

s. c. 9 Bom. L. R. 542.

14 (1870) 13 M. I. A. 551.

15 (1930) 33 Bom. L. R. 356.

16 (1928) 30 Bom. L. R. 1539, 1549.

F. B 1941 *Sabava v. Yamanappa*,<sup>1</sup> *Krishnarao v. Ghaman*,<sup>2</sup> and *Girdharilal Prayagdatt v. Manikamma : Girdharilal Prayagdatt v. Yeshodabai*.<sup>3</sup> It has stood so long. It is not inconsistent with English cases.

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*R. A. Jahagirdar*, was not called upon in reply.

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BEAUMONT C. J. This is a second appeal from a decision of the Assistant Judge of Dharwar, which has been referred to a full bench, because it raises the question whether the decision of this Court in *Sidlingappa v. Hirasa*<sup>4</sup> is correct.

The facts as found by the lower Courts are that in 1923 there was a decree passed against defendants Nos. 1 and 2, who are the present appellants, which decree was in process of being executed. Then on January 3, 1928, the defendants executed in favour of the present plaintiff what purported to be a sale-deed, and on that deed the plaintiff sues for possession. Both the lower Courts have held that in fact no consideration passed on that sale-deed, that it was part of a fraudulent attempt on the part of the defendants to defeat their creditors, and that the deed on which the plaintiff sues was in effect a benami transaction. On those findings, which bind us in second appeal, the learned Subordinate Judge dismissed the plaintiff's suit on the ground that to grant a decree in favour of the plaintiff would be to assist him in perpetrating a fraud. The defendants are still in possession, and the plaintiff, unless he can get a decree for possession from the Court, will not be able to gain any advantage from this alleged sale-deed. In appeal the learned Assistant Judge overruled the decision of the trial Court on the authority of *Sidlingappa v. Hirasa* (supra).

The principles, which must govern cases of this sort are in my opinion clear. No Court will allow itself to be used as an instrument of fraud, and no Court, by the application of rules of evidence or procedure, can allow its eyes to be closed to the fact that it is being used as an instrument of fraud. The legal maxim is *ex turpi causa non oritur actio*. Once the Court finds that the plaintiff is seeking its assistance to enable him to get the benefit of what is a fraud, the Court refuses to assist him. If, as a result of such refusal, the defendant is left in possession of some advantage derived from his own fraud, that is not due to any action on the part of the Court. It is a fraud for a plaintiff to claim beneficial title under a deed in respect of which he was a mere benamidar, and the Court cannot refuse to allow the defendant to prove the benami nature of the transaction, even though in doing so the defendant may have to rely on his own wrong doing.

In *Sidlingappa v. Hirasa* (supra) the facts were substantially the same as in the present case, and the Court there held that the defendant could not be allowed to defeat the plaintiff's case by alleging his own fraud. It was pointed out that the deed on which the plaintiff sued was ostensibly a valid conveyance, and it was held that the defendant could not be allowed to show that it was not what it purported to be, a conveyance on sale, by setting

1 (1932) 35 Bom. L. R. 345, 360.

s. c. 15 Bom. L. R. 805.

2 (1934) 36 Bom. L. R. 1074, 1078.

4 (1907) I. L. R. 31 Bom. 405,

s. c. 9 Bom. L. R. 542.

3 (1913) I. L. R. 38 Bom. 10,

up his own fraud. The leading judgment was given by Sir Lawrence Jenkins, and I should never differ from any decision of his without very great diffidence, but, in my opinion, his decision in that case cannot be supported. The judgment resulted in the Court decreeing possession to a man who, on the facts proved, had no title whatever to possession, and was setting up a fraudulent claim. The case seems to postulate the existence of some sort of rule of estoppel, under which a defendant is never entitled to set up his own fraud; but, in my opinion, there is no such rule. An admission by a witness that he has been guilty of fraud never comes gracefully, but at the same time such admissions cannot be said to be illegal. I think the true rule is stated by Sir Grimwood Mears in *Vilayat Husain v. Misran*,<sup>1</sup> where he says (p. 398) :—

"In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances embrace and include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the court to look into the matter, and if the court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff (who is asking the court to give him some help) and that of the defendant, the duty of the court is not to assist either party; in other words, the duty of the court is to dismiss the claim, because the court having then in its knowledge that it has before it two persons equally guilty of fraud will not assist either of them."

In the present case the fraud which the plaintiff and the defendants perpetrated on the defendants' creditors is a thing of the past, and this Court is not asked, and would certainly refuse, to assist in that. The fact that such a fraud was perpetrated in the past cannot justify this Court at the present time in assisting the plaintiff to perpetrate a further fraud upon the defendant.

We have been referred to a considerable number of cases, and, except for the Madras High Court, all the other High Courts have not followed the principle laid down in *Sidlingappa v. Hirasa*. This High Court itself in two earlier cases, *Luckmidas Khimji v. Mulji Canji*,<sup>2</sup> and *Babaji v. Krishna*,<sup>3</sup> had adopted what I venture to think is the right principle, and said that in a case of this sort the Court does not interfere to assist the plaintiff, but leaves the estate to lie where it falls. Unfortunately those cases were not discussed in *Sidlingappa v. Hirasa*. *Sidlingappa v. Hirasa* has been disapproved by the Allahabad High Court, by the Lahore High Court, and by the Calcutta High Court. In *Qadir Bakhsh v. Hakam*,<sup>4</sup> a full bench of the Lahore High Court went in considerable detail through all the cases on this subject in the High Courts in India, and arrived at the conclusion that the true principle is that the Court in a case of this sort would not interfere to help the plaintiff, even though in proving the fraudulent nature of the plaintiff's claim it is necessary for the defendant to rely on his own earlier fraud. In the Madras High Court there are several cases which follow *Sidlingappa v. Hirasa*. The last of them, which is *Kotayya v. Mahalakshamma*,<sup>5</sup> merely rests the

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1 (1923) I. L. R. 45 All. 396.

2 (1880) I. L. R. 5 Bom. 295.

3 (1893) I. L. R. 18 Bom. 372.

4 (1932) I. L. R. 13 Lah. 713, F.B.

5 (1933) I. L. R. 56 Mad. 646.

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decision on the doctrine of *stare decisis*, though apart from the decisions of the Madras High Court itself, the balance of authority is heavily against the view taken. To my mind, the principle, which was acted upon in *Sidlingappa v. Hirasa*, is fundamentally wrong and offends against the rule that the Court must never allow itself to be used to assist in the perpetration of fraud. *Sidlingappa v. Hirasa* must be treated as overruled.

In my opinion, the decision of the learned trial Judge in this case was right, and the decision of the lower appellate Court was wrong. We must, therefore, allow the appeal, set aside the decree of the lower appellate Court, and restore that of the trial Court, with costs throughout.

DIVATIA J. The point arising for decision in this appeal is whether it is open to the defendants to prove a joint and successful fraud of themselves and the plaintiff to defeat the latter's claim for possession of property conveyed under a collusive and nominal transaction. The lower appellate Court has held, relying on a decision of our High Court in *Sidlingappa v. Hirasa*,<sup>1</sup> that the defendants cannot plead their own fraud as an effective answer to a claim to property conveyed by them to a benamidar. On this point the opinion of our own as well as other High Courts is not unanimous. In three previous decisions of our High Court the view adopted was that it was open to the defendant to defend his possession by proving that the transaction of sale between himself and the plaintiff was effected to defraud a third party : *Luckmidas Khimji v. Mulji Canji*,<sup>2</sup> *Babaji v. Krishna*,<sup>3</sup> and *Honappa v. Narsappa*.<sup>4</sup> That view was based on the well-known maxim that when each party is equal in fault, the law favours him who is actually in possession. In *Sidlingappa v. Hirasa* it was, however, held that the defendant cannot plead his own fraud in answer to a claim which is ostensibly good in law and that it was a sounder policy to accept the rule that a party alleging his own participation in the fraud shall not be heard. The same view was expressed by Beaman J. in a later decision in *Sayad Nahannu v. Sabrinibibi*.<sup>5</sup> In *Lakshman v. Vasudev*<sup>6</sup> the decision in *Sidlingappa v. Hirasa* was criticised but was sought to be distinguished on the ground that where the plaintiff, who was a purchaser from a fraudulent party, had not proved his own good faith and due enquiry, he was not entitled to the assistance of the Court.

Among the other High Courts, the Madras High Court is the only one which has in its recent rulings, the last of which is in *Kotayya v. Mahalakshamma*,<sup>7</sup> adopted the same view as in *Sidlingappa v. Hirasa*, although its earlier decisions were to the contrary. The Calcutta, Allahabad, Lahore and Rangoon High Courts have dissented from the decision in *Sidlingappa v. Hirasa*, and held that the defendant is entitled to maintain his possession by proving the fraudulent nature of the transaction where the fraud is joint and successful : *Raghrupati v. Nrisingha*,<sup>8</sup> *Vilayat Husain v. Misran*,<sup>9</sup> *Qadir*

1 (1907) I. L. R. 31 Bom. 405,  
 s. c. 9 Bom. L. R. 542.  
 2 (1880) I. L. R. 5 Bom. 295.  
 3 (1893) I. L. R. 18 Bom. 372.  
 4 (1898) I. L. R. 23 Bom. 406.  
 5 (1911) I. L. R. 37 Bom. 217,

s. c. 13 Bom. L. R. 1011.  
 6 (1930) 33 Bom. L. R. 356.  
 7 (1933) I. L. R. 56 Mad. 646.  
 8 (1922) 36 C. L. J. 491.  
 9 (1923) I. L. R. 45 All. 396.

*Bakhsh v. Hakam*,<sup>1</sup> and *Ma Nan Chaw v. Ma E*.<sup>2</sup> It is to be noted that there is unanimity on the point that the plaintiff cannot be allowed any relief by way of declaration or possession based on a transaction initiated by his own fraud whether with or without the defendant as his accomplice; the diversity of opinion is with regard to the defendant's right to plead the joint fraud in answer to the plaintiff's claim. In order to test the two different views on this point, it is necessary to examine the various ways in which the allegation of fraud can come before a Court. Fraud may be either unilateral or bilateral, i.e., it may be committed only by one party to the suit while the other party is innocent or it may be by both the parties conjointly and collusively to defeat a third person. In both cases it might be successfully effected by the fraudulent object being accomplished or it might be ineffective in the sense that after the fraudulent transaction has been entered into, its object has been frustrated. In all cases of unilateral or bilateral fraud which has not been successfully accomplished, either party to it can repudiate the fraudulent transaction and can recover or maintain his possession relying upon his real title. That has been laid down in a number of authorities of which the principal ones are *Petherpermal Chetty v. Muniandi Servai*,<sup>3</sup> *Jadu Nath Poddar v. Rup Lal Poddar*,<sup>4</sup> and *Bai Devmani v. Ravishankar Oghadbhai*.<sup>5</sup> That is also the rule underlying s. 84 of the Indian Trusts Act. Where, however, the fraudulent object is achieved, different results would follow according as the fraud is unilateral or bilateral. Where the fraud is unilateral, the fraudulent party cannot be allowed to plead his own fraud either as a plaintiff or as a defendant on the well-known maxim that no man shall be heard to plead his own fraud. Where the fraud is bilateral and both parties are equal in turpitude, neither of them can, as plaintiff, enforce his claim against the other relying upon the fraudulent nature of the transaction on the same principle that a right of action cannot arise out of fraud. So far the position is clear. But what would happen when the fraudulent plaintiff, suppressing the collusive and nominal nature of the transaction and relying on its outward legality, sues his accomplice in the fraud to obtain possession of property which he would not have been able to get if he had disclosed the fraud? The divergence of opinion emerges here. The decisions, of which *Sidlingappa v. Hirasa* is a type, are based on the view that the defendant is in no better position than the plaintiff and both are governed by the same principle of incapacity of proving one's participation in fraud. Thus in a case where the defendant has purported to sell his property to the plaintiff by a formally good but really hollow and collusive deed without parting with possession, the plaintiff can obtain a decree for possession by relying on his outwardly good title and preventing the defendant from proving the fictitious nature of the transaction.

That is the actual decision in *Sidlingappa v. Hirasa*, and if it is correct that would be the result in the present case also. It is observed in that decision that in order to deter persons effectively from committing frauds, it is a sounder policy to act upon the rule of equity prohibiting a party from prov-

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1 (1932) I. L. R. 13 Lah. 713, F.B.

2 (1926) I. L. R. 4 Ran. 429.

3 (1908) L. R. 35 I. A. 98,  
s. c. 10 Bom. L. R. 590.

4 (1906) I. L. R. 33 Cal. 967.

5 (1928) I. L. R. 53 Bom. 321,  
s. c. 31 Bom. L. R. 109.

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ing a fraud of which he is an accomplice than to act upon another rule of equity that the Court will not help a plaintiff where the litigants are parties to a common fraud. In arriving at this conclusion the Court mainly followed an old English decision in *Deo dem Roberts v. Roberts*.<sup>1</sup> But, as observed in *Quadir Bakhsh v. Hakam* and *Vilayat Husain v. Mistran*, that decision is not now considered an authority and the Courts act on the principle that where parties are of equal guilt, the estate will lie where it falls, and the defendant can, therefore, plead the fraud to maintain his possession. See Broom's Legal Maxims (9th edn.,) at pp. 465-6 and 478-9, and Taylor on Evidence, Vol. I (12th edn.,), p. 89. It may be further stated here that the rule applied in *Sidlingappa v. Hirasa* is also based on the principle of estoppel that the defendant being a party to the fraud is estopped from pleading his own fraud, but, as held in *Ram Surun Singh v. Mussamut Pran Peary*,<sup>2</sup> there can be no estoppel in the case of joint fraud where the facts are known to both the parties.

As I stated before, all the Indian High Courts except the Madras High Court have dissented from the decision in *Sidlingappa v. Hirasa*. After that decision was reported, the Madras High Court changed its former view and adopted the reasoning of that decision. I may state here that in *Petherpermal Chetty v. Muniandi Servai* their Lordships quoted with approval a passage from Mayne's Hindu Law to the effect that where the fraudulent purpose has been effected by the colourable grant, the maxim "*In pari delicto potior est conditio possidentis*" applies and the Court will help neither party.

Testing the matter on principle apart from authorities, it seems to me that the rule adopted in *Sidlingappa v. Hirasa* is less equitable than the other view. By preventing the defendant from establishing the real nature of the transaction, the Courts would encourage the plaintiff, who has already joined in one fraud, to practise another fraud on the Court by falsely posing as an innocent party and misleading the Court which would not have granted him any relief if he had himself alleged the true facts. There is much less reason in equity for allowing the plaintiff the relief which he seeks by suppressing his own fraudulent part and thereby gagging the defendant's mouth from telling the truth.

It might be said that if the plaintiff is not allowed to set up his fraud, why should a defendant be allowed to do so, but the answer to that is that the Courts will not allow a fraud being practised on them by the plaintiff and they will hear the defendant on any ground which would defeat a false and fraudulent claim. The defendant in possession does not ask for any relief from the Court but only tells the truth which the plaintiff is suppressing. It is that equitable principle that underlies the maxim that where each party is equal in fault, the law favours him who is actually in possession, thereby not assisting either party to the fraud by granting any executable decree. The rule that as between parties of equal guilt the law favours the party in possession is as good a rule in equity as the rule that no man can plead his own fraud and there is no conflict between them. They can both be worked consistently by applying the latter rule where fraud is pleaded for obtaining

1 (1819) 2 B. & Ald. 367.

2 (1870) 13 M. I. A. 551.

relief from Court and the former, where joint fraud is pleaded by the defendant to maintain his possession. Another reason pointing to the same conclusion is that a hollow as well as fraudulent transaction between the parties is void *ab initio* and as such unenforceable. In such cases, a defendant, by proving a common fraud, proves the void nature of the transaction which would otherwise have not been established.

As a result of this discussion the law on the subject can be summarized as follows :—

I. In all cases of unilateral or bilateral fraud which has not been successfully effected, either party can repudiate the fraudulent transaction and can recover or maintain his possession by proving his real title.

II. In cases where fraud is accomplished—

(1). where only one party acts fraudulently, he cannot be allowed, either as plaintiff or as defendant, to plead his fraud, on the principle that no man shall be heard to plead his own fraud ;

(2) where both parties are equally fraudulent, the Courts will refuse to enforce the fraudulent transaction on the principles that where each party is equal in fault, the law favours him who is actually in possession, and will give relief to neither, and that a right of action cannot arise out of fraud, with the result that—

(a) where the plaintiff seeks relief on the allegation and on the basis of joint fraud, his suit will be dismissed ; and

(b) where he seeks relief by suppressing the fraud, the defendant can plead and prove the common fraud to defeat the plaintiff's claim.

In the present case, the defendants having proved the successful fraud of both the parties, they are entitled to remain in possession and the plaintiff is not entitled to any relief. The appeal should, therefore, be allowed with costs throughout.

MACKLIN J. I agree.

*Appeal allowed.*

#### APPELLATE CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

LAXMAN ANANT PAI KAGAL

*v.*

GOVIND RAMBHAT.\*

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*February 6.*

*Civil Procedure Code (Act V of 1908), Sec. 73—Rateable distribution—Execution of decree against father and son, members of Hindu joint family—Sale proceeds of property held in Court—Whether judgment creditors of father can ask for rateable distribution—Construction.*

A decree obtained against a father representing a joint Hindu family and a decree obtained against the father and his son constituting the joint family are

\* Civil Revision Application No. 438 of 1939, from an order passed by M. K. Trilokekar, Subordinate Judge

at Kumta, on application for rateable distribution in Darkhast No. 892 of 1935.

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not decrees obtained against "the same judgment-debtor" for the purpose of rateable distribution under s. 73 of the Civil Procedure Code, 1908.

Applicant obtained a decree against a father and son who were members of a Hindu joint family. The opponents obtained decrees against the father alone as manager of the joint family. In execution of the applicant's decree ancestral property belonging to the father and son was sold and the amount realised was held in Court. The opponents in execution of their decrees asked for rateable distribution of the assets with the applicant :

*Held*, that the opponents' decrees against the father alone and the applicants' decree against the father and son were not decrees against "the same judgment-debtor" within the meaning of s. 73 of the Civil Procedure Code, and therefore rateable distribution could not be claimed by the opponents.

*Ramanathan Chettiar v. Subramania Sastrial*<sup>1</sup> and *Subramanian v. Annamalai*,<sup>2</sup> dissented from.

*Govind Abaji Jakhadi v. Mohanraj Vinayak Jakhadi*<sup>3</sup> and *Chunilal v. Broach Urban Co-op. Bank Ltd.*,<sup>4</sup> referred to.

RATEABLE distribution.

One Laxman (applicant) obtained a decree against Ramakrishna and his son Venketesh, who were members of a Hindu joint family, for a sum of Rs. 3,096-8-6. Govind and others (opponents) obtained decrees against Ramakrishna alone. In execution of the applicant's decree ancestral property belonging to Ramakrishna and Venketesh was sold for Rs. 5,289 and this amount was held by the executing Court.

The opponents then applied to execute their decrees and asked for rateable distribution with the applicant. The applicant contended that inasmuch as the opponents' decrees were not passed against the same judgment-debtor within the meaning of s. 73 of the Civil Procedure Code, 1908, rateable distribution of the assets falling to the share of Venketesh could not be ordered for the benefit of the opponents.

The trial Judge allowed rateable distribution and ordered the sum realised to be distributed among all the decree-holders. He observed as follows :—

"The decrees in all Darkhasts pending for rateable distribution show that Defendant Ramakrishna Venketesh is the manager of the family. Defendant No. 2 ... is the undivided son of Defendant No. 1 Ramakrishna Venketesh. Thus all the decrees being against Defendant Ramakrishna Venketesh in his capacity of the manager it follows that they are binding on his son Venketesh ... moreover, he being the son his father's debts which are not shown to be immoral or illegal are binding on him. Hence it is implied that Venketesh Ramakrishna is represented in all these Darkhasts by his father as the manager. That being so it is immaterial if his name specifically does not appear in each of the Darkhasts."

The applicant applied in revision to the High Court.

*R. A. Jahagirdar*, for the applicant.

*N. J. Pandit*, for opponents Nos. 1, 4, 5, 7 and 9.

*D. R. Manerikar*, for opponents Nos. 2 and 3.

*K. R. Bengeri*, for opponent No. 10.

1 (1902) I. L. R. 26 Mad. 179.

2 [1940] A. I. R. Mad. 525.

3 (1901) I. L. R. 25 Bom. 494,

s. c. 3 Bom. L. R. 407.

4 (1937) 39 Bom. L. R. 815.



BEAUMONT C. J. This is a revision application under s. 115 of the Civil Procedure Code, which raises a question under s. 73 of the Civil Procedure Code, which is not altogether free from difficulty.

The present applicant obtained a decree against a father and son, members of a Hindu joint family. Of the thirteen opponents, one obtained a similar decree against the father and son, and his position is obviously the same as that of the applicant. But the other twelve opponents obtained decrees against the father alone, and I will assume that in all those decrees the father was shown as the manager of the joint Hindu family. In execution of the applicant's decree, ancestral property has been sold for Rs. 5,289, and that money is in Court. The opponents applied to execute their decrees, and they now ask for rateable distribution with the applicant.

Section 73 provides that :—

“(1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons :”

Admittedly all the provisions of that section except one have been complied with by the opponents. It is said however that their decrees are not against “the same judgment-debtor”, and that is the point which we have to determine.

Now there has been a difference of opinion between this High Court and the High Court of Madras as to the meaning of the expression “same judgment-debtor” in s. 73 in cases where a decree has been obtained against a man in his lifetime, and then after his death another decree has been obtained against his personal representative. In such a case are both decrees obtained against the same judgment-debtor? This Court held in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*<sup>1</sup> that they were not, that the expression “the same judgment-debtor” must be construed strictly, and that, inasmuch as the decrees were against different persons, they could not be said to be against the same judgment-debtor. The same view was taken recently by this Court in *Chunilal v. Broach Urban Co-op. Bank, Ltd.*<sup>2</sup> On the other hand, the Madras High Court has given a more liberal construction to the expression “the same judgment-debtor”, and has held that the deceased debtor and his personal representative must be regarded as the same judgment-debtor, because the decrees are executable against the same estate. The latest decision of the Madras High Court is a full bench decision, *Rama Krishnan Chettiar v. Viswanathan Chettiar*.<sup>3</sup> So far as that point is concerned, we are bound by the decisions of this Court, which could only be dissented from by a full bench. But the point which arises in this case, namely, whether a decree against a Hindu father is against the same judgment-debtor as a decree against the father and son, is, to my mind, not by any means the same point, though in some of the Madras cases it has been suggested that it is, at any rate, very similar. Sir Arnold White C. J. in

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1941

LAXMAN

ANANT

v.

GOVIND

RAMBHAT

1 (1901) I. L. R. 25 Bom. 494,  
s. c. 3 Bom. L. R. 407.

2 (1937) 39 Bom. L. R. 815.

3 (1935) I. L. R. 59 Mad. 93.

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RAMBHAT  
—  
*Beaumont C.*

*Ramanathan Chettiar v. Subramania Sastrial*<sup>1</sup> suggested that the same principle governed both classes of case, and held that a decree against a father and a decree against a father and his son were decrees against the same judgment-debtor, the father being the manager of the joint family of which the son was a member. So that, that decision is exactly in point, and it has been followed in later decisions by the Madras High Court, the last decision being *Subramaniam v. Annamalai*.<sup>2</sup> But with all deference to the Madras High Court, I think there are serious difficulties in the way of the construction adopted. In the first place, it is really incorporating into the construction of s. 73 principles peculiar to Hindu law, because it is only where the defendants, father and son, are members of a joint Hindu family, that they can be regarded as the same judgment-debtor. In the case of defendants belonging to other communities, or being members of a divided Hindu family, it could not be suggested that a decree against a father is against the same judgment-debtor as a decree against father and son. Apart from the difficulty of construing an Act of the legislature so as to assign to it different meanings according to the community of the parties, there seems to me to be this practical difficulty, that the construction adopted by the Madras High Court may very well deprive the son of his right to claim that the debt, the subject of the decree against his father, was one incurred by the father for immoral purposes, and is, therefore, not binding upon him. There may be a decree against a father and son for a debt which was incurred for the purposes of the joint family; then there may be a decree against the father alone for a debt not incurred for the purposes of the joint family, but incurred for immoral purposes. If the former decree-holder is proceeding to execute his decree, it seems to me that the creditor of the father alone can obtain rateable distribution, if the debtor is the same, without allowing to the son any opportunity of disputing his liability, because the terms of s. 73 are peremptory and in a case falling within its terms rateable distribution must be allowed. For those reasons, in my opinion, on the true construction of s. 73 it cannot be said that a decree against a father and a decree against a father and son are decrees against the same judgment-debtor.

It is admitted that so far as the father is concerned, he being a common debtor under both decrees, rateable distribution can be claimed. But as against the son it seems to me that rateable distribution cannot be claimed, because the two decrees are not, so far as he is concerned, against the same debtor. The learned Subordinate Judge took a different view of the matter and allowed rateable distribution.

I think, therefore, that the application must be allowed as against the opponents whose decrees are against the father alone, and the order of rateable distribution set aside. Such opponents must pay the costs of the application to this Court. The exact amount of distribution will be worked out in the lower Court.

MACKLIN J. I agree.

*Application allowed.*

1 (1902) I. L. R. 26 Mad. 179.

2 [1940] A. I. R. Mad. 525.

Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.

JAMIYATRAM GAURISHANKAR JOSHI

1941

v.

UMIYASHANKAR PRANSHANKAR JOSHI.\*

February 20.

*Civil Procedure Code (Act V of 1908), Sec. 73—Rateable distribution—“Same judgment-debtor,” meaning of —Decree against judgment-debtors personally and another decree against them in representative capacity—Whether such decrees are against “same” judgment-debtors.*

A decree against a person individually and a decree against that person as representative of a deceased person are not decrees against “the same judgment-debtor” within the meaning of s. 73 of the Civil Procedure Code, 1908, so as to entitle the holders of the two decrees to rateable distribution.

The expression “the same judgment-debtor” in s. 73, Civil Procedure Code, 1908, denotes identity of individuality and identity of character or interest. Decrees obtained against the same individual, but in different capacities, may be regarded as not obtained against “the same judgment-debtor.”

*Rama Krishnan Chettiar v. Viswanathan Chettiar*,<sup>1</sup> *Bhola Nath v. Maqbul-un-nissa*,<sup>2</sup> *Sadhu Ram v. Dhanpat Rai-Telu Ram*<sup>3</sup> and *Balmer Lawrie & Co. v. Jadunath Banerjee*,<sup>4</sup> followed.

*Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*,<sup>5</sup> referred to.

*Hemendra Nath Chaudhuri v. East Bengal Commercial Bank*,<sup>6</sup> dissented from.

Where the language of a statute is sufficiently clear, the Court can only give effect to it, however inequitable or unjust the result of such a construction may seem to the Court to be. But if the Court can avoid construing a statute so as to cause what the Court regards as injustice, it would do so.

#### EXECUTION proceedings.

The applicant, Jamiyatram Joshi, obtained a personal decree for Rs. 478 and costs against one Nathabai Motibhai and his two brothers, Shankarbhai and Marghabhai, and one Desai Babarbai, in suit No. 100 of 1935 in the Court of the Subordinate Judge, Umreth.

The opponent, Umiyashankar Joshi, also obtained a decree for Rs. 310 and costs against Nathabhai and his two brothers, as heirs of their father Motibhai, and against the property of Motibhai, in suit No. 333 of 1936 in the same Court.

The opponent filed a darkhast (No. 269 of 1939) for execution of his decree. Some property of Motibhai was sold in execution and the Court was in possession of the sale proceeds.

The applicant filed a darkhast (No. 68 of 1940) claiming rateable distribution in the proceeds of the sale.

The Subordinate Judge held that the applicant was not entitled to any rateable distribution as claimed. He observed :—

\* Civil Revision Application No. 321 of 1940, from an order passed by H. S. Tadvī, Subordinate Judge at Umreth, in Regular Darkhast No. 68 of 1940.

1 (1935) I. L. R. 59 Mad. 93.

2 (1903) I. L. R. 26 All. 28.

3 (1937) I. L. R. 18 Lah. 637.

4 (1914) I. L. R. 42 Cal. 1.

5 (1901) I. L. R. 25 Bom. 494,  
s. c. 3 Bom. L. R. 407.

6 (1936) I. L. R. 63 Cal. 923.

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 —

"What is contemplated by s. 73, Civil Procedure Code, is that the decrees must be against the 'same judgment-debtor.' In Reg. Darkhast No. 269/39 the decree is passed against the estate of the deceased Motibhai Baberbhai and what is being sold in this darkhast is also the same property, whereas the decree in Regular Darkhast No. 68/40 is passed against the judgment-debtors 1 to 4 in their personal capacity. Thus although the property is the same still the decrees are not against the 'same judgment-debtors,' for the words 'same judgment-debtor' do not include a person who does not occupy the 'same character' in all the decrees. In Regular Darkhast No. 68/40 the decree is apparently in the personal capacity against the judgment-debtors, while the other in Regular Darkhast No. 269/39 is against defendants 1, 2 and 3 in the representative capacity. This view is abundantly borne out in *Govind Apaji Jakhadi v. Mohaniraj* (25 Bom. 494) and *Chunilal Raychand v. The Broach Urban Co-operative Bank*, 39 Bom. L. R. 815. The result is that the two decrees (i.e. in Reg. Darkhast No. 68/40 and Reg. Darkhast No. 269/39) not being against the same judgment-debtor the judgment-debtor in Reg. Darkhast No. 68/40 is not entitled to any rateable distribution as claimed."

The applicant applied to the High Court.

C. K. Shah, for the applicant.

J. C. Shah, for the opponents.

BEAUMONT C. J. This is a revision application in execution, which raises a question under s. 73 of the Civil Procedure Code, 1908. There were two decrees, the first being against three persons personally and a fourth person whose existence can be ignored, I think, and the second against the same three persons as the heirs of their deceased father. The question which arises is whether a decree against a person individually and a decree against that person as representative of a deceased person can be held to be decrees against the same judgment-debtor within the meaning of s. 73 so as to entitle the holders of the two decrees to rateable distribution.

Mr. C. K. Shah for the applicant relies on a recent decision of the Calcutta High Court in *Hemendra Nath Chaudhuri v. East Bengal Commercial Bank*<sup>1</sup> in which the Court held that in such a case the decrees were against the same judgment-debtor. On the other hand, Mr. J. C. Shah relies on decisions of other High Courts in which the opposite view has been taken. The question does not seem to have come before this Court.

When there is a conflict of authority upon a question, I like to consider the matter in the first instance apart from authority. Section 73 of the Civil Procedure Code provides, so far as material, that where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor, the assets shall be rateably distributed among all such persons. "Judgment-debtor" is defined in s. 2 (10) as meaning any person against whom a decree has been passed or an order capable of execution has been made. The argument for the applicant is that the language of s. 73 is quite clear, that a decree against a particular person in his individual capacity and another decree against that person in a representative capacity are nevertheless both decrees against the same person, and, therefore, against the same judgment-debtor within the definition. I agree that, if one gives the most literal meaning to the word "judgment-

debtor," that result must follow. For the respondent it is argued that a person, who may be an individual or a corporation, can for legal purposes be regarded sometimes as two persons. I am not prepared to accept that view, and I always deprecate the practice, which is sometimes followed, of making the same person a party twice over where he represents different interests. But at the same time the same person may hold different characters, and he may be a party to litigation in different capacities, and I apprehend that it would always be open to the Court to allow a party to appear and argue in different capacities by different counsel, if that course is necessary to avoid one aspect of the matter not being put before the Court. Therefore, the Court recognizes, and certainly the framers of the Civil Procedure Code have recognized, that the same person may appear in various capacities, and it would seem to me not to be unduly stretching the language of s. 73 to say that the expression "the same judgment-debtor" denotes identity of individuality and identity of character, and that two decrees obtained against the same individual, but in different capacities, may be regarded as not obtained against the same judgment-debtor. In considering whether to give a literal or a less literal meaning to s. 73, I think that any Court must have regard to the consequences which are likely to follow from either construction. It seems to me that the grossest injustice and absurdity may follow from holding that decrees against the same person must always be regarded as decrees against the same judgment-debtor for the purposes of s. 73. One may have creditors of estate of A, which is solvent, being compelled to share the assets of that estate with the creditors of estate B, which is insolvent and possesses no assets, merely because there is a common trustee of the two estates. It is not difficult to imagine the confusion which might arise in the case of a corporation sole, like the Official Assignee of Bombay, who may have decrees passed against him as representative of many different estates. No doubt, if the language of an Act of Parliament is sufficiently clear, the Court can only give effect to it, however inequitable or unjust the result of such a construction may seem to the Court to be. But if the Court can avoid construing an Act of Parliament so as to cause what the Court regards as injustice, in my opinion, it certainly ought to do so. I think it is not unduly stretching the expression "the same judgment-debtor" to say that it denotes identity, not only of individuality but of character or interest.

Coming now to the authorities, no doubt the Calcutta High Court in *Hemendra Nath Chaudhuri v. East Bengal Commercial Bank* (*supra*) has adopted a strict construction of the expression "the same judgment-debtor," and has held that, if the individual against whom two decrees are obtained is the same, then one cannot look further and consider whether his interests or character are the same. In so construing the Act the Court has to some extent purported to follow the decision of this Court in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*.<sup>1</sup> That was a case in which there was one decree against a deceased person and another decree against his legal representative, and this Court held that inasmuch as the decrees were against two distinct individuals, they could not be said to be against the same judgment-

A. C. J.

1941

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v.

UMIYA-  
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SHANKAR

Beaumont C.J.

1 (1901) I. L. R. 25 Bom. 494, s. c. 3 Bom. L. R. 407.

O. C. J. debtor, although the two individuals represented the same estate. On the  
 1941 other hand, the High Court of Madras has taken a different view, and has  
 — held that in such a case the judgment-debtor is the same. The most recent  
 JAMİYATRAM case is *Rama Krishnan Chettiar v. Viswanathan Chettiar*.<sup>1</sup> We are not con-  
 GAURI- cerned with that question, and indeed we are bound by the decision of this  
 SHANKAR Court. But it is one thing to say that decrees against two distinct indivi-  
 v. duals cannot be said to be decrees against the same judgment-debtor, and  
 UMIYA- quite another to say that decrees against the same individual, though in differ-  
 SHANKAR ent capacities, must be regarded as decrees against the same judgment-debtor.  
 PRAN-  
 SHANKAR

Other High Courts have taken the same view of s. 73 as I do. In *Rama  
 Beaumont C.J. Krishnan Chettiar v. Viswanathan Chettiar (supra)* Mr. Justice Pandrang  
 — Row in the course of his judgment says (p. 98) :

“It has also been held, and here too there is no dispute, that even though the person against whom the decrees were passed is the same in name, section 73 will not apply unless that person occupied the same character in all the decrees; for instance, where one decree was passed against A in his personal capacity and another against him as heir of P, the two decrees are not against the same judgment-debtor.”

The same view has been taken by the Allahabad High Court in *Bhola Nath v. Maqbul-un-nissa*<sup>2</sup> and by the Lahore High Court in *Sadhu Ram v. Dhanpat Rai-Tehu Ram*<sup>3</sup> and there is a dictum to the same effect in *Balmer Lawrie & Co. v. Jadunath Banerjee*.<sup>4</sup> The balance of authorities is in favour of the view which, I think, is the right one of the construction of the expression “the same judgment-debtor.” We must hold, therefore, that in this case there is no right of rateable distribution, and that was the view taken by the lower Court.

The revision application, therefore, will be dismissed with costs.

MACKLIN J. I agree.

Application dismissed.

## CRIMINAL REVISION.

Before Mr. Justice Broomfield and Mr. Justice Divatia.

EMPEROR

v.

ALLADATTA.

1941

March 31.

*City of Bombay Police Act (Bom. IV of 1902), Sec. 27 as amended by the City of Bombay Police (Amendment) Act (Bom. XIV of 1938)—Order of externment passed by Commissioner of Police—Commissioner of Police whether executive officer or Court subordinate to High Court—Validity of such order—Whether High Court has jurisdiction to interfere in revision—Application for revision whether lies to High Court—Practice.*

- 1 (1935) I. L. R. 59 Mad. 93, F. B.
- 2 (1903) I. L. R. 26 All. 28.
- 3 (1937) I. L. R. 18 Lah. 637.
- 4 (1914) I. L. R. 42 Cal. 1.

\* Criminal Application for Revision No. 69 of 1941, from an order of externment passed by W. R. G. Smith, Commissioner of Police, Bombay.

In passing an externment order under s. 27 of the City of Bombay Police Act, 1902, as amended by the City of Bombay Police (Amendment) Act, 1938, the Commissioner of Police acts as an executive officer and not as a Court subordinate to the High Court. The High Court, therefore, has no jurisdiction to interfere in revision with such an order. The order can only be called in question by a Court on the grounds mentioned in s. 27(7) of the City of Bombay Police Act, 1902, or under the circumstances referred to in *Emperor v. Anna Vithoba*<sup>1</sup> and *Emperor v. Yarmahomed Ahmedkhan*,<sup>2</sup> as for instance, when an attempt is made to impose a penalty for breach of the order.

An application for revision of an externment order under s. 27 of the City of Bombay Police Act, 1902, does not lie direct to the High Court.

ORDER of externment under the City of Bombay Police Act, 1902.

The applicant, Alla Datta, was residing in Bombay for seventeen years.

On September 26, 1939, the police took proceedings against him and six other persons, under Chapter VIII of the Criminal Procedure Code, 1898, in the Court of the Presidency Magistrate, Second Court, for an order directing each of them to execute a bond of Rs. 100 with one surety in like amount to keep the peace for one year. The police alleged that there was a long standing enmity between the parties. The proceedings were dismissed on September 27, 1940 for want of prosecution.

On November 11, 1940, the applicant was arrested by a warrant under s. 27 (5) of the City of Bombay Police Act, 1902, and was released on bail of Rs. 200 in cash and a surety for Rs. 500.

On December 6, 1940, the Commissioner of Police passed an order of externment against the applicant directing him to leave the city of Bombay for two years.

On December 16, 1940, the applicant appealed to the Government of Bombay against the order of the Commissioner of Police, but his appeal was rejected on December 19, 1940. He left Bombay on that day.

The applicant, thereafter, applied to the High Court in revision.

*B. R. Ambedkar*, with *G. J. Mane*, advocate for the petitioner.

*M. C. Setalvad*, Advocate General, with *R. A. Jahagirdar*, Government Pleader, for the Crown.

BROOMFIELD J. This is an application for revision by one Alla Datta Mahamad Siddik against whom the Commissioner of Police, Bombay, has made an order under s. 27(1)(a) of the City of Bombay Police Act (Bom. IV of 1902) as amended by Bombay Act XIV of 1938 directing him to remove himself from the City of Bombay.

The Advocate General, who appears for the Crown, has taken a preliminary objection that the revision application does not lie. So far as we are aware the only precedent for an application to the High Court seeking to revise an order by the Commissioner of Police is *Emperor v. Gulabdin Pathan*,<sup>3</sup> which was disposed of by the Chief Justice and Mr. Justice N. J. Wadia in February, 1935. This Court was of opinion that the Police Commissioner's order, which

A. Cr. J.

1941

EMPEROR

v.

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1 (1931) 33 Bom. L. R. 1164.

2 (1938) 40 Bom. L. R. 483, F.B.

3 (1935) Criminal Application for

Revision No. 504 of 1934, decided by  
Beaumont C. J. and N. J. Wadia J.,  
on February 8, 1935 (Unrep.).

A. Cr. J. of course was made under the Act as it stood before the amendment, was not  
 1941 justified by the provisions of the Act. Nevertheless it was held that, as the  
 ——— Commissioner was not a Court subordinate to this Court, there was no juris-  
 EMPEROR diction to interfere with the order.  
 v.

ALLADATTA The position is of course different where a person is prosecuted and a Court  
 ——— is asked to impose a penalty for breach of the order. It was held in *Emperor*  
*Broomfield J.* v. *Anna Vithoba*,<sup>1</sup> that, though the order of an executive officer, not being an  
 order of an inferior criminal Court, cannot be set aside in revision, neverthe-  
 less when an executive officer makes an order or issues a notification, and an  
 attempt is made to enforce the exaction of a penalty against a person commit-  
 ting a breach of such order or notification, it becomes the duty of the judicial  
 authority to consider whether the order is properly made or not. This case  
 was followed and the principles laid down in it were explained by a full bench  
 decision, *Emperor v. Yarmahomed Ahmedkhan*.<sup>2</sup> In the course of his judg-  
 ment the learned Chief Justice said (p. 492) :

"It may be conceded that an order made under s. 27 is an order made by an  
 executive officer, and is not subject to appeal or revision in any Court. But it  
 is a very different matter to affirm that when an attempt is made to impose a penalty  
 for breach of an order made under the section, the validity of the order cannot be  
 impeached."

Further on he said (p. 493) :

"In all charges before a Magistrate under s. 128 of the City of Bombay Police  
 Act, (that is the section by which breaches of orders under s. 27 are made punish-  
 able), it is, in our judgment, incumbent upon the Magistrate to be satisfied, first,  
 that the accused was informed by the Commissioner of the charge against him with  
 sufficient particularity to enable him to answer the charge, and that he was given  
 an opportunity of so answering; and, secondly, that there was material before the  
 Commissioner of Police on which he could properly hold that the conditions of s. 27  
 had come into operation."

It is clear from these authorities and it is conceded that prior to the amend-  
 ment of the Bombay City Police Act by Act XIV of 1938 the order of the  
 Police Commissioner was not subject to revision by the High Court. It is  
 contended, however, on behalf of the applicant here that the changes made by  
 that amending Act have altered this position. It is necessary, therefore, to  
 notice what these changes are. There is first of all an alteration in the lan-  
 guage of s. 27(1)(a). Whereas the original provision dealt with the move-  
 ments and designs of gangs or bodies of persons, the clause as amended pro-  
 vides that the movements or acts of any person may be regulated as provided  
 in case it shall appear to the Commissioner that they are causing or calculated  
 to cause alarm, danger or harm. Then there are a number of sub-sections  
 which are newly enacted. Sub-s. (4) provides that before an order is made  
 under the preceding part of the section the Commissioner shall inform the  
 person concerned in writing of the general nature of the allegations against  
 him and give him a reasonable opportunity of explaining those allegations.  
 Provision is also made for the examination of witnesses offered by the person  
 concerned and for his appearance before the Commissioner of Police. Sub-  
 section (5) provides that the Commissioner or other officer authorised in this  
 behalf may exercise all or any of the powers of a Court under ss. 75 to 77

1 (1931) 33 Bom. L. R. 1164.

2 (1938) 40 Bom. L. R. 483, F.B.



of the Code of Criminal Procedure. Those are the sections of the Code dealing with warrants of arrest. Sub-section (6) provides that any person aggrieved by an order made by the Commissioner of Police under the preceding part of the section may appeal to the Provincial Government within thirty days from the date of the order. Sub-section (7), which is the one on which the applicant mainly relies, is in these terms :

"An order passed by the Commissioner of Police under sub-section (1), (2) or (2A) or by the Provincial Government under sub-section (6) (i.e. in appeal) shall not be called in question in any Court except on the ground that the Commissioner of Police or the officer authorized by him under sub-section (4) had not followed the procedure laid down in the said sub-section or that there was no material before the Commissioner of Police upon which he could have based his order or on the ground that the Commissioner of Police was not of opinion that witnesses were unwilling to come forward to give evidence in the public against the person in respect of whom an order was made under sub-section (1)."

Sub-section (8) provides that notwithstanding the preceding provisions no police-officer shall be required to disclose either to the person against whom an order is made or to the Court the sources of his information.

It is conceded by the learned counsel on behalf of the applicant that if the High Court is competent to entertain this application it must be on the footing that a revision application lies under s. 439 of the Criminal Procedure Code by which the High Court has power to revise the proceedings of Courts subordinate to it. Dr. Ambedkar's argument is that the amendments to which I have drawn attention have the effect of constituting the Commissioner of Police a Court for the purposes of s. 27, so that when he makes an order under that section he is no longer merely an executive officer but a Court subordinate to the High Court whose proceedings are subject to revision. In support of that argument he mainly relies, as I have said, on the provisions of sub-s. (7). We are unable to agree, however, that this new sub-section has the effect for which he contends.

Before we come to sub-s. (7) it may be pointed out that sub-s. (4) in requiring that due notice of the nature of the allegations should be given to the person concerned and in providing that he should have a reasonable hearing is merely giving effect to the findings of the full bench case, *Emperor v. Yarmahomed Ahmedkhan*. Sub-section (5), in our opinion, is opposed to the argument that it was intended to make the Commissioner of Police a Judicial Officer or Court. If it was intended that he was to be a Court, it would have been superfluous to provide that he was to exercise all or any of the powers of a Court. The provision in sub-s. (6) for an appeal to Government is also we think difficult to reconcile with the view that the Commissioner's order was intended to be regarded as a judicial order of a Court.

Sub-section (7) is in a negative form. It does not on the face of it empower the High Court or any other Court to do anything but merely provides that the Commissioner's order or an order by the Provincial Government in appeal shall not be called in question in any Court except on certain grounds. The grounds stated are practically the same as those mentioned in the full bench judgment as matters to be considered by a Court when the validity of an executive order is called in question in a prosecution for breach of the order. Dr. Ambedkar says that if the position of the Commissioner and the

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A. Cr. J. nature of the orders made by him were not intended to be changed, there was  
 1941 no reason to enact sub-s. (7), the provisions of which might have been left  
 EMPEROR to be deduced from the full bench judgment. This argument, we think, is  
 v. unconvincing. It by no means follows that the legislature intended to go  
 ALLADATTA beyond the provisions of the full bench judgment because the effect of that  
 judgment is included in the Act as amended.  
 Broomfield J. In our opinion, so far as the point now before us is concerned, viz., the  
 question whether an order of the Commissioner of Police under this section  
 can be revised by the High Court, the position is precisely the same as it was  
 before the amendment. We cannot accept the contention that the effect of  
 these provisions is that the Commissioner is now a Court subordinate to the  
 High Court. We think he remains as before an executive officer. His orders  
 may be called in question as before in the circumstances referred to in *Emperor*  
*v. Anna Vithoba* and *Emperor v. Yarmahomed Ahmedkhan*. But no appli-  
 cation for revision of his orders lies direct to the High Court. That being so,  
 we have no jurisdiction to deal with the application on the merits and the  
 rule must be discharged.

Rule discharged.

## APPELLATE CIVIL.

*Before Mr. Justice Broomfield and Mr. Justice Macklin.*

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BAPUGOUDA YADGOUDA PATIL

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v.

VINAYAK SADASHIV KULKARNI.\*

*Civil Procedure Code (Act V of 1908), Sec. 92 ; O. 1, r. 8—Plaint, amendment of, in suit under s. 92—Amendment when permissible—Sanction of Advocate General or Collector when necessary—Amendment by Court without such sanction—Procedure under O. 1, r. 8, whether to be followed in suits under s. 92.*

In suits under s. 92 of the Civil Procedure Code, 1908, it is for the Court to decide, as in any other suit, whether an amendment of the plaint is permissible, and the consent of the Advocate General or the Collector, as the case may be, is really evidence which has to be taken into consideration before deciding whether the amendment should be allowed. Amendments which do not substantially change the character of the suit or enlarge the scope of it may be made by the Court itself without the sanction of the Advocate General or the Collector. Amendments which enlarge the scope of the suit, for instance by allowing further reliefs, without substantially changing its character, may be made with the sanction of the Advocate General or the Collector, such sanction being evidence that the suit after amendment is to all intents and purposes the same suit and not a different one. Amendments which substan-

\* First Appeal No. 179 of 1939, from the decision of V. R. Mangalvedhekar, First Class Subordinate

Judge at Belgaum, in Regular Suit No. 290 of 1935.

tially change the character of the suit are not permissible even with the sanction of the Advocate General or the Collector.

*Musammat Ali Begam v. Badr-ul-Islam*,<sup>1</sup> *Darves Haji Mahamad v. Jainudin*,<sup>2</sup> *Gopal Dei v. Kanno Dei*,<sup>3</sup> *Abdul Rehman v. Cassum Ebrahim*,<sup>4</sup> *Sayad Hussein Miyan v. Collector of Kaira*,<sup>5</sup> *Srinivasa v. Venkata*,<sup>6</sup> *Pitchayya v. Venkatakrishnamachari*,<sup>7</sup> and *Anand Rao v. Ramdas Daduram*,<sup>8</sup> referred to.

The procedure laid down in O. 1, r. 8, of the Civil Procedure Code, 1908, is not applicable to suits under s. 92 of the Code.

*Musammat Ali Begam v. Badr-ul-Islam*,<sup>9</sup> referred to and explained.

Proof of breach of trust or mismanagement is not essential for removal of a trustee of a charitable institution. The Court has a wide discretion under s. 92, Civil Procedure Code, to take such action as it thinks necessary or desirable for the good of the charity.

*Mahomed Ismail Ariff v. Ahmed Moolla Dawood*<sup>10</sup> and *Mohammedally v. Akberally*,<sup>11</sup> referred to.

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SUIT under s. 92 of the Civil Procedure Code, 1908.

Vinayak and others (plaintiffs), who were residents of Mangur in the Chikodi Taluka of Belgaum District, claimed an interest in the Hindu temple of Shree Kalleshwar at Mangur. Bapugouda (defendant No. 4) claimed to be hereditary vahivatdar of the temple and all its properties. The plaintiffs made an application to the Collector of Belgaum praying that they should be allowed to file a suit against defendant No. 4 and others under s. 92 of the Civil Procedure Code, 1908.

By a Government Resolution dated August 8, 1934, the Government of Bombay authorized the Collector to give sanction for the institution of a suit by the plaintiffs under s. 92, Civil Procedure Code.

On August 18, 1934, the Collector gave sanction to the plaintiffs for the institution of a suit to frame a scheme of management in respect of the temple.

On August 26, 1935, the plaintiffs filed the present suit against the defendants on the strength of the Collector's sanction. The reliefs claimed in the plaint were (1) a scheme of management, (2) appointment of new trustees, (3) order for vesting of the property and (4) such further reliefs as the nature of the case required.

Defendant No. 4 took objection to the plaint as it asked for further reliefs in addition to settling a scheme as sanctioned by the Collector.

On February 11, 1937, the plaintiffs made an application to the Collector and he gave sanction to the plaintiffs to claim further reliefs in the suit, viz. (1) removing the old trustees, (2) appointing new trustees, (3) vesting the property in the trustees, (4) directing accounts and inquiries, (5) declar-

1 (1938) L. R. 65 I. A. 198,  
s. c. 40 Bom. L. R. 835.

2 (1906) I. L. R. 30 Bom. 603,  
s. c. 8 Bom. L. R. 751.

3 (1903) I. L. R. 26 All. 162.

4 (1911) I. L. R. 36 Bom. 168,  
s. c. 13 Bom. L. R. 593.

5 (1895) I. L. R. 21 Bom. 257.

6 (1887) I. L. R. 11 Mad. 148.

7 (1929) I. L. R. 53 Mad. 223.

8 (1920) L. R. 48 I. A. 12.

9 (1938) L. R. 65 I. A. 198,  
s. c. 40 Bom. L. R. 835.

10 (1916) I. L. R. 43 Cal. 1085,  
s. c. L. R. 43 I. A. 127,  
18 Bom. L. R. 611.

11 (1933) 36 Bom. L. R. 386, P.C.

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ing what proportion of the trust property shall be allocated to any particular object of the trust, and (6) granting such further or other relief as the nature of the case may require.

On July 29, 1937, the plaintiffs applied to the Court for permission to amend their plaint stating that they had regarded these further reliefs as being merely ancillary to the prayer for the framing of the scheme. The Court allowed the amendment holding that the additional reliefs sought were not inconsistent with the suit as originally instituted.

Defendant No. 4 contended *inter alia* that the sanction given by the Collector on February 11, 1937, was not legal and proper in view of the provisions of s. 92(2) of the Civil Procedure Code, as it should have been obtained before the institution of the suit; that he was the hereditary vahi-vatdar of the temple and all its properties, that he was carrying on the management according to the religious rules, and that there was no need for any directions of the Court.

The trial Judge held that the sanction obtained by the plaintiffs from the Collector was legal and proper. He framed a scheme of management of the temple, removed defendant No. 4 from the trusteeship of the temple, and restrained him from making vahivat of the temple and its property. In his judgment he observed as follows :—

“Defendants Nos. 4 to 9 urge that this sanction under exhibit 119 is not legal and proper in view of the express provisions of s. 92, para 2, Civil Procedure Code. They urge that this sanction, exhibit 119, should have been obtained before the institution of the suit and that such a sanction obtained after the institution of the suit is not legal and valid in law. In support of this proposition they rely on a number of rulings. They are : *Abdul Rahim v. Mohammad Barkatalli*, (55 Cal. 519, 524), 30 Bom. L. R. 774, 32 Bom. 435 and 446, A. I. R. 1931 Bom. 33 (*Narsidas v. Ravishankar*), 21 Bom. 257 (*Sayad Hussien v. The Collector of Kaira*), 30 Bom. 603 and 606 (*Darves Haji v. Jainuddin*) 26 All. 162 (*Gopal Dei v. Kanno Dei*) and Ghosh's Law of Endowment, edition 1932, page 308. Plaintiffs' pleader on the other hand relies on 36 Bom. 168, 171, paras 1 and 2 and 172 last para. (*Abdul Rehman v. Cassum Ibrahim*), 30 Mad. 138 (*Prayag Doss v. Tirumala*).

It is true that when the plaint was filed the sanction of the Collector, exhibit 42, did not mention the reliefs in clauses 2 to 4 of para 20 of the plaint. The sanction in regard to these reliefs has been granted by the Collector on February 11, 1937 (vide exhibit 119). After this sanction, exhibit 119, plaintiffs have applied for the amendment of the plaint praying that the reliefs claimed therein be embodied in the plaint. In my opinion this sanction, exhibit 119, is perfectly legal, proper and valid. The rulings relied on by defendants Nos. 4 to 8 in support of their proposition can be easily distinguished and they cannot apply to the facts of the present case. As the defendants' pleader hotly contests this point, I deem it necessary to discuss each ruling quoted by them.

The case in 55 Cal. related to a Wakf's case; parties were impleaded in that suit later on and certain reliefs were claimed against this added parties without the sanction of the Advocate General. In the present case, sanction has been obtained before the amendment application, exhibit 109, was presented to the Court. This ruling cannot therefore apply to the present case. The next ruling is 30 Bom. In this case one plaintiff only had brought the suit. An amendment for an addition of another plaintiff was sought. This was not allowed. Originally this suit in 30 Bom. was defective *ab initio*. It was, therefore, rightly held that amendment could not be granted as the suit was defective in its inception. Such is not the case in the present case. The third ruling is 26 All. 162. In this case, sanction was given in the name of one person by name and another. It was held that

sanction should have been given in the name of definite persons. The sanction in this case also was illegal in its inception. Such is not the case in the present suit. The sanction is perfectly valid as it has been given prior to the amendment of the plaint. The next ruling is 21 Bom. 257. In this case also new defendants were added and subsequent reliefs claimed were without sanction. It was therefore rightly held that the suit was not maintainable. This ruling also does not and cannot apply to the facts of the present case. The last ruling is 32 Bom. L. R. 435. In this case, the plaintiffs were pujaris claiming reliefs against the persons in possession of the trust property. There was no sanction by the Advocate General. Relief was for possession and accounts. So far as possession was concerned sanction was not necessary. For accounts sanction was necessary. This had not been obtained and the Court held that the suit was not tenable without such sanction.

I now discuss the rulings relied on by plaintiffs. In my opinion, 36 Bom. 168, relied on by the plaintiffs, applies to the present case. In this ruling one defendant was impleaded later on and three more prayers were sought by an amendment. The High Court held that this could not be granted without the express sanction of the Advocate General. On page 171, para. 3 of this ruling, it is remarked that 'It is quite clear that previous sanction of the Attorney General is necessary before an amendment could be made in an action instituted by relators in respect of public charitable properties.' Again on page 172, para. 4, it is remarked as follows: 'If it is a condition precedent to the institution of the suit, it is quite clear that it is equally a condition precedent to the amendment of the plaint, more especially if by the amendment other party or parties are added to the suit and other reliefs are claimed against such added parties.' This ruling clearly lays down that all that is necessary, for the granting of an amendment of the plaint after the suit is filed under s. 92, Civil Procedure Code, is that a sanction should have been obtained previously. This is exactly what has happened in the present case. Prior to the amendment application, exhibit 109, plaintiffs have obtained a sanction, exhibit 119. If this is so, then the amendment has been rightly granted and I do not think that it is open to defendants Nos. 4 to 8 to urge that this sanction is not valid and proper. The next ruling relied on by plaintiffs is 30 Mad. 138. This is no doubt a ruling of the Privy Council, but prior to the addition of para 2 to s. 92, Civil Procedure Code. It is true that in this ruling an amendment was sought and was allowed. But as the case is prior to the addition of para 2 to s. 92, Civil Procedure Code, I do not think that this ruling will help plaintiffs much. I am supported in this finding by the remarks of A. Ghosh in his book, the Law of Endowment, 1932 edition, pages 548-49. I deem it necessary to quote his remarks verbatim: 'According to the English practice previous sanction of the Attorney General is necessary before an amendment could be made in an action instituted by relators in respect of public charitable properties. *Attorney-General v. Fellows*, the Lord Chancellor said that an amendment could not be permitted without the sanction of the Attorney General. If it were, the whole information, except the introduction, might be changed. The Indian authorities seem to point the same way.' Later on, the ruling in 36 Bom. is also quoted on this very page by A. Ghosh. If the argument of the learned pleader for defendants Nos. 4 and 5 were to be accepted then it follows that no amendment of a plaint can ever be allowed in a suit under s. 92, Civil Procedure Code. I do not think that this was the intention of the Legislature when incorporating para 2 to s. 92, Civil Procedure Code. On a review of all these rulings, I am of opinion that the sanction obtained by plaintiffs from the Collector under exhibit 119 is quite legal and proper."

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The defendants appealed to the High Court.

*Purshottam Tricunddas*, with *B. Moropantih*, for the appellants.

*G. N. Thakor*, with *S. G. Chitale*, for the respondents.

A. C. J. BROOMFIELD J. This is a suit under s. 92 of the Civil Procedure Code  
 1940 relating to a Hindu temple of Shree Kalleshwar at Mangur in the Chikodi  
 taluka. The plaintiffs are residents of Mangur claiming an interest in the  
 institution. In the plaint they have given an account of what they say  
 is the history of the temple and the circumstances leading to the suit. There  
 are three fields which form the endowment. The management of the pro-  
 perty at first belonged to the village officers and in 1883, after an official  
 inquiry, a committee of management was formed consisting of the officiating  
 patil and kulkarni and three other residents of the village. This committee  
 functioned till 1893. After 1893 a member of the Kulkarni family, who was  
 not officiating, acted as manager, and in 1899, when Yadagouda, father of  
 defendant No. 4, ceased to be officiating revenue patil and his son defendant  
 No. 4 was appointed as deputy, he still continued to be a manager of the  
 institution. The panchas who were appointed along with the village officers  
 died in course of time and after 1918 Yadagouda Patil and Sadashiv  
 Kulkarni were the only trustees in management. After the death of Yada-  
 gouda in 1928 the plaintiffs allege that Sadashiv, who incidentally was the  
 father of plaintiff No. 1 and defendant No. 10, was in sole charge of the  
 management.

The plaint further alleges that in June, 1930, there was a public meeting  
 in the village at which five persons, viz. defendants Nos. 1, 2 and 3, one  
 Annagonda Devgonda Patil and one Ramchandra Pandurang Kulkarni de-  
 ceased were elected vahivatdars. Two of the fields belonging to the temple,  
 survey Nos. 90 and 91, were leased to Sattu Appa, defendant No. 9, in 1926.  
 His lease expired on March 31, 1931, and the plaintiffs allege that the lands  
 were then put to auction and leased to new tenants by the five vahivatdars  
 appointed in 1930. Defendant No. 4 and his brother defendant No. 5, and  
 another brother, who was not among the defendants, claimed a right to  
 manage the temple exclusively and took a lease of the fields in their own  
 names. That led to disputes which according to the plaintiffs have endan-  
 gered the proper administration of the trust. Defendant No. 9 having got  
 a new lease in his favour brought a suit in 1931 which lasted for several  
 years. In the course of it a receiver was appointed who took possession of  
 the two fields. In March, 1935, the suit was withdrawn. Plaintiffs allege  
 that because of the patil family, i.e. the family of defendant No. 4, having  
 put forward a false claim to the property of the temple there has been a  
 complete breach of the fulfilment of the purposes of the trust. The manage-  
 ment of the God's affairs and the property of the deity has been endangered  
 and it cannot be definitely stated who is responsible for the management.  
 That being so, it is necessary that the direction of the Court should be  
 obtained for the administration of the trust by appointment of new trustees  
 and vesting of the property in them. It is stated that defendants Nos. 4, 5  
 and 6 who claim the right of management are Jains and are therefore wholly  
 incompetent to be vahivatdars of a Hindu temple. The plaint recites that  
 defendants Nos. 1 to 7 and 10 claim a right to management of the suit  
 property and that defendants Nos. 8, 9 and 11 claim to be in possession of  
 the suit lands as tenants. It may be mentioned that defendants Nos. 1, 3  
 and 10 are related to some of the plaintiffs. The reliefs claimed in the plaint

are (1) a scheme of management, (2) appointment of new trustees, (3) order for vesting of the property, (4) such further reliefs as the nature of the case may require.

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Defendant No. 4 is the principal defendant. In his written statement he claims to be hereditary vahivatdar of the temple and all its properties. He does not say in so many words in his written statement that he is the sole vahivatdar, but, as he says in the course of the statement that no persons have a right to share in the management except those appointed by his ancestors or himself, it is clear that he was putting forward an exclusive claim to be the sole vahivatdar and that position was made perfectly clear by the evidence given on his behalf by his brother, defendant No. 5. Defendant No. 4 himself did not give evidence. According to the written statement from the time of his great-great-grandfather the management of the temple has been with his family and he became hereditary vahivatdar on the death of his father in 1928. He says that he has been carrying on the management according to the religious rules and that there is no need for any directions of the Court. He denies that the villagers ever had any hand in the management. He says there was no committee in 1883 and also no appointment of vahivatdars in June, 1930. The police patil, he alleges, has nothing to do with the management. Plaintiffs and those defendants who are related to them and the police patil have made common cause against him to deprive him of his hereditary right and of possession of the temple lands.

Exhibit 146 is a Government Resolution giving sanction to the Collector of Belgaum to exercise in respect of the institution of the suit by Vinayak Sadashiv Kulkarni and others relating to the Devasthan property belonging to Shri Kalleshwar Deo at Mangur the powers conferred by s. 92 of the Civil Procedure Code on the Advocate General. The authority was given with special reference to this suit in consequence of the decision of the Privy Council in *Prem Narain v. Ram Charan*,<sup>1</sup> that it is not sufficient to empower an officer generally to exercise the powers of the Advocate General but Government must give previous sanction in the case of the particular suit. Exhibit 42 is the Collector's sanction. He gave sanction to six named persons, i.e. the present plaintiffs, for the institution of a suit to obtain a decree, settling a scheme of management in respect of the institution in question. As I have mentioned, the plaint asked for further reliefs in addition to settling a scheme and objection was taken to this on the part of defendant No. 4. An application was then made to the Collector, and by exhibit 119 he gave sanction to the plaintiffs to claim further reliefs in the suit, viz. (1) removing the old trustees, (2) appointing new trustees, (3) vesting the property in the trustees, (4) directing accounts and inquiries, (5) declaring what proportion of the trust property shall be allocated to any particular object of the trust and (6) granting such further or other relief as the nature of the case may require. The plaintiffs then applied to the Court for permission to amend their plaint. The application is exhibit 109 and it begins by saying that the plaintiffs had regarded these further reliefs as being merely ancillary to the prayer for the framing of a scheme. But in view of the objection taken by

<sup>1</sup> (1931) L. R. 59 I. A. 121, s. c. 34 Bom. L. R. 494.

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the defendants they had applied to the Collector for sanction to remove a technical defect. The Court allowed the amendment holding that the additional reliefs sought were not inconsistent with the suit as originally instituted. Issues were framed. The learned Judge overruled technical objections to the maintainability of the suit and held that the directions of the Court were necessary for the administration of the trust. He also held that defendant No. 4 had failed to prove his claim to be the sole hereditary vahivatdar and he drew up a scheme of management which is set out in detail in paragraph 18 of the judgment. According to this there are to be two *ex officio* trustees and three persons to be elected from amongst Hindu devotees of the temple. The officiating trustees are to be either the police or revenue patil and the kulkarni. The patils are to hold office for three years alternately, the first to officiate being the police patil. So that, although defendant No. 4 has not been held to be incompetent, he has been placed on the same footing as the police patil and has been omitted from the managing committee for the first period of three years.

Against the lower Court's decree, defendants Nos. 4 to 9 have appealed. Learned counsel on their behalf has raised certain technical objections to the maintainability of the suit similar to those, though not precisely the same as those, which were urged in the lower Court. The first point is that as this is a representative suit the Court ought to have taken action under Order I, r. 8, and issued notices as provided in that rule. No authority has been cited in support of this argument, and it is conceded that it never has been the practice to apply O. I, r. 8, to suits under s. 92 either on the Original Side of the High Court or in the mofussil. The only case cited in this connection is *Musammāt Ali Begam v. Badr-ul-Islam Ali Khan*.<sup>1</sup> The only point which their Lordships had to decide in that case was whether where sanction has been given to five plaintiffs to bring a suit under s. 92 an appeal by four of these plaintiffs with the fifth plaintiff as a respondent is competent. In connection with that narrow point their Lordships made some general observations, viz. that a suit must conform to the consent, that there is no provision in the Code for recourse being had to the Advocate General or the Collector during the course of the suit and that when once a suit is validly instituted it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular. In our opinion it cannot be deduced from these observations that the procedure laid down in O. I, r. 8, must be followed in suits under s. 92. No such point was in the minds of their Lordships.

Mr. Purshottam's next point was that the amendment of the plaint by asking for further reliefs was illegal. His argument goes so far as to say that in a suit under s. 92 no amendment of the plaint can ever be made. In the present case at any rate he contends that the Court had no power to allow the amendment. The sanction of the Collector made no difference because there was no sanction of Government in that behalf. The only relief which can be granted in the present suit according to this argument is the framing of a scheme, because even the original plaint went beyond the terms of the

<sup>1</sup> (1938) L. R. 65 I. A. 198, s. c. 40 Bom. L. R. 835.



Collector's sanction. It is difficult to reconcile this reasoning with some of the observations of their Lordships in *Musammam Ali Begam v. Badr-ul-Islam* to which I have just referred, for, if a suit under s. 92 once validly instituted is subject to all the incidents affecting suits in general, one of such incidents undoubtedly would be the amendment of the plaint when circumstances justify it. *Darves Haji Mahamad v. Jainudin*<sup>1</sup> was cited. In that case a suit under s. 92 had been brought by a single plaintiff. It was amended by adding a second plaintiff. It was held that the suit was bad at its institution and the amendment did not better it. The reason was of course that there never was in that case a suit instituted by two persons as required by s. 92. The case is no authority for holding that an amendment of the plaint can never be allowed. *Gopal Dei v. Kanno Dei*<sup>2</sup> is a similar case. Sanction had been given not to two specified persons but to "A and another" and this defect was remedied at a late stage of the proceedings. It was held that the authority must be given specifically to two persons and that it cannot be given after the institution of the suit.

*Abdul Rehman v. Cassum Ebrahim*<sup>3</sup> was a case on the Original Side of this High Court tried by Mr. Justice Davar. In that case two of the defendants were struck off and a new one was added and by an amendment of the plaint reliefs were sought against the added defendant. Mr. Justice Davar held that the plaintiffs were not entitled to maintain the suit against the added defendant because no sanction of the Advocate General had been obtained before he was made a defendant and before the amendment of the plaint. This case is an authority for the view that amendments may be permitted with the sanction of the Advocate General as in England. In *Sayad Hussein Miyan v. Collector of Kaira*<sup>4</sup> the Court said that a suit under s. 92 must be limited to matters included in the sanction and it is not competent to the Court to enlarge the scope of the suit and grant reliefs other than those included in the sanction. The facts of the case were peculiar. Some new defendants were joined at the request of one of the original defendants and reliefs were granted against them. The amendments were allowed by the Court without the sanction of the Collector who was the plaintiff in the suit. The Court took the view that the procedure was illegal and that the Court had no power to grant the reliefs against the added defendants. That was because the learned Judges were of opinion that the amendments had substantially changed the character of the suit. Mr. Justice Jardine said (p. 262): "The suit actually determined is not the same as that for which sanction was accorded." Mr. Justice Ranade observed that there must be close correspondence between the suit instituted and the suit sanctioned. The judgments of both the learned Judges suggest that if the amendments had been sanctioned by the Collector they would have felt no difficulty about the case.

We were also referred to two Madras decisions. In *Srinivasa v. Venkata*,<sup>5</sup> which was a suit under the Religious Endowments Act, the claim for one of

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1 (1906) I. L. R. 30 Bom. 603,

s. c. 8 Bom. L. R. 751.

2 (1903) I. L. R. 26 All. 162.

3 (1911) I. L. R. 36 Bom. 168,

s. c. 13 Bom. L. R. 583.

4 (1895) I. L. R. 21 Bom. 257.

5 (1887) I. L. R. 11 Mad. 148.

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the reliefs, viz. damages, was dropped and the Court held that this altered the character of the suit and therefore the plaint had been rightly rejected. It was considered that on the facts of the case the dropping of that particular relief gave the suit a different character. This case, however, is no authority for the view that a suit under s. 92 must always be strictly limited to the reliefs for which sanction has been expressly given. In *Pitchayya v. Venkatakrishnamachari*<sup>1</sup> the Court held that where sanction has been given to file a scheme suit "no relief can be given in respect of any other matter, e.g. removal of the trustee or the appointment of new trustees." No reasons were given, however. The judgment merely refers to *Srinivasa v. Venkata* which certainly does not lay down any such general proposition. We were told that the decisions of the Madras High Court on this point have not been uniform, and apart from that, *Pitchayya v. Venkatakrishnamachari* is difficult to reconcile with the observations of their Lordships of the Privy Council in *Anand Rao v. Ramdas Daduram*<sup>2</sup>. There permission had been given to institute a suit under s. 539. The application for permission had asked simply for the appointment of new trustees. The plaint prayed for the removal of a trustee and the settlement of a scheme and the Court removed the trustee and said that it would proceed to settle a scheme. On appeal the right of the trustees to take part in the management was upheld but the judgment of the first Court was otherwise confirmed. Their Lordships of the Privy Council affirmed the judgment of the High Court and observed as follows in their judgment (p. 15):—

"The first point that is pleaded is that the permission to institute a suit under s. 539 does not square with the application, which was an application conceived merely for the appointment of new trustees, but it really had to be conceded, and their Lordships think it quite clear that, although the application as framed may have been for the appointment of new trustees, yet when they came before the Deputy Commissioner and explained the matter it was quite within his power to grant the sanction as he has granted it."

"The next point that is put is that when the sanction says: 'I grant them permission to institute a suit under section 539,' that does not mean any suit which may be raised under section 539, but is confined merely to one of the species of suits that could be so raised—namely, the appointment of new trustees. Their Lordships do not think that any such narrow reading can be put upon the sanction as given."

We think it is impossible to accept the proposition that no amendment of the plaint is ever permissible in suits under s. 92. If that were so, it would lead to very inconvenient results. There is clear authority in *Abdul Rehman v. Cassum Ebrahim*,<sup>3</sup> that amendments may be made with the sanction of the Advocate General. We see no reason why the Collector should be regarded as being in a different position. It is quite true, as Mr. Purshottam pointed out, that the Collector under the Government Resolution is only given the powers of the Advocate General in respect of the institution of the suit. But that was the only power which it was necessary to give him and the Advocate General's only power expressly given by s. 92 is to institute or consent to the institution of a suit. As their Lordships of the Privy Council

1 (1929) I. L. R. 53 Mad. 223.

2 (1920) L. R. 48 I. A. 12.

3 (1911) I. L. R. 36 Bom. 168,  
 s. c. 13 Bom. L. R. 583.

pointed out in *Musammal Ali Begam v. Badr-ul-Islam*, the Code does not provide for recourse to the Advocate General or the Collector after the suit has been instituted. Mr. Purshottam's suggestion that there should have been another Government Resolution sanctioning the amendment of the plaint is not supported by anything in the Code. It does not follow, however, from the lack of statutory provision that the Advocate General or the Collector may not take any further part in the suit.

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We think the true position is that it is for the Court to decide in suits under s. 92 as in any other suit whether an amendment is permissible, and the consent of the Advocate General or the Collector as the case may be is really evidence which has to be taken into consideration before deciding whether the amendment should be allowed. We can see no reason why amendments which do not substantially change the character of the suit or enlarge the scope of it should not be made by the Court itself without sanction. Amendments which enlarge the scope of the suit, for instance by allowing further reliefs, without substantially changing its character, may be made with the sanction of the Advocate General or the Collector, that sanction, as I say, being evidence that the suit after amendment is to all intents and purposes the same suit and not a different one. Amendments substantially changing the character of the suit would we think not be permissible even with sanction. In such a case it could hardly be said that the suit in its amended form was ever validly instituted. No such point as this, however, arises in the present case. In the application which the plaintiffs submitted to the Collector asking for sanction they set out their case pretty much in the same form as in the plaint. The only relief which they mentioned there was the necessity for framing a scheme of management. But in the course of their application, as in the plaint, they had referred to the conduct of defendant No. 4. They had described him and his brothers as being incompetent to become vahivat-dars and they had therefore brought it to the Collector's notice that in framing a scheme of management the appointment of new trustees would have to be considered. Framing a scheme for the management of an institution of this kind may or may not involve the appointment of new trustees or the removal of existing trustees. Mr. Purshottam conceded that the appointment of new trustees at any rate may be involved in the framing of a scheme. It would obviously be purposeless to draw up a scheme of management without arranging for the appointment of trustees in the present case because there would be no one to put the scheme into operation.

The principal argument on behalf of the appellants in this appeal has been that defendant No. 4 is entitled to a place among the trustees to be appointed under the new scheme and that no sufficient grounds have been shown for removing him. As on this point we are in agreement with him, the technical points which have been argued have not great importance, but we may say that if we had come to the conclusion that the character or conduct of defendant No. 4 rendered it inexpedient that he should be a member of the Managing Committee, we should have felt no difficulty on legal grounds in agreeing with the trial Court.

[His Lordship after dealing with the merits of the case proceeded :]

That being so, the only matter to be considered is whether it is necessary

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to remove defendant No. 4 or to omit him from the committee of management. The plaint was a little vague in this connection and the only specific ground indicated there for the removal of defendant No. 4 was that he is a Jain and therefore incompetent to be a vahivatdar. But as the evidence shows that the family of defendant No. 4 has been associated with this institution ever since we have any record of its history, the argument that he is in any way disqualified by his religion has very little force. The evidence shows that there are a considerable number of Jains in the village, about as many Jains as Hindus, and in the past a number of Jains have been appointed as panchas. Other reasons for removing defendant No. 4 suggested in the judgment are that he has put forward an unwarranted claim to the right of exclusive management, that no religious ceremonies are now being performed, that he has not kept accounts and that he gave a remission of rent to defendant No. 9 without sufficient cause. We have examined the evidence on these points such as it is and we do not consider that there is anything in them. It has been held in a number of cases, e.g. *Annaji v. Narayan*<sup>1</sup>, and *Damodar v. Bhat Bhogilol*<sup>2</sup>, that claims such as defendant No. 4 has been putting forward in the present case do not necessarily call for the penalty of exclusion from the management. The learned Judge is no doubt right in saying that proof of breach of trust or mismanagement is not essential. The Court has a wide discretion under s. 92 to take such action as it thinks necessary or desirable for the good of the charity : *Mahomed Ismail Ariff v. Ahmed Moolla Dawood*,<sup>3</sup> and *Mohammedally v. Akberalli*.<sup>4</sup>

But when a family has been connected with an institution as long as that of this defendant, there ought to be some strong reason for depriving him of his privilege. Mr. Thakor has pointed out that for three years out of this long period Yadagouda the father of defendant No. 4 did not for some reason take part in the management. That does not affect the fact that since pre-British times this family, the family of the revenue patil, has been associated with the institution and furnished one of its trustees. We do not say that this long connection with the institution gives defendant No. 4 a legal right to share in the management. But he has a claim to share in the management which is certainly superior to that of anybody else except the kulkarni and previous association is undoubtedly one of the matters which the Court normally takes into consideration in deciding who the managers of an institution should be. Although the learned Judge does say in one passage in his judgment that defendant No. 4 is "greatly instrumental or responsible for the present state of affairs," he has nowhere stated that it was necessary to deprive him of any share in the management. The matters he has discussed in that connection merely lead him to the finding that he should not be entrusted with the sole management in the scheme to be framed by the Court. As for the present impasse we think that both parties are partly to blame and that defendant No. 4 is by no means solely responsible. It does not appear that the police patil or anyone in the family of the police

1 (1896) I. L. R. 21 Bom. 556.

2 (1896) I. L. R. 22 Bom. 493.

3 (1916) I. L. R. 43 Cal. 1085,

s. c. L. R. 43 I. A. 127,

s. c. 18 Bom. L. R. 611.

4 (1933) 36 Bom. L. R. 386, P.C.

patil has ever had anything particular to do with the management of the temple. We see no reason therefore why the police patil should be put on a level with the revenue patil in the scheme which has been framed. \*

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We propose therefore to modify the scheme framed by the learned First Class Sub-Judge by deleting the references to the police patil. The officiating members of the board of management will therefore be the officiating revenue patil and the officiating kulkarni or the talati. There is one other modification which we think it desirable to make, and we may say we do this with the concurrence of learned counsel on both sides. The scheme at present provides that the three members of the board other than the *ex officio* members shall be elected from amongst the Hindu devotees of the temple at a public meeting of the Hindu devotees. In view of the fact that there are so many Jains in this village and in view of the association of Jains with this institution in the past, we see no reason why Jains should be prohibited from becoming members of the board of management if elected by the devotees. The scheme will therefore provide that the trustees are to be appointed by the Hindu devotees but that both Hindus and Jains are eligible for election. In other respects we confirm the scheme framed by the lower Court. The order removing defendant No. 4 from the trusteeship is set aside. The first election of the three non-officiating members of the board of management should take place within a month of the receipt of the record of this case by the lower Court. The board should begin to function within a week from the election of the chairman of the board of management.

Defendant No. 4 took up an extreme position in the trial Court which he maintained in his memorandum of appeal. Had he been more accommodat- ing there might have been no need for litigation. At any rate it would not have been so long drawn out. Under the circumstances we think the proper order to make as to costs will be that defendants Nos. 4 to 9 do pay half the costs of the plaintiffs in the suit and do recover half the costs of the appeal from the respondents.

*Decree varied.*

SCHEME RELATING TO THE KALLESHWAR TEMPLE AT MANGUR VILLAGE, CHIKODI TALUKA, AS MODIFIED BY THE HIGH COURT IN FIRST APPEAL NO. 179 OF 1939.

1. The Court directs that the management (in respect of the property belonging to the Kalleshwar Temple) shall be in the hands of at least five persons (trustees); two of whom shall be *ex-officio* members of the board or the committee.
2. The officiating revenue patil and the officiating kulkarni or the talathi will be the *ex-officio* members of the board of trustees.
3. The other three persons shall be elected from among the Hindu devotees of the temple.
4. The trustees are to be appointed by the Hindu devotees.
5. Both Hindus and Jains will be eligible for election.
6. For the purpose of election, the officiating revenue patil and the kulkarni shall convene a public meeting of the Hindu devotees of this temple after due advertisement of the date, say, at least a week before the meeting.
7. The revenue patil and kulkarni now officiating shall first take the initiative in this matter of forming the board of management.

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1940 the two village officers shall form a board of management.

— 9. The chairman of this board shall be elected by the five members constituting  
BAPUGOUDA the board, by a vote of majority.

YADGOUDA 10. A fresh election shall take place every three years.

v. 11. The first election of the three non-officiating members of the board of  
VINAYAK management should take place within a month from the receipt of the record of  
SADASHIV the case by the lower Court. The chairman shall be elected within a week after  
these elections are over, so that the board should begin to function within a week  
Broomfield J. from the election of the chairman of the board of management.

— 12. The chairman of this committee shall be the treasurer of the funds of the  
deity.

13. This board shall be in existence for a period of three years.

14. All matters relating to this temple on which the board is not unanimous  
are to be decided by a majority of votes. The chairman elected shall have a  
casting vote.

15. As soon as the board begins to function, a budget shall be prepared giving  
the income and expenditure of the temple property. The budget shall make provi-  
sion for the performances of all the religious ceremonies, that were being done till  
this litigation began. If any surplus amount remains at the end of the year, the  
chairman shall deposit it in a safe bank likely to carry some interest.

16. No immoveable property of the temple shall be given on lease for more  
than three years. No property of the deity whether moveable or immoveable shall  
be sold by this board without the sanction of this Court.

17. Accounts of the income and expenditure shall be regularly kept by the  
chairman and they shall be available for inspection by any Hindu devotee of the  
temple.

18. A record of the proceedings of all meetings held prior to the election as well  
as after the election should be kept.

19. The chairman of this board shall submit to the Court, before the 1st April  
each year, a statement of account of the previous year as well as the budget for  
the next year sanctioned by the board.

20. Liberty is given to the board and any Hindu devotee of the temple to apply  
to this Court for any modification of this scheme that may appear to be necessary  
or convenient in the light of the experience gained.

21. If the chairman of this board finds that it is necessary for him to incur  
expenditure on any head of the budget substantially in excess of the amount pro-  
posed in the draft budget, or if he finds that it is necessary to depart materially  
from any of the directions decided by the board, he shall, if the time available  
allows it, call a meeting of the board and lay his proposals before them. If there  
be no sufficient time for this he shall inform the members of the board as soon  
as possible of the action taken by him in this behalf.

22. The chairman shall pay due heed to the suggestions and criticisms made  
by the board and the Hindu devotees at all such meetings as far as they appear to  
him consistent with the due discharge of his responsibilities as chairman.

23. The board shall supervise all the functions to be performed in the temple  
and see that the temple and its buildings are kept in good order.

24. Necessary repairs to the temple shall be made by the board whenever neces-  
sary.

25. If at any meeting of the board the chairman is absent, the remaining mem-  
bers shall elect their own chairman by a majority of votes.

Before Mr. Justice N. J. Wadia and Mr. Justice Wassoodew.

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*Civil Procedure Code (Act V of 1908), O. XXII, r. 10, O. XLIII, r. 1, sub-cl. (1), and Sec. 104, cl. (2)—Application in execution proceedings—Application to join party to darkhast—Whether application falls under O. XXII, r. 10—Whether second appeal lies from an order refusing such application.*

Order XXII, r. 10, of the Civil Procedure Code, 1908, applies to execution proceedings. An order made under that rule is appealable under the provisions of O. XLIII, r. 1, sub-cl. (1), but no second appeal lies from an order passed in appeal in virtue of s. 104, cl. (2), of the Civil Procedure Code.

*Muthiah Chettiar v. Govindoss Krishnadoss<sup>1</sup> and Midnapore Zamindari Co. Ltd. v. Naresn Narain Roy<sup>2</sup>*, followed.

*Virupakshappa v. Sidappa and Basappa<sup>3</sup>, Srinivasa v. Pratapa Simha<sup>4</sup>, Mayankutti v. Biyyathumma<sup>5</sup>, Goodall v. The Mussoorie Bank, Limited<sup>6</sup>, Musammatt Gulab Kuer v. Syed Mohamed Zaffar Hassan Khan<sup>7</sup> and Shaik Davud Rowther v. Paramasami Pillai<sup>8</sup>*, referred to.

#### APPLICATION in execution.

The property in suit originally belonged to one Narayan Ramji of Kopergaon. On April 15, 1916, he mortgaged the property to the father of Krishnaji (applicant). On June 7, 1917, he again mortgaged the property to one Bhikchand (opponent).

On August 17, 1922, Bhikchand obtained a mortgage decree and on March 3, 1931, he purchased the mortgaged property in execution proceedings of his own decree. The sale was confirmed on May 25, 1931. In the meantime the Court of Wards, as the applicant was then a minor, brought suit No. 136 of 1923 against Narayan and obtained a decree upon the prior mortgage of 1916 on August 4, 1923. Bhikchand was not joined as a party to this suit.

The Court of Wards filed darkhasts in 1927 and 1930, but these were not prosecuted. The Court of Wards filed the present darkhast (No. 360 of 1931) on March 21, 1931. On April 5, 1931, the Court of Wards applied to add Bhikchand as a party to the darkhast.

The trial Judge dismissed the application holding that O. XXII, r. 10, and s. 47 of the Civil Procedure Code, 1908, did not apply to an auction-purchaser in execution proceedings. In his judgment he observed.—

\* Second Appeal No. 207 of 1939, from the decision of G. B. Constantine, District Judge at Ahmednagar, in Appeal No. 209 of 1937, confirming the decree passed by B. G. Murdeshwar, Subordinate Judge at Kopergaon, in Application Darkhast No. 360 of 1931.

1 (1921) I.L.R. 44 Mad. 919, F.B.

2 (1911) I. L. R. 39 Cal. 220.

3 (1901) I. L. R. 26 Bom. 109, s.c. 3 Bom. L. R. 565.

4 [1926] A. I. R. Mad. 244.

5 [1927] A. I. R. Mad. 824.

6 (1887) I. L. R. 10 All. 97.

7 (1921) 6 P. L. J. 358.

8 (1916) 31 M. L. J. 207.

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"The words 'during the pendency of a suit,' [in O. XXII, r. 10, Civil Procedure Code] read together with the marginal note, make it clear that the provisions of the rule apply only 'before a final decree or order has been made in the suit. It follows, therefore, that they will not apply after the termination of the suit, for instance, to execution proceedings."

On appeal the order of the trial Court was confirmed and the appeal was dismissed.

The applicant appealed to the High Court.

*J. G. Rele*, for the appellant.

*K. N. Dharap*, for the respondent.

N. J. WADIA J. This appeal arises out of an application made by the appellant in execution proceedings which had been started by him to execute a mortgage decree obtained by him in suit No. 136 of 1923. The property involved in the suit had been mortgaged to the appellant-plaintiff by one Narayan Ramji on April 15, 1916. Subsequent to this the same property was mortgaged by Narayan to the respondent Bhikchand Ramkaran Marwadi on June 7, 1917. In 1921 Bhikchand filed a suit on his mortgage and obtained a mortgage decree on August 17, 1922, and in the course of the execution proceedings on that decree he himself purchased the property on March 3, 1931, the sale being confirmed on May 25, 1931. In the meanwhile the plaintiff filed his suit, No. 136 of 1923, and obtained a decree on August 4, 1923. To this suit Bhikchand had not been joined as a party. The plaintiff filed darkhasts in 1927 and 1930, but these were not prosecuted. Finally darkhast No. 360 of 1931, from which this appeal arises, was filed by him on March 21, 1931, prior to the confirmation of the sale of the property, to Bhikchand. On April 5, 1933, the Court of Wards on behalf of the plaintiff applied in darkhast No. 450 of 1931 to add Bhikchand as a party. The learned trial Judge rejected the application holding that it could not be made under O. XXII, r. 10, of the Code of Civil Procedure, 1908, upon which the applicant relied, because in his view that rule did not apply to execution proceedings. He also held that Bhikchand being a purchaser at a Court sale was not the legal representative of the judgment-debtor. Against this order there was an appeal to the District Judge of Ahmednagar who dismissed it, and the applicant has come in second appeal.

A preliminary objection has been raised by Mr. Dharap for the respondent that no second appeal lies. His contention is that the appellant's application to add Bhikchand as a party to the darkhast is an application under O. XXII, r. 10, and against an order made under that rule an appeal lies under the provisions of O. XLIII, r. 1, sub-cl. (1), and under the provisions of s. 104, cl. (2), of the Code of Civil Procedure, no second appeal lies from any order passed in appeal under O. XLIII, r. 1. The question therefore is whether the provisions of O. XXII, r. 10, applied to the present application which was one made in the course of execution proceedings. For the appellant it is contended that O. XXII, r. 10, does not apply to execution proceedings. In support of that contention reliance is placed on the language of the rule itself which is as follows :

"In other cases of an assignment, creation or devolution of any interest during



the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

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The marginal note to the rule shows that it deals with the "Procedure in case of assignment before final order in suit." It is argued that the words "during the pendency of a suit" clearly indicate that the rule could not apply to execution proceedings after a decree has been passed. The question whether the provisions of this rule apply to execution proceedings is one not free from doubt and there have been conflicting rulings of the different High Courts on the point. Our attention has not been drawn to any decision of our own High Court on this question. Rule 12 of O. XXII, says that "nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order." It would seem to follow from this express reference to rr. 3, 4 and 8, that the remaining rules of this Order including r. 10 would apply to proceedings in execution. Sir Dinshah Mulla in his Commentary on the Code, 10th edn., page 850, says that the provisions of O. XXII apply to execution proceedings except rr. 3, 4 and 8. The fact that the rule refers to "an assignment, creation or devolution of any interest during the pendency of a suit" would not necessarily mean that it could not apply to execution proceedings. Applications in execution are proceedings in the suit as was held in *Virupakshappa v. Shidappa and Basappa*<sup>1</sup> and in that sense the assignment, creation or devolution of any interest during the pendency of execution proceedings could be said to be during the pendency of the suit. The question whether O. XXII, r. 10, applies to execution proceedings was considered by a full bench of the Madras High Court in *Muthiah Chettiar v. Govinddoss Krishnadoss*<sup>2</sup> and the view taken by the majority of the full bench was that it did apply. Wallis C. J. in dealing with the contention that O. XXII, r. 10, did not apply to execution proceedings said (p. 923) :

"Generally, an application for execution is a proceeding in a suit, as held in *Virupakshappa v. Shidappa and Basappa*<sup>1</sup> and *Shaik Davud Rowther v. Paramasami Pillai*<sup>3</sup> and I think that the present Code has been drafted on this basis. It expressly provides by Order XXII, rule 12, that nothing in rules 3, 4 and 8 of that Order, which provide for abatements, shall apply to execution, and in Order XXIII, rule 4, that nothing in that Order shall apply to execution, while it contains no such provision in Order XXXIII, as to minors or persons of unsound mind which must none the less be equally applicable to execution.

"A further objection has been taken that an application in execution cannot be an application 'during the pendency of a suit', within the meaning of Order XXII, rule 10, but, if for the purposes of the Order applications in execution are applications in suits, they must in my opinion equally for the purposes of the Order be applications during the pendency of suit."

The decision in *Muthiah Chettiar v. Govinddoss Krishnadoss* however was not rested upon this conclusion. In a subsequent decision of the Madras High Court in *Srinivasa v. Pratapa Simha*<sup>4</sup> a division bench of the Madras High Court held that O. XXII, r. 10, applied only to pending suits. In *Mayankutti v. Biyyathumma*<sup>5</sup>, which was a decision of a single Judge, the question again arose whether O. XXII, r. 10, applied to proceedings subse-

1 (1901) I. L. R. 26 Bom. 109,  
s.c. 3 Bom. L. R. 565.

2 (1921) I. L. R. 44 Mad. 919, F.B.

3 (1916) 31 M. L. J. 207.

4 [1926] A. I. R. Mad. 244.

5 [1927] A. I. R. Mad. 824.

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quent to a decree, and it was held following the decision in *Srinivasa v. Pratapa Simha* that O. XXII, r. 10, would not apply to post-decree proceedings. The decision of the full bench in *Muthiah Chettiar's* case was referred to but was not followed on the ground that the decision of the case rested on other grounds and not on the view that O. XXII, r. 10, applied to execution proceedings. In *Midnapore Zamindari Co. Ltd. v. Naresh Narain Roy*<sup>1</sup> a division bench of the Calcutta High Court also expressed the opinion that the provisions of O. XXII, r. 12, would seem to imply, by the principle of exclusion, that all the rules of that Order, except rr. 3, 4 and 8, are applicable to proceedings in execution of a decree or order, and that r. 10 was therefore so applicable. But this was a mere expression of opinion, the actual decision being based on the view that the proceedings in that case, which were proceedings for assessment of mesne profits after a decree had been obtained in a suit for the recovery of possession of immoveable property were proceedings in continuation of the original suit, and the case was therefore treated as a case of devolution of interest by sale during the pendency of the litigation.

I am with respect of opinion that the view expressed by the majority of the full bench in *Muthiah Chettiar v. Govindoss Krishnadoss* and by the Calcutta High Court in *Midnapore Zamindari Co. Ltd. v. Naresh Narain Roy* that O. XXII, r. 10, applies to execution proceedings, is correct. It is difficult to reconcile the opposite view with the provisions of r. 12 of the Order. If the Legislature had intended that r. 10 should not apply to execution proceedings, that rule would have been mentioned in r. 12 along with rr. 3, 4 and 8. It was argued that the language of r. 10 itself precluded its application to execution proceedings since it referred to suits. But there is a similar reference to suits in rr. 1, 2, 7 and 9 of the Order and it is not contended that these rules also do not apply to execution proceedings. The appellant's application must therefore be treated as an application made under O. XXII, r. 10, and that being so, no second appeal lies. The appeal must therefore be dismissed with costs.

We have been asked to treat this appeal as a revision application. But as the power to add the name of any person upon whom any interest has devolved as a party to the proceedings is one within the discretion of the Court, we see no reason to allow the application to be argued as an application in revision.

WASSOODEW J. I agree in holding that O. XXII, r. 10, of the Civil Procedure Code, applies to execution proceedings. In terms that rule lays down the procedure in cases of assignment, creation or devolution of any interest "during the pendency of a suit." That expression has given rise to a conflict of opinion among the different High Courts: see *Goodall v. The Mussoorie Bank, Limited*<sup>2</sup>, *Midnapore Zamindari Co. Ltd. v. Naresh Narain Roy*<sup>3</sup>, *Musammatt Gulab Kuer v. Syed Mohamed Zaffar Hassan Khan*<sup>4</sup> and *Muthiah Chettiar v. Govindoss Krishnadoss*.<sup>5</sup> It is contended that the

1 (1911) I. L. R. 39 Cal. 220.

2 (1887) I. L. R. 10 All. 97.

3 (1911) I. L. R. 39 Cal. 220.

4 (1921) 6 P. L. J. 358.

5 (1921) I. L. R. 44 Mad. 919, F.B.

expression "during the pendency of a suit" in r. 10 implies the interval between the filing of the plaint and the passing of the final decree, and that therefore the Legislature contemplated that the rule would apply to an application made before the decree or final order in the suit. There is no reported decision of this Court on the application of that rule. It has been held in a series of decisions of this Court and other Courts,—see *Virupakshappa v. Shidappa and Basappa*<sup>1</sup> and *Shaik Dawud Rowther v. Paramasami Pillai*<sup>2</sup>—that an application in execution is a proceeding in a suit, or, in other words, execution is a continuation of the suit. If that view is correct, an application in execution would necessarily be an application "during the pendency of the suit." It has been urged that the contrary view is supported by the marginal note to the rule which says that it relates to the "procedure in case of assignment before final order in suit." But the marginal note cannot be used to limit the construction of the provisions of the statute and it does not form part of it. The other provisions of O. XXII show, as my learned brother has pointed out, that the Legislature drafted those provisions on the basis that the execution was a continuation of the suit. Rule 1 of O. XXII as regards abatement necessarily applies to execution proceedings, and it has not been suggested that it does not. Wherever the application of the rules as to abatement to execution proceedings was considered objectionable, the Legislature has said so. That affords an explanation for the existence of r. 12 of O. XXII which excludes the operation of rr. 3, 4 and 8 of O. XXII to execution proceedings. Whenever the Legislature intended that certain rules of the Code which in terms apply to suits should not apply to execution proceedings, it has been expressly so provided. See O. XXIII, r. 4.

But the principal contention of the appellant is that inasmuch as the executing Court could pass orders upon the application in question under s. 47 of the Code, because that section confers jurisdiction to deal with questions as to representation, the application itself is referable to the provisions of that section. That section does not lay down the procedure by which an assignee of an interest of a party to a decree could be added as a party to the execution proceedings, although it confers jurisdiction on the Court to decide his representative character. There are several rules in O. XXII which confer jurisdiction to decide questions relating to the representative character of persons sought to be joined or already joined as parties. Rules 2, 3 and 4 deal with cases of devolution of interest on the death of a party to a suit. Rule 5 expressly confers power on the Court to determine the question as to legal representation. Rule 7 deals with the case of creation of interest on husband on marriage. The Legislature however considered it essential to lay down the procedure for adding persons as parties acquiring interest by other modes of assignment by framing r. 10. That was done for obvious reasons. Before the jurisdiction as to the determination of representation can be exercised every party has to follow the preliminary procedure of bringing the person whose representative character is to be determined before the Court. For that purpose rules laying down the procedure will be necessary.

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1 (1901) I. L. R. 26 Bom. 109,  
s.c. 3 Bom. L. R. 565.

2 (1916) 31 M. L. J. 207.

A. C. J. In the absence of any specific provisions in the Code to that effect relating  
 1941 to execution a party will be driven to invoke the inherent powers of the Court  
 under s. 151. That may lead to difficulty, and in my opinion a strict con-  
 KRISHNAJI struction of r. 10 may result in hardship. I think that consideration would  
 RAM- justify the application of the rule to execution proceedings. If therefore an  
 CHANDRA application to bring an assignee on the record in execution proceedings is  
 v. an application in continuation of the suit and therefore during the pendency  
 BHUKCHAND thereof, the application would fall under the provisions of O. XXII, r. 10. Con-  
 RAMKARAN sequently, I agree with the order proposed.  
 Wassoodew J.

*Appeal dismissed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

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HARILAL PANNALAL SARDA

v.

February 27.

VISHNU RAMCHANDRA KALLOL.\*

*Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Mortgage decree—Decree-holder declared insolvent by foreign Court—Receiver appointed by foreign Court—Whether such receiver can execute decree in British India.*

The expression "by operation of law" in O. XXI, r. 16, of the Civil Procedure Code, 1908, means by operation of the appropriate law and does not include the law in force in an Indian State.

A mortgage decree was passed by a Court in British India in favour of the plaintiff which directed that the plaintiff could get the defendants' properties sold if he was not paid certain instalments. The plaintiff was afterwards declared an insolvent by a Court of an Indian State and a receiver was appointed. The receiver then applied in his own name, to the Court in British India, to execute the mortgage decree by sale of the mortgaged property, as there was default in payment. On the question whether the "receiver" was entitled to execute the decree :—

*Held*, that the title of the receiver, appointed by the Court of the Indian State, to execute the decree could not be recognized by the Court in British India; and that therefore, without a proper assignment of the decree in his favour, he was not entitled to execute the decree.

EXECUTION proceedings.

One Harilal Narayan on February 1, 1932, obtained a mortgage decree in the Court of the Subordinate Judge at Belgaum, against Vishnu and others (respondents). The decree directed payment to Harilal of a sum of Rs. 13,000 by certain instalments and provided that in case the respondents failed to pay any two instalments, Harilal could recover the whole amount by getting the mortgaged property sold.

In 1936 Harilal was declared an insolvent by the District Court at Miraj in the Miraj State, and one Dattatraya (appellant) was appointed a receiver by the Miraj District Court.

\*Letters Patent Appeal No. 20 of 1940, against the decision of Divatia J., in First Appeal No. 175 of 1938, preferred against the decision

of V. R. Mangalvedhekar, First Class Subordinate Judge at Belgaum, in Darkhast No. 46 of 1937.

The appellant then applied, in his own name, to the Subordinate Judge at Belgaum, to execute the decree of 1932 by sale of the mortgaged property, there having been default in payment of two instalments. The trial Judge held that the appellant was not entitled to execute the decree as he was a receiver appointed by a foreign Court and observed as follows :—

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“*Prima facie*, the Miraj Court has no jurisdiction to deal with property of the insolvent in British India. In my opinion, the present procedure adopted by the receiver is not correct. If he is an assignee of the decree in question by operation of law, the proper procedure for him is to apply to the Court which passed the decree for a certificate as is required by law. He cannot at once give this Darkhast on the ground that he is appointed a Receiver of the insolvent in the Miraj Court. Even when there is reciprocity between the British Court and a Native State Court, a decree obtained in a State Court cannot be executed in a British Court unless the proper procedure laid down is followed. In the present case no such procedure is followed. The Receiver has straightaway filed the Darkhast on the ground that the decree has been obtained by the insolvent in this Court and that he is appointed Receiver of the insolvent. The mere fact that the Miraj State has introduced the same Insolvency Act that is in force in British India would not suffice the present Darkhastdar to step in the place of the insolvent and give this Darkhast as the representative of the insolvent. The British Court cannot recognize the status of the present Darkhastdar to present this Darkhast.”

The appellant appealed to the High Court. The appeal was heard by Divatia J. who on March 20, 1940, confirmed the order of the trial Court and dismissed the appeal. His Lordship's judgment is as follows :—

DIVATIA J. I think the order of the lower Court is correct and must be confirmed. The appellant, who is the darkhastdar, is the receiver of one Hari Narayan appointed by the Court in the Miraj State with regard to his property situated in that State. This Hari Narayan had obtained a decree in British India against the present respondents. The receiver appointed by the Miraj Court now applies for execution of that decree, and the judgment-debtors objected that he has no *locus standi* to apply because British Indian Courts cannot recognise a receiver appointed in the Miraj State. The only provision of law under which this application for execution could be made is O. XXI, r. 16, of the Civil Procedure Code, 1908. Under that rule the decree must be transferred by an assignment in writing or by operation of law. I cannot see how the decree could be deemed to have been transferred by the operation of law simply because the receiver appointed in the Miraj State applied for execution of the decree. It may be that the law of insolvency in the Miraj State is the same as that in British India, but that does not necessarily mean, unless there is an agreement of reciprocity, that a receiver appointed in an insolvency proceeding in a foreign Court must be deemed to have the right to apply for the insolvent for execution of a decree in British India. Whatever may be the law with regard to moveable property, it is clear that so far as immoveable property is concerned, the receiver appointed by a foreign Court cannot have the right to make such an application in British India. The proper course for the receiver is to obtain an assignment in writing from the insolvent and then to apply for execution as an assignee under O. XXI, r. 16.

The order of the lower Court is, therefore, confirmed and the appeal is dismissed with costs.

A. C. J. The appellant appealed under the Letters Patent.

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A. G. Desai, with G. A. Desai, for the appellant.

G. P. Murdeshwar, for respondents Nos. 1, 3 and 4.

VISHNU RAM- CHANDRA — BEAUMONT C. J. This is an appeal under the Letters Patent from a decision of Mr. Justice Divatia, and it raises an interesting question of law.

On February 1, 1932, a mortgage decree was passed in favour of one Hari Narayan against the respondents. The decree directed payment to the plaintiff of a sum of Rs. 13,000 by certain instalments, and then provided :

“ In case defendants fail to pay any two instalments, plaintiff do recover the whole of the amount by getting the below-mentioned mortgaged properties sold.”

So that it is not an ordinary preliminary decree directing that if the plaintiff is not paid, he may apply for an order for sale ; the order directs that the plaintiff may get the properties sold, if he is not paid. In 1936 Hari Narayan was declared an insolvent by a Court of the Miraj State, that is to say, by a foreign Court, and a person styled a “ Receiver ”, who is the present appellant, was appointed. The appellant then applied in his own name to execute the decree of 1932 by sale of the mortgaged property, there having been default in payment of two instalments. The learned Subordinate Judge, before whom the matter came, held that the appellant was not entitled to execute the decree being a receiver appointed by a foreign Court, and in appeal Mr. Justice Divatia agreed with that view. The question before us is whether that is the right view.

Now, under O. XXI, r. 16, Civil Procedure Code, 1908, it is provided that where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it. I apprehend that the expression “ by operation of law ” means by operation of the appropriate law, and the real question is whether the appropriate law, which in this case is the law of the Miraj State, is one which this Court can recognize as operating to transfer the decree.

In my opinion the general rule is well established that Courts in England or British India will recognize a process of universal distribution of a person's moveable property under the law of a foreign country. That principle was recognized by the House of Lords in *Galbraith v. Grimshaw*,<sup>1</sup> and adopted by the Privy Council in *Anantapadmanabhaswami v. Official Receiver, Secunderabad*.<sup>2</sup> It is clear that no Court will recognize the transfer of immoveable property situate within its own jurisdiction by the operation of a foreign system of law. The title to immoveable property is always governed by the *lex loci*.

The question is whether the transfer of this decree which operates upon immoveable property in the Province of Bombay can be transferred by the operation of any system of law other than that of the country where the immoveable property is situate. No doubt, a decree is generally moveable property, but this decree is a document of title affecting immoveable property. The title of a purchaser will have to be made under this decree, and his title might be challenged on the ground that the person who got the decree executed

1 [1910] A. C. 508.

2 (1933) 35 Bom. L. R. 747, P.C.

was not the proper party to do so. It seems to me that it would be contrary to the principles on which this Court acts to hold that the title to immoveable property within this Province depends on the hazard of a correct appreciation of some foreign system of law. We are told that the Miraj State has adopted a system of insolvency law similar to that which prevails in British India outside Presidency towns, and no doubt the law of the State can easily be ascertained. But some systems of insolvency law might be very difficult to ascertain. One might easily have conflicting expert opinions on one side and the other. The nature of a foreign law is a question of fact to be proved by experts, and I think it would be wrong in principle to allow title to land in this country to depend on the state of some foreign law.

In my opinion, therefore, the lower Court and Mr. Justice Divatia were right in holding that the title of the receiver appointed by the Miraj Court to execute this decree cannot be recognized. As Mr. Justice Divatia pointed out, there is no difficulty in his enforcing the decree. He can obtain from the insolvent an assignment of such interest in the decree as the insolvent possesses in British India, and I apprehend that if he were unwilling to make such assignment, the insolvency Court in Miraj could force him to do so. However, that is not a matter which concerns us.

I think the decision of Mr. Justice Divatia was right, and the appeal must be dismissed with costs.

MACKLIN J. I agree.

*Appeal dismissed.*

*Before Mr. Justice Divatia.*

VIJAYADAS HANUMANTDAS GUDIHAL

*v.*

SHEKHARAPPA ANANTAPPA SAVANUR.\*

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March 11.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 57—Decree—Execution—Attachment—Determination of attachment.*

On July 11, 1932, the defendant obtained a money decree under which the decretal amount was payable at any time within six months of its date. On August 9, 1932, while the decree was still unexecutable, the defendant applied for an order of attachment of the judgment-debtor's immoveable property, and obtained the order on August 31. Thereafter the Court passed an order directing the attached property to be sold and issued notice under O. XXI, r. 66, of the Civil Procedure Code, 1908. The process fee not having been paid, the Court dismissed the application, but allowed the attachment to continue. While the attachment was thus in force, the judgment-debtor sold a portion of the

\* Second Appeal No. 843 of 1939, from the decision of G. H. Guggali, District Judge of Dharwar, in Appeal No. 76 of 1937, reversing the

decree passed by V. A. Samsi, Subordinate Judge at Hubli, in Civil Suit No. 91 of 1936.

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attached property to the plaintiff. The defendant having subsequently obtained an order for attachment and sale of the attached property including the property sold, the plaintiff filed a suit to obtain a declaration that the property sold to him was not liable to be attached and sold in execution of the decree :—

*Held*, decreeing the suit, (1) that the order of dismissal of defendant's application on the score of non-payment of process-fees as well as of non-prosecution should be deemed to be an order passed under O. XXI, r. 57, with the result that as soon as the application was dismissed the attachment came to an end :

*Baba v. Kisan*<sup>1</sup> referred to ;

(2) that there having been no review or appeal from the order of dismissal, the order, though passed by the Court under a misapprehension, was still a binding order and should be taken to be an order under O. XXI, r. 57 ;

(3) that on the principle of constructive *res judicata*, which applied to execution proceedings, the order should be regarded as binding on the defendant in the second application ;

(4) that, therefore, in spite of the order of the Court continuing the attachment there was no legal and valid attachment after the date of the order, and the plaintiff purchased the property free from any attachment ;

(5) that the defendant should have applied to the executing Court and filed an application for an order of attachment even before the decree became executable, but he having allowed the dismissal of his application had to abide by the consequences of it.

SUIT for declaration.

On July 11, 1932, the defendant, Vijayadas, obtained a money decree for Rs. 370 against one Basangouda (in suit No. 676 of 1931). The decree made the amount payable at any time within six months of the decree, i.e. up to January 11, 1933.

Meanwhile, on August 9, 1932, the defendant filed a darkhast (No. 834 of 1932) praying that attachment be placed on the immoveable property belonging to the judgment-debtor Basangouda. The Court ordered the attachment to issue on August 31, 1932. The Court, however, proceeded further on September 27, 1932, ordered the attached property to be sold, and issued notice under O. XXI, r. 66, of the Civil Procedure Code, 1908. The defendant did not pay process fee for the issue of notice. The Court thereupon, on November 8, 1932, dismissed the darkhast for want of prosecution, but ordered the attachment to continue.

On July 10, 1933, the plaintiff Shekharappa purchased some of the lands which were under attachment from Basangouda's heirs for Rs. 3,000.

Shortly afterwards the defendant filed a darkhast (No. 458 of 1933) for attachment and sale of the property including the one sold to the plaintiff. The plaintiff intervened and put up his objection to the attachment and sale of the property sold to him. The Court overruled the objection and ordered execution to proceed.

On March 3, 1936, the plaintiff filed a suit, under O. XXI, r. 63, alleging first that the attachment was illegal and ineffectual, and, secondly, that even if it was valid in law darkhast No. 836 of 1932 having been dismissed for



want of prosecution the attachment terminated on the dismissal of the darkhast by virtue of O. XXI, r. 57, and thirdly, that even if the attachment was deemed to exist, the property should be sold subject to the prior mortgage which he had paid off from the purchase money.

The trial Court negatived the allegations and dismissed the suit, observing as follows :—

“Under O. XXXVII, r. 5, Civil Procedure Code, property can be attached even before a decree is passed and in anticipation thereof. For a greater reason, therefore, it can be so attached after the decree though there is no express provision in the Civil Procedure Code for that and that can be done under the inherent power of the Court under s. 151, Civil Procedure Code, before money becomes due under the decree. It is true that time for execution of the decree obtained by the defendant in original suit No. 676 of 1931 had not arrived when the defendant filed his darkhast No. 836 of 1932. But the express recital in that darkhast shows that the decree-holder (defendant) prayed only for attachment of property lest the judgment-debtor might sell it leaving no property against which the decree-holder could proceed. He expressly prayed only for attachment in that darkhast on that ground, which is now amply justified by subsequent events. The attachment was perfectly valid.

The darkhast (No. 836 of 1932) being only for attachment any orders after attachment was effected were redundant, improper and ineffectual. It is true that the Court passed an order for sale of the property after the attachment and that the decree-holder (now defendant), did not pay process for that and the darkhast was dismissed. This Court could not pass an order for sale in the absence of a prayer for it. That is why the decree-holder did not pay process for a step which he had not even asked for. That order was passed through oversight and that perhaps was detected later when the Court disposed of the darkhast adding an order that the attachment was to continue. The Court really disposed of the darkhast and not dismissed it as the prayer had been granted and fulfilled. There was thus, no failure to prosecute that darkhast and the darkhast was not dismissed for want of prosecution. Order XXI, r. 57, has therefore no application, and the attachment subsists after the disposal of the darkhast on November 8, 1932.

On appeal the decree was reversed and the suit was decreed by the District Judge, for the following reasons :—

“There is no provision in the Civil Procedure Code for making an application to attach property in execution of a decree which has not become ripe for execution. During the pendency of a suit the Court can order attachment before judgment. In this case there was no such attachment. In execution proceedings the Court can order attachment and sale of property. But mere attachment is not one of the modes of execution recognised by the Civil Procedure Code. Order XXI, r. 11, cl. (j), of the Civil Procedure Code requires that an application for execution of a decree shall contain particulars as to the mode in which the assistance of the Court was required, whether by delivery of property decreed, by the attachment and sale or by the sale without attachment of any property, by the arrest and detention in prison of any person, by the appointment of a receiver, or otherwise as the nature of the relief granted may require. Mere attachment is not one of the modes of execution. The decree-holder could not apply for the sale of the property as the money was not then due. The darkhast was not therefore tenable. It was then premature to file any darkhast. So the application should have been rejected as failing to comply with the mandatory provisions of O. XXI, r. 11 (*vide* 19 Bom. 34, P. J. for 1890, p. 22, 34 Mad. 25.). The order of attachment passed below the application was not legal. The Court, however, passed an order for attachment as well as for sale though there was no prayer for sale. The applicant did not pay any process fees, and the darkhast was dismissed for default. The

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A. C. J. Court at the same time passed an order that the attachment should continue. That  
 1941 order also was not legal.  
 — It is conceded that an order for attachment only cannot be passed in execution  
 VIJAYADAS proceedings. It is, however, urged that the order be taken to have been passed  
 HANUMANT- under s. 151 of the Civil Procedure Code, there being no other provision of the  
 DAS law under which it can be justified. The mere fact that there is no other remedy  
 v. would not attract the application of s. 151 (*vide* 4 Pat. 704). The Court had no  
 SHEKHAR- jurisdiction to pass such an order it being passed neither during the pendency of  
 APPA a suit nor in proper execution proceedings. The attachment order is illegal and  
 ANANTAPPA not binding.

The defendant appealed to the High Court.

G. R. Madbhavi, for the appellant.

A. G. Desai, for the respondent.

DIVATIA J. This appeal raises a somewhat novel point with regard to the right of a decree-holder to attach the judgment-debtor's property before the decree becomes executable.

The facts are shortly these :—On July 11, 1932, the present appellant, who was the defendant in the suit, obtained a money decree against one Basangowda for Rs. 370. Under the decree the amount was payable within six months. It is common ground between the parties that by virtue of that direction the decree-holder was not entitled to file an application for execution before the termination of that period. On August 9, 1932, before the period of six months expired, the present defendant filed a darkhast against his judgment-debtor in which he only asked for the relief of attachment of the judgment-debtor's immoveable property. That prayer seems to have been made on the ground that the judgment-debtor was going to alienate his property to defeat the decree-holder's claim. On August 31 the Court passed an order attaching the judgment-debtor's immoveable property. Thereafter, on September 27 the Court passed a further order directing the attached property to be sold and issuing notice under O. XXI, r. 66, of the Civil Procedure Code. It is not explained under what circumstances that order came to be passed when there was no prayer for sale in the darkhast itself. However, the order for sale was passed, and there is an endorsement on the darkhast on October 11, 1932, that process fees for the notice were not paid. Thereupon on November 8 the Court passed an order "Not prosecuted. Dismissed. Attachment to continue". Several months after that order, i.e. on July 10, 1933, the present plaintiff purchased some of the immoveable property, which was attached by the Court, from the heirs of Basangowda, the judgment-debtor for Rs. 3,000. Thereafter, another darkhast No. 458 of 1933 was filed by the present defendant for the attachment and sale of the judgment-debtor's immoveable property including the property sold to the present plaintiff. The plaintiff intervened and objected to the attachment and sale of the property sold to him by the heir of the judgment-debtor. His objection was, however, overruled by the executing Court, with the result that he filed the present suit for a declaration that the suit property was not liable for attachment and sale in execution proceedings of the decree obtained by the defendant, and for the alternative relief of a declaration that the property was liable to be sold subject to the mortgage incumbrance of

Rs. 2,000 which the plaintiff had paid to a mortgagee in satisfaction of his mortgage on the attached property. The defendant contended that the sale to the plaintiff was hollow and that it cannot avail him as it was subsequent to the attachment of the property by him in his first darkhast, which was continued even after its dismissal.

The trial Court framed issues as to whether the attachment in the first darkhast was valid in law and whether it subsisted after the disposal of that darkhast; if not, whether the property was liable to be sold in execution of the decree obtained by the defendant; and if it was liable to be sold, what limitations should be imposed on the sale. It was held that the attachment in the first darkhast was valid and subsisting after its disposal, and that the property was, therefore, liable to be sold in execution of the defendant's decree. On that finding the suit was dismissed.

That decree has been reversed by the appellate Court, which held that the defendant's first darkhast for the attachment of the judgment-debtor's immoveable property was invalid inasmuch as the only relief asked for was the attachment and that too at the date when the decree had not become executable. The defendant had not obtained any attachment before judgment in his suit, so that there was no continuing attachment after the date of the decree. It further held that the order of the Court dismissing the darkhast for non-prosecution, but continuing the attachment, which purported to have been made under O. XXI, r. 57, of the Civil Procedure Code, was erroneous inasmuch as it has been held by our as well as other High Courts that if a darkhast is dismissed for non-prosecution, the attachment ceased even though there was an express order to continue it. As a result it was held that the plaintiff purchased the property at a time when there was no subsisting attachment on the property, and he was therefore entitled to the relief of declaration prayed for by him.

The defendant has now appealed to this Court, and his contentions are, first, that the order of the Court dismissing the darkhast for non-prosecution and continuing the attachment is not made under O. XXI, r. 57, and, secondly, that it was competent to him to apply for attachment even before the decree became executable under s. 151 of the Civil Procedure Code.

On the first point, it seems to me that the appellate Court was right in taking the order of November 8 to be under O. XXI, r. 57. The order was clearly one of dismissal for non-prosecution, and as such it would fall within the purview of that rule. The further direction for continuing the attachment was, therefore, illegal, because it is expressly provided in that rule that upon the dismissal of such application, the attachment shall cease. I have held in *Baba v. Kisan*<sup>1</sup> that the word "default" in O. XXI, r. 57, of the Civil Procedure Code, in so far as it applies to the decree-holder, means default not merely in the sense of non-appearance or non-payment of the process fees, etc., but includes the case of non-prosecution as well. The present is a case of non-payment of the process fees as well as of non-prosecution. It is, therefore, clear, to my mind, that this order must be taken to have been passed under O. XXI, r. 57, with the result that the order of continuing the

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It is next contended that the order does not fall under that rule, because although the darkhast purports to be dismissed for non-prosecution, it was an erroneous order passed under a misapprehension as there was no prayer by the defendant in his darkhast for sale of the property. It is indeed true that there was no such prayer and the executing Court seems to have passed the order for the sale under an erroneous belief that there was such prayer. It is rather curious that neither the decree-holder nor the judgment-debtor pointed out to the Court, when the order for notice under O. XXI, r. 66, was made, that no such notice was necessary at that stage, because the darkhast did not pray for the relief of sale. Not only was it not pointed out, but so far as the present appellant, i.e. the decree-holder, was concerned, he did not pay the *bhatta* and allowed the darkhast to be dismissed for non-prosecution. If he had pointed out to the Court that there was no question of passing an order for sale, it is probable that the Court might have vacated its order for selling the property. But the order of November 8 does stand to this day without any application on the part of the defendant for review or an appeal against it. The result, therefore, is that that order, although passed under a misapprehension, is still there as a binding order and must be taken to be an order under O. XXI, r. 57. On the principle of constructive *res judicata*, which also applies to execution proceedings, this order in the first darkhast must be regarded as binding on the defendant in the present, i.e. the second, darkhast, and he cannot be allowed to challenge it at the present stage. That being so, it must be taken that in spite of the order of the Court continuing the attachment on November 8, there was no legal and valid attachment after that date, and the plaintiff purchased the property free from any such attachment in July, 1933.

There is moreover another difficulty in the appellant's way and that is his prayer in the first darkhast which was filed only for the relief of attachment of the property at a time when the decree was not executable. It was not filed in the form of an ordinary application for attachment of the property before the darkhast was executable, but it was filed, as a regular darkhast in the executing Court. It is questionable whether the executing Court should have passed an order for attachment as prayed for before the decree became executable. The appellant contends that that order should be regarded as one under the inherent jurisdiction of the Court, and the argument is that just as a plaintiff can, during the pendency of a suit, apply for attachment before judgment under O. XXXVIII, a decree-holder can also apply for attachment of the property after the decree is passed but before it becomes executable; otherwise he would have no remedy if his judgment-debtor is going to dispose of the property between those two dates. Such a case would be very rare inasmuch as ordinarily a decree is executable immediately after it is passed. It is only in a case like the present where the judgment-debtor is given a period of six months for paying the decretal amount or where the decree is made payable by instalments some time after it is passed and becomes executable on failure to pay one or more instalments, that such a question would arise. But it seems to me that if in such a case the decree-holder wants the relief of attachment, he cannot go to the executing Court

and file a darkhast for the purpose of getting that relief. It may be that the Court passing the decree might give him the proper relief by the appointment of a receiver under O. XL, r. 1, as a receiver can be appointed even after the passing of a decree. But, in any case, it seems to me that the procedure adopted by the defendant-decree-holder was not authorised by any of the provisions of the Civil Procedure Code. The defendant allowed the darkhast to continue as such even after the Court had issued the notice under O. XXI, r. 66, and he ultimately allowed the darkhast itself to be dismissed for non-prosecution, although the attachment was continued. By his own conduct, therefore, he has allowed the execution proceedings to go on as if the executing Court had jurisdiction to proceed against the judgment-debtor's property in that darkhast, and that being so, in my opinion, he must take the consequences of proceeding in the manner in which he has done. I doubt very much whether the decree-holder can apply under s. 151, Civil Procedure Code, merely for attachment and that too before the decree becomes executable, but in any case such an application would, if at all, lie to the Court passing the decree. The executing Court will have jurisdiction only after the decree becomes executable. It seems to me to be clear in any case that the subsequent order of the Court on November 8 dismissing the darkhast for non-prosecution is governed by O. XXI, r. 57, with the result that the attachment ceased in any case on that date. The plaintiff has, therefore, purchased the property free from such attachment.

The decree of the lower appellate Court, therefore, in my opinion, is correct, and the appeal is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Broomfield and Mr. Justice Divatia.*

CHHOTUBHAI BHIMBHAI

*v.*

BAI KASHI.\*

1941

March 20.

*Civil Procedure Code (Act V of 1908), O. XLVI, r. 1—"Not subject to appeal"—"Any such decree"—Interpretation—Subordinate Judge—Reference to High Court.*

The words "not subject to appeal" in O. XLVI, r. 1, of the Civil Procedure Code, 1908, mean that the law provides no appeal in any circumstances. They include a case in which it can be said that there might have been an appeal from the decree passed by the High Court, although it was extremely unlikely that there should have been one.

The words "any such decree" in the rule mean either (a) a decree in a suit where no appeal is provided against the decree, or (b) a decree in an appeal where no further appeal is provided.

*Oriental Loan Association, Limited v. George Pelham Hatch*,<sup>1</sup> followed.

\* Civil Reference No. 10 of 1939  
made by C. G. Bhatt, Subordinate

Judge at Bulsar.

1 (1892) I. L. R. 17 Bom. 735.

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A. C. J. THIS was a reference made by the Subordinate Judge of Bulsar, under  
1941 O. XLVI, r. 1, of the Civil Procedure Code, 1908.

CHHOTUBHAI The reference arose out of proceedings in execution of a decree passed by  
BHIMBHAI the High Court in a second appeal.

B. In Regular Suit No. 171 of 1915 the plaintiff Chhotubhai obtained a decree  
BAI KASHI entitling him to recover a sum of money out of the money received by the  
— defendants as *desaigiri hak*. The decree was upheld by the High Court in  
second appeal.

In the course of the execution of the decree passed by the High Court, a question arose : Whether it is open to the executing Court under O. XXI, r. 52, of the Civil Procedure Code, to question the refusal of a public officer to pay the amount attached by a prohibitory order under O. XXI, r. 52, if the amount was due and payable on the date on which the prohibitory order was served.

The Subordinate Judge, before whom the execution proceedings were pending, referred the question to the High Court under O. XLVI, r. 1.

*M. R. Vidyarthi* and *S. M. Vidyarthi*, for the applicant.

No appearance for the opponents.

*B. G. Rao*, Assistant Government Pleader, for the referor.

BROOMFIELD J. This purports to be a reference under O. XLVI, r. 1, but in our opinion no reference lies.

The facts of the case briefly are as follows. A suit was filed in 1915 to obtain a share in a certain cash allowance payable at the Sub-Treasury of Jalalpur in the Surat District. The plaintiff got a decree for a sum of Rs. 9-14-0 against two defendants which amount he was held entitled to recover annually from generation to generation. Up to the year 1931 it appears that plaintiff recovered what was due, but from 1931 to 1938 nothing was recovered because, as we were informed, the judgment-debtors died and the names of their legal representatives were not brought on the alienation register. In 1938 the plaintiff brought a darkhast to recover the arrears and made an application under O. XXI, r. 52, laying claim to Rs. 69 and odd out of a sum of Rs. 182 lying in the Sub-Treasury in the names of the judgment-debtors. Order XXI, r. 52, provides that where property to be attached is in the custody of any Court or public officer, the attachment is to be made by a notice to such Court or officer, requesting that such property may be held subject to the further orders of the Court from which the notice is issued. A notice was issued to the Sub-Treasury officer to hold the amount subject to the orders of the Court and he was further directed to send the money, but on May 12, 1939, a communication was received from the Collector of the district stating that as the money had been unclaimed for six years it was liable to forfeiture. On May 29, he wrote again saying that it had actually been forfeited with the sanction of the Commissioner. Thereafter there were further proceedings in the darkhast. A notice was sent to the Collector who appeared by the Government Pleader and objected that the only procedure open to the Court was to sell the debt or appoint a receiver for the purpose of bringing a suit on the analogy of O. XXI, r. 46. After hearing the matter argued the learned Judge felt a difficulty as to

the correct procedure and referred the following point for the determination of this Court : Whether it is open to the executing Court under O. XXI, r. 52, to question the refusal of a public officer to pay the amount attached by a prohibitory order under O. XXI, r. 52, if the amount was due and payable on the date on which the prohibitory order was served.

The question submitted to this Court appears to assume that the amount was due and payable on the date on which the prohibitory order was served, which is by no means clear on the record before us. However, as we are of opinion that the reference does not lie we are not going into the merits of the case.

Order XLVI, r. 1, is in the following terms :—Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may draw up a statement of the facts and refer such statement for the decision of the High Court. It should be mentioned that the decree which the plaintiff has now sought to execute is the decree of this High Court. There were first and second appeals against the original decree in plaintiff's favour by which that decree was confirmed. It is well settled that when there has been an appeal, which has been heard and decided, whether the decree of the Court of first instance is confirmed or not, the only decree which can be executed is the decree of the appellate Court. So that here we are concerned with the execution of a decree of this High Court passed in second appeal.

The learned Assistant Government Pleader who appears for Government on this reference has contended that there was no further appeal and therefore the case comes within the scope of O. XLVI, r. 1, and the reference lies. On the other hand, the learned advocate for the plaintiffs contends that the decree of this Court was subject to appeal to the Privy Council, at any rate under cl. (c) of s. 109, and therefore the reference does not lie. The idea underlying the rule seems clearly to be to allow difficult points of law to be brought before the High Court in cases where that could not otherwise be done, e.g. where the original decree in a suit is final or where a matter has been decided in first appeal and no second appeal is provided. In execution proceedings one would have expected that the power to refer points would have been limited to cases where there is no appeal against the order of the executing Court. But that is not a possible construction of the rule. The power depends on whether the decree to be executed is subject to appeal or not.

Mr. Rao relied upon the fact that in the particular case no application was made to appeal to the Privy Council. But, whatever meaning is to be attached to the words "not subject to appeal" in the rule, it seems at any rate clear that they cannot mean simply that no appeal has in fact been made. Having regard to the first sentence of the rule "before or on the hearing of a suit or an appeal in which the decree is not subject to appeal", the words "any such decree" in the clause with which we are concerned must mean either (a) a decree in a suit where no appeal is provided

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against the decree, or (b) a decree in an appeal where no further appeal is provided. As a matter of construction, apart from questions of convenience, it seems to be impossible to say that the appeal in (b) can be limited to first appeals in cases where no second appeal is provided. On the other hand, we take the view that the words "not subject to appeal" must mean that the law provides no appeal in any circumstances. It is quite true that in a case of this kind it is exceedingly unlikely that an appeal to the Privy Council from the decree of this Court would have been made or that this Court would have certified the case to be a fit one for appeal under s. 109 (c). At the same time that might have been done; there might have been an appeal, and, if in certain circumstances there might be a further appeal, it cannot be said that the decree is not subject to appeal.

As far as we are aware this particular point is one of first impression. No case has been cited which really bears on the facts of the present case. In *Oriental Loan Association, Limited v. George Pelham Hatch*,<sup>1</sup> the Court was concerned with the construction of the corresponding rule in the Civil Procedure Code of 1882 in which the wording was somewhat different and instead of "decree not subject to appeal" the words "final decree" occurred. A question had been referred to the High Court by a Judge of the Consular Court at Zanzibar which arose in execution of a decree of a Division Court. It was argued that the matter ought not to have been referred on the ground that the decree was not final, because it was a decree of a Division Court against which there might be an appeal. This argument was accepted. It was held that no reference lay, the decree not being final. The reason for holding that the decree was not final was that there might have been an appeal against it. So in this case we think it can be said that as there might have been an appeal from the decree of this Court, although it was extremely unlikely that there should have been, nevertheless the decree was strictly speaking subject to appeal and no reference could therefore be made under the rule in question.

The learned Sub-Judge must therefore decide the question in dispute for himself and dispose of the application for execution. We make no other order on the reference except that the papers should be returned and costs will be costs in the cause.

*Reference returned.*



## CRIMINAL REVISION.

*Before Mr. Justice Broomfield and Mr. Justice Divatia.*

VINAYAK ATMARAM PATHARE

1941

v.

SHANTARAM JANARDAN PATHARE.\*

April 8.

*Criminal Procedure Code (Act V of 1898), Sec. 439—Revision—Private party—Order of acquittal—Defamation cases—Indian Penal Code (Act XLV of 1860), Sec. 499, exceptions 1, 9 and 10.*

The High Court will not as a rule interfere with orders of acquittal in revision at the instance of a private party, except where such interference is urgently demanded in the interest of justice. Cases of defamation, however, form an exception to the above general rule, as in such cases, which from their very nature affect private parties and not the public, Government would usually be unwilling to interfere.

*Faujdar Thakur v. Kasi Chowdhury*,<sup>1</sup> *Faredoon Cawasji*, *In re*,<sup>2</sup> and *Emperor v. Rameshwar Harnath*,<sup>3</sup> followed.

*Asutosh Das Gupta v. Purna Chandra Ghosh*,<sup>4</sup> referred to.

At a meeting of the community, to which both the complainant and the accused belonged, resolutions were passed that the complainant should not be invited to any function of the community and that if he attended any such function he should be turned out. In publishing those resolutions in a newspaper which circulated mainly among the members of the community and some outsiders also, the accused went somewhat beyond the strict limits of the resolutions. On a prosecution for defamation by the complainant the accused relied on the protection afforded by exception 1 to s. 499 of the Indian Penal Code, 1860 :—

*Held*, (1) that exception 1 had no application, because assuming that the newspaper article gave a substantially correct account of the resolutions, it could not be said that their publication was for the public good ;

(2) that excessive publication took the case out of the privileges conferred by exceptions 9 and 10 of the section, for it could not be said that it was necessary for the protection of the interest of the accused or other members of the community that the resolutions should be published in a newspaper.

APPLICATION in revision against an order of acquittal.

Case of defamation.

The complainant Vinayak and the accused Shantaram were members of the Pathare Kshatriya community, the main centres of which were in Bombay and at Alibag in the Kolaba district. The community had an institution called the Pathare Kshatriya Vaktrutwotetjak Samaj, which had organised a function in the beginning of August, 1938, and of which one Gharat was the president.

\* Criminal Application for Revision No. 524 of 1940, from an order of acquittal passed by D. S. Babrekar, Presidency Magistrate, 3rd Additional Court, Girgaum, Bombay.

1 (1914) I. L. R. 42 Cal. 612.

2 (1917) I. L. R. 41 Bom. 560, s. c. 19 Bom. L. R. 354.

3 (1929) I. L. R. 53 Bom. 564, s. c. 31 Bom. L. R. 529.

4 (1922) I. L. R. 50 Cal. 159.

A. Cr. J. 1941 The complainant was the editor of a newspaper called "*Udhar*," in which he criticised the choice of the president.

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The Samaj did not approve of the criticism, and its members convened a meeting on August 21, 1938, at which the following resolutions were passed :—

- "(1) That V. A. Pathare (i.e. the complainant) should not be invited for any meeting, gathering or any other function held under the auspices of the Samaj ;
- (2) that if V. A. Pathare attends a meeting or a gathering, he should be turned out ;
- (3) that a copy of the resolutions should be sent to all secretaries."

There was a weekly newspaper called "*Rashtratej*," which circulated mainly among the members of the community, but it had circulation among other persons as well. On September 1, 1938, the accused contributed an article in that newspaper in which he published the following resolutions as having been passed by the Samaj :—

- "(1) That no one should send an invitation to V. A. Pathare ;
- (2) that no one should bring him to a meeting of the Samaj ;
- (3) that if he attended any such meeting he should be turned out ; and
- (4) that before co-operating with and taking part in any work of other institutions, it should be made certain that those other institutions would not invite V. A. Pathare."

For publishing the above article, the complainant lodged a complaint against the accused for defamation, when the latter relied on the protection afforded by exception 1 to s. 499 of the Indian Penal Code, 1860.

The trying Magistrate accepted the defence and acquitted the accused, observing as follows :—

"Taking all this evidence and circumstances into consideration I hold that the accused has made out a sufficient case to show that he had published the substance of the resolutions passed by P. K. V. Samaj at the meeting of August 21, 1938, and he did it for the information of the members of his community specially and the people of Alibag generally who were offended by the publication of Ex. No. 2 by the complainant against a man whom they respected. In my opinion I hold that the accused is entitled to the benefit of exception 1 to s. 499 of the Indian Penal Code."

The complainant applied to the High Court in revision against the order of acquittal.

The petitioner in person.

Y. V. Dixit and B. S. Joglekar, for the opponent.

R. A. Jahagirdar, Government Pleader, for the Crown.

BROOMFIELD J. This is an application for revision of an order of acquittal passed by the Presidency Magistrate, Third Additional Court, Bombay. The applicant Vinayak Atmaram Pathare prosecuted the opponent Shantaram Janardan Pathare for defamation in respect of an article written by him and published in a weekly vernacular newspaper called "*Rashtratej*." The complainant and the accused are both members of the Pathare Kshatriya community, the members of which live mostly in Bombay and the Kolaba District. The complainant is a journalist, and in a magazine which he publishes called "*Udhar*" he had made criticisms on one Ramji Laxman Gharat,

a member of this community, who had presided at a meeting of its members held in August, 1938. These criticisms on Mr. Gharat were resented and on August 21, 1938, there was a meeting of a society called Pathare Kshatriya Vakrutwottejak Samaj which passed resolutions condemning the complainant. The article, which was the subject of the defamation case, was published in the "*Rashtratej*" newspaper on September 1, 1938. It purported to give an account of the meeting of the Samaj and the resolutions passed thereat. But it was stated that some resolutions were passed which were not, in fact, passed at the meeting. The accused claimed that his conduct in writing this article was privileged and covered by the first exception to s. 499, Indian Penal Code, that is to say, his contention was that the imputation made was true and for the public good. The learned Magistrate accepted this view and acquitted the accused.

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This revision application was allowed to stand over to see whether Government proposed to appeal. But there has been no Government appeal and ultimately a Rule was issued. The Government Pleader now appears in these proceedings and says that his instructions are that if any expression of opinion is called for, he should support the application.

In a well known judgment in *Faujdar Thakur v. Kasi Chowdhury*,<sup>1</sup> Sir Lawrence Jenkins expressed the view that as a general rule it is expedient not to interfere, on revision, at the instance of a private person, with an acquittal after trial by the proper tribunal, and that applications for that purpose should be discouraged on public grounds. Even at the time of Sir Lawrence Jenkins' judgment there was a consensus of judicial opinion in favour of this view, and our own High Court has approved of the principle stated in *Faujdar Thakur v. Kasi Chowdhury* in several cases, for instance, *Fareedoon Cawasji*, In re,<sup>2</sup> and *Emperor v. Rameshwar Harinath*.<sup>3</sup> It is clear from these cases that for a long time past this Court, like most of the other High Courts, has consistently declined to interfere in revision with orders of acquittal except where interference is urgently demanded in the interest of public justice.

Defamation cases, however, may perhaps form an exception to this general rule as was pointed out by Sir Lawrence Jenkins in the case to which I have referred. The reason is that in cases of defamation, which from their very nature affect private parties and not the public, Government would usually be unwilling to interfere. For that reason the High Court has interfered in revision on the application of a private party, for instance, in *Asutosh Das Gupta v. Purna Chandra Ghosh*.<sup>4</sup> We have accordingly heard this application argued. We have done so because it is a defamation case and not because the Government Pleader has appeared in support. The view we take is that as it is provided in s. 439, cl. (5), of the Criminal Procedure Code, that where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed, the Government Pleader has, strictly speaking, no *locus standi* to appear. Certainly Government cannot avoid the obligation of

1 (1914) I. L. R. 42 Cal. 612.

2 (1917) I. L. R. 41 Bom. 560,

s.c. 19 Bom. L. R. 354.

3 (1929) I. L. R. 53 Bom. 564,  
s.c. 31 Bom. L. R. 529.

4 (1922) I. L. R. 50 Cal. 159.

A. Cr. J. 1941 appealing in a proper case by lending support to a revision application brought by the complainant.

— Coming to the merits of the case, the resolutions which were actually passed at the meeting of the Samaj were—

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— (1) that V. A. Pathare (i.e. the complainant) should not be invited for any meeting, gathering or any other function held under the auspices of the Samaj ;  
(2) that if V. A. Pathare attends a meeting or a gathering, he should be turned out ;

Broomfield J. — and it was also resolved that a copy of the resolutions should be sent to all secretaries, which means apparently the secretaries of the various branches of the Samaj.

According to the article which the accused published in the "*Rashtratej*" the resolutions were

- (1) that no one should send an invitation to V. A. Pathare ;
- (2) that no one should bring him to a meeting ;
- (3) that if he made himself bold to attend any meeting he should be turned out ; and
- (4) that before co-operating with and taking part in any work of other institutions, it should be made certain that those other institutions would not invite V. A. Pathare.

The article further stated that it was decided at the meeting that these resolutions should be published.

The article was correct in saying that it had been resolved that V. A. Pathare should not be invited to any meeting, and that if he came to any meeting, he should be turned out. It was not correct in stating that no one was to bring him to a meeting or that enquiries were to be made about the practice followed in other institutions. However, it would seem that the more important resolutions were undoubtedly the resolutions about not inviting the complainant and turning him out if he came, and there is, at any rate, some justification for the view taken by the learned Magistrate that the additional resolutions referred to in the article were rather by way of amplification of the resolutions actually passed and did not carry the matter much further. One Mr. Dandekar, who appears to be a prominent member of the Pathare Kshatriya Community and who was examined as a witness for the complainant, himself stated in his evidence that he could see very little difference between the actual resolutions and the form in which they were reported in the newspaper article.

The complainant's main grievance appears to be the publication of these resolutions in the "*Rashtratej*" rather than the form in which they were published. The learned Magistrate, having found that the imputations were substantially true, proceeded to discuss the question whether the publication was for the public good and not excessive. The accused relied on exception 1 to s. 499, and apparently the learned Magistrate thought that that was the exception governing the case. He found that the complainant's criticism of Mr. Gharat had caused great resentment in the Pathare Kshatriya community many of whom live in Alibag where the "*Rashtratej*" newspaper mainly circulates. He found that the complainant had published a leaflet containing abuse of Mr. Gharat, which leaflet he had distributed broadcast.

He found that this leaflet was in unbecoming language, and in view of all these circumstances, he came to the conclusion that the accused was justified in getting this article published in a newspaper which, though it circulates in other places also, has its main circulation in the Alibag Taluka and therefore among the members of this particular community.

We think that there can be no doubt that the learned Magistrate was wrong in applying exception 1 to s. 499. Assuming that it can be said that the imputation in this case was true, that is to say, that the newspaper article gave a substantially correct account of the resolutions passed by the Samaj, it cannot reasonably be argued that the publication of these resolutions was for the public good. The conduct of the complainant is a matter which concerns the Pathare Kshatriya community and does not in any way concern the public. The exceptions which would properly apply to the case are the 9th and the 10th exceptions. Those exceptions require proof of good faith. The learned Magistrate has not found in so many words that the accused acted in good faith, although it may perhaps be inferred from his judgment that he thought so. But, apart from the question of good faith, it would clearly be going too far to say that it was necessary for the protection of the interest of the accused or other members of the community in question that these resolutions should be published in a newspaper. It is no doubt an extenuating circumstance that the newspaper in question circulates mostly in Alibag, but it circulates in other places also including Bombay. That being so, it was clearly, in our opinion, excessive publication which would take the case out of the privilege conferred by exceptions 9 and 10.

We think, therefore, that on the evidence the accused might properly have been convicted. At the same time, we think that when all the circumstances are considered, the Court would not have been called upon to do anything more than impose a fine and not a heavy fine. In a revision application we cannot convert an order of acquittal into one of conviction. The most we could do would be to direct a retrial. But we think that this is a private quarrel which mainly concerns the complainant and the accused and to some extent the other members of the Pathare Kshatriya community. It is not a matter, we think, in which the public has any interest whatever. That being so, it would be waste of time and money to direct that there should be a retrial, and we have decided that we will not interfere.

The rule is accordingly discharged.

*Rule discharged.*

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## ORIGINAL CIVIL.

Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice B. J. Wadia.

1941

*In re* THE ALL-INDIA SPINNERS' ASSOCIATION.\*

April 8.

*Indian Income-tax Act (XI of 1922), Sec. 4(3) (i)—Exemption from liability to income-tax—Trust of property for "charitable purpose" essential—Assessment of income of property—Property must be held under trust or other legal obligation—Association for relief of poor agriculturists—Whether object of association is charitable—Whether charitable object ceases to be charitable because such association is organised by political body.*

In order to avoid liability to income-tax under s. 4(3) (i) of the Indian Income-tax Act, 1922, the assessee has to establish that the income assessed is derived from property held under trust or other legal obligation wholly for religious or charitable purposes.

If the object of an association is relief of the poor, it is none the less charitable, because some political body may consider that it affords the best method of relieving the poor, and may, therefore, adopt the scheme.

An unregistered Association consisting only of persons who had become its members was created for the following objects:—"To raise loans, to collect subscriptions, to hold immoveable property, to invest funds under proper security, to give and take mortgage for the furtherance of hand-spinning and khaddar, to give financial assistance to khaddar organisation by way of loans, gifts or bounties, to help or establish schools or institutions where hand-spinning is taught, to help or open khaddar stores, to establish a khaddar service, to act as agency on behalf of the Congress to receive self-spun yarn as subscription to the Congress and to issue certificates and to do all the things that may be considered necessary for the furtherance of its objects, with power to make regulations for the conduct of affairs of the Association or the Council and to make such amendments in the present constitution, as may be considered necessary from time to time." The Income-tax Officer assessed the association to income-tax and super-tax on the total income of Rs. 88,601 for the year 1936-37, overruling its contention that it was not assessable to income-tax by reason of the exemption contained in s. 4(3) (i) of the Indian Income-tax Act. This was confirmed on appeal to the Assistant Commissioner. The assessee then applied to the Commissioner either to revise the order or to state a case to the High Court; but the latter refused to do so. The association then applied to the High Court under s. 66(3) of the Act and the High Court directed the Commissioner to state a case. The Commissioner thereupon referred the following question to the High Court—"Whether having regard to the objects of the Association and the manner in which they are carried out and the purpose for which its funds are applied the income of the Association is liable to income-tax and/or super-tax." The Commissioner was of opinion that the objects of the Association were not charitable and therefore the Association was properly assessed:—

*Held*, that the document specifying the objects of the Association was not couched in the language of obligation but of permission, and there was nothing

\* Income-tax Reference No. 1 of 1941, made by K. R. K. Menon, Commissioner of Income-tax, Bombay,

under s. 66(3) of the Indian Income-tax Act, 1922.

therein which limited in any way the purposes for which any profits derived by the Association could be applied ;

that the Association had failed to show that the property from which the profits were derived was property held under trust or other legal obligation for charitable purposes and that there was a binding legal obligation to devote its profits to charitable purposes ; and

that, therefore, the Association had not brought itself within the exemption in s. 4 (3) (i) of the Indian Income-tax Act and was rightly assessed to income-tax and super-tax.

*Trustees of Tribune Press v. Commissioner of Income-tax, Punjab*<sup>1</sup>, distinguished.

REFERENCE under s. 66(3) of the Indian Income-tax Act, 1922.

The All India Spinners' Association was taken on the assessment list of Ahmedabad city, within which area the head office and the principal place of the business of the Association were situated, for the first time for the assessment year 1925-26. It was then known by the name of "The Bharat Charkha Sangha". For each of the financial years up to and including 1930-31 the Association worked at a loss and was for that reason not assessed. For the assessment year 1931-32 it was assessed to tax by the Income-tax Officer on an income of over Rs. 24,766. On appeal the Assistant Commissioner cancelled the assessment holding that the Association had been formed for the advancement of an object of general public utility and its income was therefore not liable to tax having regard to the provisions of s. 4(3) (i) of the Indian Income-tax Act, 1922. Thereafter the Association was not assessed to tax up to and including the financial year 1935-36.

A notice was, however, issued under s. 34 of the Act to the Association by the Income-tax Officer for the assessment year 1936-37. After considering the plea of the Association that it was not liable to tax by reason of the provisions of s. 4(3) (i) of the Act, the Income-tax Officer assessed the Association to income-tax and super-tax on the total income of Rs. 88,601 for the assessment year 1936-37 by his order dated February 23, 1939.

On March 25, 1939, the Association presented an appeal to the Assistant Commissioner, Income-tax, Northern Division, against that order, contending *inter alia* that its income was not liable to tax having regard to the provisions of s. 4(3) (i) of the Act. At the hearing of the appeal the Assistant Commissioner confirmed the assessment made by the Income-tax Officer under s. 31 of the Act by his order dated May 6, 1939.

On July 12, 1939, the Association petitioned to the Commissioner of Income-tax, Bombay Presidency, praying under s. 33 of the Act for a revision of the assessment made, and asking the Commissioner, in the alternative, to refer for the decision of the High Court the question of law mentioned in the petition under s. 66(2) of the Act. The Commissioner of Income-tax came to the conclusion that no question of law arose which required a reference to the High Court for decision, and by his order dated September 5, 1939, refused to state a case to the High Court and declined to interfere with the order of the Assistant Commissioner confirming the assessment.

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O. C. J.      The Association, thereupon, filed a petition in the High Court under s. 66(3) of the Act, praying that the Commissioner might be required to state a case and refer to the High Court the question mentioned therein for its decision. On July 17, 1940, the High Court ordered the Commissioner to state a case and refer for its decision the question raised by the assessee.

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"Whether having regard to the objects of the Association and the manner in which they are carried out and the purpose for which its funds are applied the income of the Association is liable to income-tax and/or super-tax."

The opinion of the Commissioner was as follows :—

"The contention of the Association is that its income is not liable to tax by reason of the provision of s. 4(3) (i) of the Act as its income is derived from property held under trust or other legal obligation wholly for charitable purposes. Before the Assistant Commissioner it was contended by the Association that its income was applied to objects of general public utility which were a charitable purpose within the meaning of the said section. In its said petition it has been contended by the Association that the object of the Association from its very commencement has been the relief of the poor through the propagation of hand-spinning and hand-weaving which is a charitable purpose within the meaning of the said section.

As s. 66 of the Act requires that I should state my opinion on the question raised, I have the honour to state that in my view s. 4(3) (i) of the Act does not apply to the income of the Association, as (1) the dominant purpose of the Association is a political purpose; (2) the main purpose of the Association is in any event not a valid charitable purpose in law; and (3) some of the objects of the Association are clearly not charitable objects...

It is submitted that it clearly appears from what has been stated above that the Association forms an integral part of the Congress organisation and has been at all material times utilised by that organisation for the purpose of carrying out its political objects. It is noticeable that the constitution of the Association nowhere refers to the relief of the poor or the giving of employment to the unemployed or to the partially employed as its objects. Hand-spinning and hand-weaving is an essential part of the programme of the Indian National Congress which is admittedly a political organisation. The Association has been formed and promoted by the Congress and has carried on its activities under the guidance of the Congress for the purpose of carrying out of this part of the programme of the Congress. The wearing of khadi is the symbol of the Congress and the Association has in furtherance of the objects of the Congress conducted propaganda in villages with the objects of increasing production of khadi and thus spreading far and wide the influence of the Congress organisation. It may be that the carrying out of this part of the programme of the Congress and of the activities of the Association involves the employment of many people who are either totally unemployed or partially employed and thus helps them to earn wages. It is submitted however that from the fact that the working of this part of the programme of the Congress results in giving such employment and wages it cannot be inferred that the dominant purpose and object of the Association is charitable and not political. On the contrary the facts above stated clearly show that the Association and its activities are entirely dominated by the National Congress and are a part of the political activities of that body. The conclusion is, therefore, irresistible that the dominant and governing purpose of the Association is a political purpose. In this connection I beg to rely on *Bowman v. Secular Society Ltd.*, [1917] A. C. 406; *In re Tetley*, [1923] 1 Ch. 258; *The Trustees of the Tribune Press of Lahore v. Commissioner of Income-tax, Punjab*, 41 Bom L. R.



1150; and *Subhas Chandra Bose v. Gordhandas I. Patel*, 42 Bom L. R. 89, wherein it has been laid down that a trust having for its objects the promotion of a political purpose would not be regarded as a charitable trust.

Even assuming that the dominant purpose of the Association is not political, the further question that arises is whether its dominant purpose is a good charitable purpose in law. In this connection attention may be invited to what has been stated above as the main object of the Association, viz., the establishment of an expert organisation for the development of hand-spinning and khaddar. The way in which this main object of the Association may be carried out is laid down in clause 4 of the constitution of the Association. Paragraphs 2 to 4 of the petition of appeal of the Association to the Assistant Commissioner, dated March 25, 1939, Exhibit 'B' hereto, state the means adopted by the Association to give effect to its aforesaid main object. It is submitted that the said main object of the Association is not in any way different from that of any other Association formed for the purpose of organising and advancing a particular industry, e.g., the mill industry. Its object is the promotion and organisation of the hand-spinning and weaving industry. That object is carried out by the Association on a strictly trading basis, viz., by employing workers who are paid on a piece wage system on the basis of the quality and quantity of the hand-spun yarn and cloth purchased from them. The cloth produced is ultimately sold at a price which would cover all the charges incurred in respect of it and provides a further margin for the accumulation of a surplus. It is submitted that this activity of the Association is in no way different from the activity of a trading concern. Every trading or industrial concern employs labourers many of whom are poor and in need of employment. The fact that employment is afforded to persons who may be wholly or partially unemployed cannot result in the inference that the concern is established with the object of and is carried on for the purpose of giving relief to the poor or the unemployed. The relief of the poor and the employment of the unemployed or the partially employed would be merely an incidental result of the carrying on of the trade or the industrial concern. In this connection it has to be noticed, as pointed out above, that the relief of the poor or the unemployed or the partially employed is not stated in the objects of the Association to be its purpose. The Association does not incur any expenditure for the relief of the poor in the shape of giving them food, clothing or shelter because they are poor. The workers employed by the Association are employed by them irrespective of the fact as to whether they are poor or well-to-do and the wages paid to them have reference not to their needs but the amount of the work turned out by them. It is, therefore, submitted that the object of the Association is not the relief of the poor and is not, therefore, a charitable object in law.

It is further submitted that the aforesaid object of the Association cannot in law be regarded as an object of general public utility. The Association can at most be said to benefit not the general public as a whole but a section of it only. I invite attention in this connection to the case of *The Commissioner of Income-tax, Bombay v. The Grain Merchants' Association of Bombay*, decided by this Hon'ble Court and reported in 6 I. T. R. 427.

Finally it is submitted that in any event and assuming that some of the objects of the Association are charitable, some of its objects are clearly not charitable objects in law and that under the circumstances the Association cannot claim the benefit of the exemption given by s. 4(3)(i). In this connection, I rely on some of the objects to which I have already drawn attention above and which do not fall within the category of charitable objects. In this connection I rely on the decisions in *Mahomed Ibrahim Riza Malak v. The Commissioner of Income-tax, Nagpur*, reported in 32 Bom. L. R. 1538; *N. C. Kelkar v. The Commissioner of Income-tax, Bombay*, 10 I. T. C. 65; and *Rex v. The Special Commissioner of Income-tax* (Ex parte *The Headmasters' Conference, and the Incorporated Association of Preparatory Schools*) 10 T. C. 63.

O. C. J. For the reasons stated above, I invite your Lordships to answer the question  
1941 set out in paragraph 7 above in the affirmative."

The reference was heard.

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*V. F. Taraporewala*, with *D. B. Desai*, for the assesseees.

*M. C. Setalvad*, Advocate General, with *G. N. Joshi*, for the Commissioner of Income-tax.

BEAUMONT C. J. This is a reference made by the Commissioner of Income-tax raising a question which he was directed to raise by this Court under s. 66(3) of the Indian Income-tax Act, 1922. The question is:—

"Whether having regard to the objects of the Association and the manner in which they are carried out and the purpose for which its funds are applied the income of the Association is liable to income-tax and/or super-tax."

The Association in question is the All India Spinners' Association. It was formed as an unregistered Association in the year 1925, and in the year 1937 it was registered under Act XXI of 1860. In the month of March 1938, notice was served on the assesseees under s. 34 of the Act claiming that income had escaped assessment for the accounting year ending December 31, 1935, and at the same time notice was also served on the assesseees under s. 22 claiming a return in respect of the accounting year ending December 31, 1936. So that the income with which we have to deal is income which was earned in years when the Association was an unregistered Association. It is claimed that the Association is not assessable to income-tax in respect of profits admitted to have been earned in the accounting years by reason of the exemption contained in s. 4(3)(i) of the Act of 1922. That sub-section provides:—

"Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:—

(i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto."

Then there is a proviso at the end of the sub-section which reads:—

"In this sub-section 'charitable purpose', includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but nothing contained in clause (i), (ia) or clause (ii) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public."

So that what the assesseees have to establish, if they are to avoid liability to tax, is that the income assessed is derived from property held under trust or other legal obligation for religious or charitable purposes.

The Association never possessed any formal trust deed, but there was a document, intended apparently to define its objects, which is exhibit G. It provides in cl. (1):—

"Whereas the time has arrived for the establishment of an expert organisation for the development of hand-spinning and khaddar and whereas experience has shown that such development is not possible without a permanent organisation, unaffected and uncontrolled by politics, political changes or political bodies, an organisation called the All India Spinners' Association is hereby established with

the consent of the All India Congress Committee as an integral part of the Congress organisation, but with independent existence and powers."

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In point of fact, the Association could not have any independent existence.

It was not registered, and, therefore, consisted only of the persons who had become members of the Association. Clause 2 contains the names of the members of the Board of Trustees and Executive Council, and, no doubt, those names suggest that the Association was formed in connection with the Congress Party, a political body. Indeed, that is not disputed. Then cl. (4) deals with the objects of the Association, and is in these terms :—

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"The Council shall have the right to raise loans, to collect subscriptions, to hold immoveable property, to invest funds under proper security, to give and take mortgage for the furtherance of hand-spinning and khaddar, to give financial assistance to khaddar organisation by way of loans, gifts or bounties, to help or establish schools or institutions where hand-spinning is taught, to help or open khaddar stores, to establish a khaddar service, to act as agency on behalf of the Congress to receive self-spun yarn as subscription to the Congress and to issue certificates and to do all the things that may be considered necessary for the furtherance of its objects, with power to make regulations for the conduct of affairs of the Association or the Council and to make such amendments in the present constitution, as may be considered necessary from time to time."

It is to be noticed that that document is couched not in the language of obligation, but of permission. Assuming, however, that it does define the objects, there is nothing therein which limits in any way the purposes for which any profits derived by the Association can be applied. The objects specified do not suggest that profits will be made. The only object, which can result in profits, seems to be that of opening khaddar stores. It is further to be noticed that under the concluding words the Council can amend the constitution as may be considered necessary from time to time.

The method in which the Association works and the manner in which the Association's profits were earned are set out in cl. (4) of the petition, which the assessee presented to the Assistant Commissioner of Income-tax, appealing against the assessment, and I think I cannot do better than read out the passage. It reads :—

"The Association carried out the said objects *inter alia* in the following manner :— Out of the funds in its hands which have mostly been contributed by donations from the public and subscriptions from the members of the Association, the Association buys Charkhas and handlooms, and supplies them to the inhabitants of villages within the limits of the various branches of the Association free of charge and further buys raw cotton and gives the same to the said persons for the purpose of spinning yarn from such cotton. The Association gives a certain wage to the said persons which, in some cases, is the sole source of income to these persons and in others adds to the earnings of the said persons so as to enable them to maintain and support their families. The yarn so spun is taken over by the Association and supplied to the other persons for weaving cloth on handlooms. The Association also buys hand-spun yarn from the said persons who have spun the same out of their own raw cotton paying them for the same on the basis of the cost of the raw cotton and the wages for spinning the same into yarn. The persons to whom all the yarn is handed over for weaving are also paid a certain wage sufficient either in itself or as an addition to the other income of the persons to maintain and support their families. The wages so paid to the spinners and weavers are not based on the current wages prevailing

O. C. J. for similar work but are fixed on the basis of giving to the said persons as far  
 1941 as possible an income sufficient to enable them to support their families. The  
 — cloth so woven is taken over by the Association and is sold in the Khaddar stores  
*In re* established by the Association in various centres by the branches of the Association.  
 THE The price charged to the public for such cloth is calculated on the basis of the  
 ALL-INDIA cost price incurred by the Association in the manner hereinbefore stated plus a  
 SPINNERS' certain percentage for shop and overhead charges, without any reference to or  
 ASSOCIATION connection with the demand for the same and the price of similar mill cloth  
 — sold in the market. In the ordinary course the moneys realised by the Association  
*Beaumont C.J.* by such sales are a little more or less than the cost calculated on the aforesaid  
 — basis."

It appears that for the years with which we are dealing the Association had decided to increase the amount of wages to be paid to spinners and weavers, with the result that the price which they charged for completed hand-spun cloth had to be increased. However, as I understand it, they sold their stocks of cloth at a price based on the increased wages to be paid, whereas in fact that cloth had been manufactured when the reduced scale of wages was in force. The result was that the Association made a profit, and the question is whether such profit is derived from property held under trust or other legal obligation for religious or charitable purposes.

Now, it is argued that this scheme is a scheme for poor relief, the idea being to provide work at certain remuneration for poor agriculturists during that season of the year in which they are not engaged in active agricultural employment. The plan involves, no doubt, subsidising what is essentially an uneconomic industry, because it is admitted that the hand-spun cloth is sold at a price which cannot compete economically with cloth manufactured in the mills, but it is said that the object of the scheme, being to relieve poverty amongst agriculturists, is in its essence a charitable object. If we had to decide whether the scheme falls within the words "object of public utility," it would be pertinent to observe that the plan is open to criticism. Some economists think that any scheme for diverting industry into uneconomic sources is in the long run bad for a country; other economists may take the view that an industry, although producing no profits, may nevertheless be beneficial to the inhabitants of the country by providing work for an essential class. It may be said too that if this scheme succeeds, and if a large amount of hand-spun cloth is sold, the result will be to diminish the sale of cloth manufactured in mills, and, therefore, whilst relieving poverty amongst agriculturists, the scheme may create poverty amongst millhands. But those are really economic questions, and if I had to decide them judicially, I should require to be fortified by opinions of experts. However, I am prepared to assume for the purpose of the present case that this is a scheme for the relief of the poor, and, if so, it is a charitable purpose, whether or no the Court considers the scheme a wise one. The learned Commissioner considers that it is not to be regarded as a charitable purpose, because in its essence it is intended to advance the purposes of the Congress, which is a political body. But if one assumes that the purpose of the Association is relief of the poor, it is none the less charitable, because some political body may consider that it affords the best method of relieving the poor and may, therefore, adopt the scheme.

But assuming that the Association is in fact carrying out a scheme for the relief of the poor, it seems to me that it fails to bring itself within the exemption under s. 4(3)(i). The Association does not show that the property from which these profits were derived, namely, the hand-spun cloth sold in the Association's shops, is property held under trust or other legal obligation for charitable purposes. At the time when these profits were made, there was no legal obligation upon the Association to devote their profits derived from the sale of cloth to any particular purpose, and the fact that they have in practice, as I will assume, devoted their profits to charitable purposes, does not create any legal obligation. Many people devote a part of their income to charitable purposes, but that does not secure them any exemption from income-tax. There must be a binding legal obligation to devote the income to charitable purposes. It seems to me quite impossible to hold that this Association was bound to devote its profits to charitable purposes. The members of the unregistered Association were free to apply their profits to any purposes they chose.

That being so, in my view the Association have not brought themselves within the exemption, and we must, therefore, answer the question raised in the affirmative.

The assessee to pay costs of the Commissioner.

B. J. WADIA J. I am of the same opinion. The question raised by the reference involves consideration of a point of law based on s. 4(3)(i) of the Indian Income-tax Act of 1922, read with the proviso at the end of the sub-section. According to that proviso the expression "charitable purposes" referred to in the section includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility. Reading the relevant parts of the sub-section and the proviso together, so far as they are applicable for the purposes of the present reference, it follows that in order that the income in dispute may be exempt from payment of income-tax, it must be income derived from property held under trust or other legal obligation wholly either for the relief of the poor or for the advancement of any other object of general public utility. There are, therefore, two points which arise for consideration, namely, (1) whether the property held by the All India Spinners' Association is held under a trust or other legal obligation, and (2) whether it is so held for the purpose mentioned above. The amount of the assessment is not in dispute.

Taking the second point first, it was argued that the real purpose for which the property was held was to relieve the poor agriculturists living within the limits of the various branches of the Association. The learned Advocate General, however, pointed out that the main object was the development of hand-spinning and khaddar as stated in the first clause of the constitution of the Association, and he argued that the carrying out of this object involved only incidentally the relief of the poor agriculturists, like any other industrial venture. I am, however, prepared to assume on reading the constitution that the real, underlying object of the Association was to benefit the poor agriculturists in the villages, specially at that time of the year when they are not actively engaged in agricultural operations. Whether

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the method employed to relieve this poverty is effective or reasonable from the economic point of view is a matter outside the Court's consideration. But if the object of the Association is the relief of poverty, the fact that the Association is "an integral part of the Congress organization", as described in its constitution, is not really material. The income-tax authorities have laid great stress on this point of the connection of the Association with the Congress. They say in one place that "the main object of the Association in furthering the production of khadi is political". In another place it is stated that "the wearing of khadi is the symbol of the Congress Party just as the wearing of black shirts is the symbol of the Fascists in Italy". In yet another place it is stated that one of the main objects of the Association was "to effectively boycott Lancashire cloth". Whether all this is true or not is also not for the Court to consider. If an association is set on foot by a political organization and is connected with it, but still has for its real object the relief of poverty, its connection with the political organization does not, in my opinion, make its real object any the less charitable.

The other point for consideration is whether the property from which the Association derived its profits was held by it under a trust or other legal obligation. A trust is an obligation annexed to the ownership of property. There is, however, no trust-deed nor any clear declaration of trust in this case. It is true that no formal or particular words are necessary to create a trust or a legal obligation; but the language used must make it certain that the author of the trust intended to create a trust or a legal obligation binding on himself or on the person to whom the property was given. The intention to create a trust or other legal obligation must be indicated with reasonable certainty. Reading all the words of cl. 4 of the constitution of the Association which are relied on, they do not indicate a trust or other legal obligation with such certainty; and the Court will not raise such trust or obligation where from the words used the intention to create a trust or obligation is not clearly and definitely expressed. One essential of a trust or a legal obligation is that it should be imperative. In my opinion cl. (4) is not couched in language which is imperative or which creates a trust or any other legal obligation. I may also point out that the clause begins by saying that the Council of the Association shall have the "right" to do all that is mentioned in that clause, and at the end it is stated that the Council may also make such amendments in the present constitution as may be considered necessary from time to time. There are no words in the whole clause which have the binding force of a legal obligation, nor are the real elements of a trust present in them. Clause 3 does not carry the case of the Association any further.

Reference was made in the argument to the case decided by the Privy Council, *Trustees of Tribune Press v. Commissioner of Income-tax, Punjab*<sup>1</sup>. But in that case it was not disputed that the will of the testator created a trust and directed his trustees to maintain the Press in question and the newspaper, namely, the *Tribune*, for the purpose or object mentioned. The only dispute was whether the purpose or object was one of general public utility

within the meaning of the section of the Indian Income-tax Act, and their Lordships held that it was.

It was stated on behalf of the Association that the surplus amount realised by the sale of the cloth woven out of the hand-spun yarn was also utilised in the same manner as the other funds of the Association, namely, *inter alia* in getting yarn and cloth manufactured, and providing wages for the persons engaged in such manufacture. The learned counsel for the Association contended that the surplus income was in fact wholly applied or set apart for the same charitable purpose. It seems that that has been the practice of the Association, and that it has been followed ever since it was founded. But a practice, however long, cannot create a trust or a legal obligation under which the property must be held, in order that the income derived from it may be exempt from assessment. It may be that the practice has been followed by the Association because they feel they are bound to do so out of motives of patriotism. But that also cannot create a trust or an obligation which is binding in law. The real question for consideration is whether the income assessed by the income-tax authorities is income derived from property held under a trust or other legal obligation, and the words and acts relied upon do not effectively create such trust or other legal obligation within the meaning of the section.

For these reasons the question raised in the reference must be answered in the affirmative.

*Answer accordingly.*

Attorneys for assessees : *Madhavji & Co.*

Attorney for Commissioner : *D. H. Nanavati*, Solicitor to the Central Government at Bombay.

#### FULL BENCH—APPELLATE CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice Macklin and Mr. Justice Sen.*

KRISHNA GOVIND PATIL

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March 6.

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 11 and 16—Decree—Assignment of decree—Application for execution by assignee—Judgment-debtor pleading payment—Payment not certified or recorded by Court—Whether Court to which application for execution is made could recognise such payment.*

Where an assignee of a decree makes an application under O. XXI, rr. 11 and 16, of the Civil Procedure Code, 1908, to the Court passing the decree for execut-

\* Second Appeal No. 121 of 1940, against the decision of R. S. Bavdekar, District Judge, Belgaum, in Appeal No. 253 of 1938, reversing the

order passed by M. S. Bagali, Subordinate Judge, Chikodi, in Darkhast No. 296 of 1935.

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ing it, the Court is hearing the application as an executing Court and is bound in virtue of O. XXI, r. 2(3), not to recognise payment or adjustment which has not been certified or recorded as required by r. 2(1)(2).

A person after obtaining a decree for maintenance assigned certain arrears of maintenance under that decree to the applicant. The applicant applied, under O. XXI, rr. 11 and 16, of the Civil Procedure Code, to the Court passing the decree to execute it. The judgment-debtor contended that the arrears of maintenance purported to have been assigned to the applicant had in fact been paid, and, therefore, there was no effective assignment. The alleged payment was, however, not certified or recorded as required by O. XXI, r. 2(1)(2) :—

*Held*, that the Court was bound by O. XXI, r. 2(3), not to recognise the payment :

*Raghunath Govind v. Gangaram Yesu*<sup>1</sup> and *Gampaya v. Krishnappa*,<sup>2</sup> over-ruled.

*Subramanyam v. Ramaswami*<sup>3</sup> and *Murari Lal v. Raghubi Saran*,<sup>4</sup> followed.

PROCEEDINGS in execution.

One Chandrabai obtained a decree against her step-son Krishnaji, on March 29, 1927, directing payment of maintenance to her at the rate of Rs. 90 per year.

On March 5, 1935, the decree-holder assigned by a registered deed her right to recover maintenance due to her for the years 1932-1934 (i.e. Rs. 270) to Moolchand Keshavchand (assignee).

The assignee applied to the Court which passed the decree for the recovery of Rs. 270 from the judgment-debtor. The Court ordered notices to issue to the judgment-debtor under O. XXI, rr. 16 and 22. In answer to the notices the judgment-debtor set up the plea that on January 21, 1935, he had paid Rs. 250 to Chandrabai (decree-holder) in satisfaction of arrears of maintenance for the years 1932-1934, and that she had remitted the balance due. The payment was evidenced by a receipt, which bore the thumb impression of the decree-holder. The judgment-debtor produced the receipt on August 10, 1935.

The assignee then raised the plea that the receipt was a forged one, and that the thumb impression on it was false. At his instance the receipt was sent to the Deputy Inspector of Police, C.I.D., Bombay Presidency, but that officer did not pronounce any opinion as the thumb-impression on the receipt was not clear. The receipt was next submitted to Charles E. Hardless of Allahabad, finger-print expert, who opined that the impression on the receipt and that on the registered deed of assignment in favour of the assignee were from the same thumb.

The Subordinate Judge held, relying on the above opinion, that satisfaction of the amount claimed was proved and dismissed the darkhast with costs.

On appeal, the District Judge excluded the opinion of the finger-print expert from consideration, found on evidence that the decree-holder's statement that she was not paid Rs. 250 was true, and that the judgment-debtor had failed

1 (1923) I. L. R. 47 Bom. 643,  
s.c. 25 Bom. L. R. 474.

2 (1924) 26 Bom. L. R. 491.

3 (1932) I.L.R. 55 Mad. 720, F.B.

4 (1933) I. L. R. 56 All. 694.



to prove that the receipt was genuine. The execution proceedings were therefore allowed to proceed.

The judgment-debtor appealed to the High Court, contending *inter alia* that the lower Court ought to have held that the deed of assignment did not entitle the assignee to claim the amount in question and that the said amount had been paid to the decree-holder and there was nothing which could be assigned or transferred to him.

On February 25, 1941, the appeal was placed for disposal before Sen J., but his Lordship referred it to a division bench.

On February 27, 1941, the appeal came up for hearing before Beaumont C. J. and Macklin J., who heard it on that day and on March 5, 1941. On the latter date, their Lordships referred the case to a full bench.

Accordingly, on March 6, 1941, a full bench consisting of Beaumont C. J., and Macklin and Sen JJ. heard the appeal.

*K. G. Datar*, for the appellant. The question for consideration in this appeal is whether a judgment-debtor, debarred under r. 2 of O. XXI, Civil Procedure Code, from pleading satisfaction of a decree, can nevertheless plead such satisfaction when objecting to an assignment of the decree in answer to the notice under r. 16 of O. XXI of the Code.

The provisions of r. 2 of O. XXI make it clear that it is only the Court executing the decree which will not recognise any payment or adjustment if the same has not been certified or recorded as required under that rule. The prohibition of recognition of uncertified payments is thus confined only to executing Courts and such payments can be recognised by other Courts. The payment itself is not invalid inasmuch as a suit could be based upon such uncertified payment and the judgment-debtor may sue the decree-holder for recovery of the same.

Then the question arises when does the Court commence to act as the executing Court? Under s. 38 of the Code a decree may be executed either by the Court which passed it or by the Court to which it is transferred for execution. Section 39 sets out under what circumstances a decree may be transferred to another Court for execution. The transferring Court is described as the Court which passed the decree. When it sends the decree to another Court for execution, I submit, it is not itself acting as an executing Court. The executing Court in such a case is the Court to which the decree is transferred. Again s. 41 uses the words "the Court which passed the decree". The words "Court executing the decree" occur in s. 42. Both the phrases occur in s. 50. Even r. 2, sub-r. (1), of O. XXI, makes it clear that the Court when recording the payment or adjustment is not necessarily the Court which is executing the decree. Payment may be made by the judgment-debtor out of Court as contemplated by r. 1 of O. XXI, even before any execution proceedings have been started by the decree-holder. In such a case the Court records the payment not as a Court executing the decree but as a Court whose duty it is to execute the decree. In other words, at the time when it records such payment, it has not yet become the Court executing the decree. It is thus clear that these provisions refer to a point of time when the Court acts under these provisions even after the decree is

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passed in the suit but before the commencement of any execution proceedings. Rules 3 to 9 of O. XXI form one group and they indicate what Courts are Courts executing the decree.

Rules 10 and 11 may be read together. I submit that it is only after an application under r. 10 is filed that the Court may be said to commence to act as an executing Court. Anything done by the Court before an application under r. 10 is filed, as for instance certifying or recording under r. 2 or transferring the decree for execution under s. 39, is done by the Court not as purporting to act as an executing Court but as a Court which passed the decree.

Now under r. 16 of O. XXI, when the assignee wants to proceed with the execution of the decree, he has first to establish his title under assignment. Ordinarily it is only the person appearing on the face of the decree as the decree-holder who is entitled to execution, unless it be shown by some other person under O. XXI, r. 16, that he has taken the place of the decree-holder. What he has therefore to establish in the first instance is his own title under the assignment and this must be done in the Court which passed the decree. The term 'which passed the decree' is used in r. 16 not merely to contradistinguish the Court from the Court to which execution is transferred but in my submission it also excludes the idea of itself being the executing Court as well. In fact the Court which passed the decree has not yet reached the stage when the Court becomes the executing Court. The question as to assignment arising under this rule is regarded as a preliminary question and the Court considering it is the Court which passed the decree, and until that question has been disposed of no question of execution can arise and therefore there is no Court at that stage which can be termed "the Court executing the decree". See *Raghunath Govind v. Gangaram Yesu*.<sup>1</sup> The proviso to r. 16 also indicates that execution is to commence only after the objections as to assignment are heard and decided.

It is only when the assignee after establishing his title makes an application under r. 10 of O. XXI that the execution of the decree is said to have commenced and the Court becomes the executing Court. Even the assignee is bound to make an application under rr. 10 and 11. This application, it may be noted, must be made to the executing Court and in the case when the decree is transferred for execution from one Court to another—to the latter Court which is alone the Court executing the decree. See *Bajinath Ramchander v. Binjraj Joowarmal*<sup>2</sup> and *Brijmohandas Damodardas v. Sadashiv Laxman*.<sup>3</sup>

The case of *Raghunath Govind v. Gangaram Yesu* has been consistently followed in subsequent cases. See *Ganpaya v. Krishnappa*.<sup>4</sup> Also the unreported judgments in *Bapu Damodar Bhadre v. Sadashiv Krishna Joshi*<sup>5</sup> and *Madhavsingh Vithalsingh Pardeshi v. Lalsingh Kisansingh Pardeshi*.<sup>6</sup> See also the general observations in *Bank of Morvi, Limited v. R. P. Wagle &*

1 (1923) I. L. R. 47 Bom. 643,  
s. c. 25 Bom. L. R. 474.

2 [1937] Bom. 691,  
s. c. 39 Bom. L. R. 540.

3 (1939) 41 Bom. L. R. 1190.

4 (1924) 26 Bom. L. R. 491.

5 (1937) S. A. No. 2 of 1936, decided by Barlee and Wassoodew JJ., on October 8, 1937 (Unrep.).

6 (1938) F. A. Nos. 326 and 327, decided by Sen J., on April 13, 1938 (Unrep.).

Co.<sup>1</sup> It is true that the other High Courts have taken a different view, and the rulings which our Court approved of and relied on in *Raghunath Govind v. Gangaram Yesu* were considered and overruled by the full bench case of *Subramanyam v. Ramaswami*.<sup>2</sup> See also *Murari Lal v. Raghur Saran*.<sup>3</sup>

But our Court has uniformly followed the ruling in *Raghunath Govind v. Gangaram Yesu* and having regard to the longstanding practice in this respect their Lordships in the unreported case (*Bapu Damodar Bhadre v. Sadas Shiv Krishna Joshi*) did not think it necessary to refer the question to a full bench for examining the correctness of the view taken in *Raghunath's* case in the light of recent decisions of other High Courts. I, therefore, submit that this practice which only relates to procedure may not be disturbed.

Finally, I submit when a stranger comes to the Court and wants to take the position of the decree-holder, it should be open to the judgment-debtor to challenge his right on all possible grounds if only because a new situation has arisen by the interposition of the assignee and this new situation for which the decree-holder himself is responsible should give the judgment-debtor an opportunity to plead an uncertified payment though that opportunity is lost to him as against the decree-holder.

Cases of fraudulent assignments may also be easily conceived ; and in such cases I submit equities would require that the judgment-debtor should be able to plead satisfaction even though he has not complied with the provisions of r. 2 of O. XXI.

*K. N. Dharap*, for the respondent, was not called upon.

BEAUMONT C. J. This is a second appeal from a decision of the District Judge of Belgaum, and has been referred to a full bench, because it raises a question, whether the decision of a bench of this Court in *Raghunath Govind v. Gangaram Yesu*<sup>4</sup> is correct.

There was a decree in this case for maintenance, and the decree-holder assigned certain arrears of maintenance under that decree to the present respondent. The present respondent applied to execute the decree under O. XXI, rr. 11 and 16, of the Civil Procedure Code. The answer made by the judgment-debtor was that the arrears of maintenance purported to have been assigned had in fact been paid, and, therefore, there was no effective assignment. The trial Judge held the satisfaction proved and dismissed the dakhast. The learned District Judge, in appeal, held on a legal point that the satisfaction was not proved and directed execution to proceed. In this Court the first point taken is that inasmuch as the alleged payment has not been certified under O. XXI, r. 2, it is not open to the judgment-debtor to prove such payment, even if in fact it took place.

Order XXI, r. 2, provides in sub-r. (1) that when a decree is adjusted out of Court, the decree-holder has to certify such adjustment to the Court whose duty it is to execute the decree, and the Court is required to record the same accordingly. Then sub-r. (2) enables the judgment-debtor to get payment or adjustment recorded, where the decree-holder fails to do so. Then

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1 (1940) 43 Bom. L. R. 266.

2 (1932) I.L.R. 55 Mad. 720, F.B.

3 (1933) I. L. R. 56 All. 694.

4 (1923) I. L. R. 47 Bom. 643,

s. c. 25 Bom. L. R. 474.

F. B. sub-r. (3) provides that a payment or adjustment, which has not been certified or recorded, shall not be recognised by any Court executing the decree. 1941 I apprehend that that rule was passed in the public interest. No doubt, KRISHNA sometimes it operates harshly by preventing an honest debtor, who has paid GOVIND off his creditor, from proving the fact; but, on the other hand, it prevents MOOLCHAND false claims of payment having been made being presented to Courts in v. execution. The Legislature having enacted that rule, it is the duty of Courts KESHAV- to give effect to it. Rule 10 provides that where the holder of a decree desires CHAND to execute it, he shall apply to the Court which passed the decree, or if the Beaumont Cj. decree has been sent under the provisions in the Code to another Court, then to such Court. Rule 11 specifies the particulars which have to be given in an application for execution. Then r. 16 deals with the assignment of a decree and provides, so far as material, that where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. Those last words certainly seem to suggest that the assignee will be placed in the same position as the decree-holder, if the Court is satisfied that the assignment is in order. The first proviso to the rule requires notice to be issued to the transferor and the judgment-debtor, and the Court has to hear their objections to the execution of the decree.

Now, the view which this Court took in *Raghunath Govind v. Gangaram Yesu* was that inasmuch as under r. 16 the application has to be made to the Court which passed the decree, which may not be the Court for the time being executing the decree, because execution of the decree may have been transferred to another Court under the provisions of ss. 38 and 39 of the Code, the Court hearing an application under r. 16 is not a Court executing the decree within O. XXI, r. 2, sub-r. (3). The Court in effect treated the application under r. 16 as being an application for leave to execute the decree, and considered that until that leave was given, the Court which passed the decree was not a Court executing the decree. But, with all respect to the learned Judges who decided that case, they have overlooked the fact that an application under r. 16 is in the express words of the rule an application for execution of the decree, and it is not an application for leave to execute the decree. Form No. 7 in Appendix E, which is the form of notice to be issued under r. 16, recognises that an application has been made to the Court for execution of the decree on the allegation that the decree has been transferred to the applicant, and then it gives notice to show cause why execution should not be granted, not why leave to execute should not be granted. So that, in my opinion, on the wording of O. XXI, r. 16, it is clear that the Court to which the application is made, which is the Court which passed the decree, is hearing the application as an executing Court, and is accordingly bound by the prohibition contained in r. 2(3).

Mr. Datar contends that there must always be two applications,—one under r. 16 to get the assignment recognised and a further application under r. 11 giving the particulars of the methods in which execution is prayed, and that the first application is really not one for execution. No doubt, it is open to

the assignee to make two applications as was held by Mr. Justice B. J. Wadia in *Baijnath v. Birraj*: In re *Jankiprasad*,<sup>1</sup> and in a case where there are any complications, or where the decree has been transferred for execution at the instance of the decree-holder to another Court, that may be a desirable course. But I entertain no doubt that it is not necessary to have two applications. A single application may ask that the decree be executed at the instance of the assignee in the manner specified, complying with the requirements of r. 11, and that course was in fact adopted in the present case.

The decision of this Court in *Raghunath v. Gangaram* was followed by a bench of this Court in *Ganpaya v. Krishnappa*<sup>2</sup> but Mr. Justice Shah, who was the only Judge who had not been a party to the decision in *Raghunath v. Gangaram* (supra), in following the decision expressed a difficulty in seeing how the assignee of the decree could be in a worse position than the decree-holder. No doubt, the decision has been followed in unreported cases in this Court, but it has not met with the approval of other High Courts. It was dissented from by a full bench of the Madras High Court in *Subramanyam v. Ramaswami*<sup>3</sup> where earlier decisions of that Court, which had been relied on by this Court in *Raghunath v. Gangaram* (supra), were overruled. The decision has also been dissented from by the Allahabad High Court in *Murari Lal v. Raghubir Saran*.<sup>4</sup>

It is said that on the principle of *stare decisis* we ought not to overrule the decision, but it is not a decision which enacts any principle of law, or which affects title to property. It seems to me to be a decision which is based on a plain misconstruction of the words of r. 16, and as it has not been followed in other High Courts, I think it is desirable that this Court should come into line with the rest of the High Courts, and that we should overrule the decision in *Ganpaya v. Krishnappa*.<sup>5</sup>

On that view of the case, it is not necessary to consider the view which the learned District Judge took on the question whether payment was proved, but I must not be taken as doubting the correctness of the view of the law which the learned District Judge took on that part of the case. It is, however, not necessary to deal with that matter.

The appeal, therefore, will be dismissed with costs.

MACKLIN J. I agree.

SEN J. I agree.

*Appeal Dismissed.*

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1 (1936) 39 Bom. L. R. 540.

2 (1924) 26 Bom. L. R. 491.

3 (1932) I. L. R. 55 Mad. 720, F.B.

4 (1933) I. L. R. 56 All. 694.

5 (1924) 26 Bom. L. R. 491.

## APPELLATE CIVIL.

Before Mr. Justice Broomfield and Mr. Justice Diwalia.

THE POST MASTER GENERAL, BOMBAY

v.

CHENMAL MAYACHAND.

GANGARAM BABAJI CHAVAN

v.

CHENMAL MAYACHAND.\*

*Execution—Attachment of portion of public servant's salary—Order imposing liability made against Government or public body—Right of Government or public body to move Court to shew illegality of order—Inherent jurisdiction of Court to hear such application—Civil Procedure Code (Act V of 1908), Sec. 60(i), O. XXI, rr. 48 and 58—Attachment of salary of public servant which is exempt from attachment under s. 60(i) of Civil Procedure Code—Whether public servant can contract himself out of statutory provision or waive his right—Voluntary transfer of part of salary by public servant—Public policy—Illegality of such transfer—Transfer of Property Act (IV of 1882), Sec. 6 (f)—Indian Contract Act (IX of 1872), Sec. 23.*

Where an order is made against Government or a public body, and the law imposes liability in case the order is not obeyed, it is open to Government or the public body to move the Court and contend that the order is not justified by the law, and the Court has inherent power to consider such an application.

*Shamu Patter v. Abdul Kadir Rawathan*,<sup>1</sup> *Prem Chand v. Mulkh Raj*,<sup>2</sup> *Secy. of State v. Ishar Das*<sup>3</sup> and *Calcutta Port Commissioners v. Bhubaneshwar Prasad*,<sup>4</sup> referred to.

Dictum in *Governor General in Council v. Magniram Mayachand*,<sup>5</sup> not approved.

A public servant, whose salary is exempt from attachment under s. 60 (i) of the Civil Procedure Code, 1908, cannot contract himself out of this statutory provision. Such a contract is opposed to public policy and is void under s. 6(f), of the Transfer of Property Act, 1882, and s. 23 of the Indian Contract Act, 1872.

The principle of waiver does not apply to a statutory prohibition based on public policy.

*Graham v. Ingleby*,<sup>6</sup> *Gaekwar Baroda State Railway v. Hafiz Habib-ul Haq*,<sup>7</sup> *Joggeswar Mahata v. Jhapal Santal*,<sup>8</sup> *Shankarlal v. Raghunathdas*,<sup>9</sup> and *Ashutosh Sikdar v. Beharilal Kirtania*,<sup>10</sup> referred to.

\* Civil Revision Applications Nos. 99 and 100 of 1940, from orders passed by V. R. Chaubal, Judge, Small Causes Court, Poona, in Miscellaneous Application No. 163 of 1939 and on application Exhibit No. 8 in Darkhast No. 1251 of 1939.

1 (1912) L. R. 39 I. A. 218,  
s.c. 14 Bom. L. R. 1034.

2 [1939] A. I. R. Lah. 380.

3 [1936] A. I. R. Lah. 761.

4 [1938] 1 Cal. 433.

5 (1937) Civ. Rev. Application No. 372 of 1937, decided by Wassoodew J., on March 7, 1938 (Unreported).

6 (1848) 1 Exch. 651.

7 (1938) 40 Bom. L. R. 811, P.C.

8 (1923) I. L. R. 51 Cal. 224.

9 (1934) 37 Bom. L. R. 778.

10 (1907) I. L. R. 35 Cal. 61, 74,

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*Jagan Nath v. Allah Dad*<sup>1</sup> and *Rajindar Kumar v. Chetan Lal*<sup>2</sup> dissented from.

A decree for Rs. 236 was passed against a peon serving in a Government Post Office and drawing a monthly salary of Rs. 41. The judgment-creditor got him arrested in execution of the decree. In order to escape from arrest he entered into a compromise with the judgment-creditor whereby he agreed that a sum of Rs. 6 per mensem should be deducted from his salary until the decree was satisfied. The Court recorded the compromise and passed an order under O. XXI, r. 48, Civil Procedure Code, directing the Post Master General to send Rs. 6 every month to the Court till the decree was fully satisfied. The Post Master General applied under O. XXI, r. 58, to set aside the order on the ground that it was illegal in virtue of the provisions of s. 60 (i) of the Civil Procedure Code, s. 6(f) of the Transfer of Property Act, 1882, and of s. 23 of the Indian Contract Act, 1872. The lower Court overruled the contention holding that the order was not illegal and that the Post Master General had no *locus standi* to apply under O. XXI, r. 58, and it therefore refused to raise the attachment. On appeal :—

*Held*, reversing the order of the lower Court, (1) that O. XXI, r. 48, was subject to the provisions of s. 60 of the Civil Procedure Code, and the Post Master General was entitled to bring to the notice of the Court the illegality of the order of attachment as Government would be liable for any sum paid in contravention of the section ;

(2) that the agreement between the judgment-creditor and the judgment-debtor amounted to a voluntary transfer of a part of the latter's salary and was opposed to the provisions of s. 6(f) of the Transfer of Property Act and s. 60 of the Civil Procedure Code ;

(3) that it was not open to the judgment-debtor to contract himself out of those statutory provisions or to waive their benefit ; and

(4) that, therefore, the attachment of the salary and the transfer thereof were illegal and opposed to public policy.

#### APPLICATION to raise attachment.

One Mayachand, father of Chenmal and his brothers (opponents Nos. 1-4), obtained a decree for Rs. 236 against the applicant Gangaram in the Small Causes Court, Poona. Gangaram was employed as a postman on a monthly salary of Rs. 41 in the City Post Office, Poona.

Mayachand filed a darkhast in 1938 for execution of the decree praying for the arrest of Gangaram. Gangaram was arrested and there was a compromise between him and Mayachand whereby it was agreed that Rs. 6 should be withheld every month from his salary by his superior officer and paid to Mayachand until the decretal amount was satisfied. The Court ordered the compromise to be recorded.

As nothing was paid under the decree the sons of Mayachand, opponents Nos. 1 to 4, filed a darkhast for executing the decree and prayed for attachment of Gangaram's salary to the extent of the amount of the decree.

On March 14, 1939, the Small Causes Court at Poona sent an order under O. XXI, r. 48, Civil Procedure Code, 1908, to the Post Master General, Bombay directing him to send Rs. 6 every month to the Court in satisfaction of the decree against Gangaram.

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1 [1939] A. I. R. Lah. 539.

2 [1940] A. I. R. Lah. 65.

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The Post Master General (applicant) applied to the Small Causes Court under O. XXI, r. 58, Civil Procedure Code, to raise the attachment and cancel the order served on him on the ground that Gangaram's salary being Rs. 41 per month, no portion of it was liable to attachment under s. 60 (i) of the Civil Procedure Code. He also urged that the agreement between Mayachand and Gangaram being a voluntary transfer of a public servant's salary was illegal and opposed to public policy under s. 6 (f) of the Transfer of Property Act, 1882, and s. 23 of the Indian Contract Act, 1872, and that the right of exemption from attachment and the restriction against voluntary transfer could not be waived by Gangaram as the attachment and the transfer were void on the ground of public policy. Gangaram also made a similar application to the Court.

The Court of Small Causes rejected both these applications holding that the Post Master General was not entitled to apply under O. XXI, r. 58, Civil Procedure Code, that Gangaram was entitled to waive the benefit of s. 60 of the Civil Procedure Code, and that the compromise by which the benefit had been waived was neither illegal nor against public policy. In the course of its judgment it observed.—

"There is no doubt that such an agreement contravenes the provisions of s. 60 of the Civil Procedure Code inasmuch as it allows the creditor to attach a moiety of pay which is not attachable. Section 60 confers certain benefits on the debtors by giving a statutory right, but such a right can be waived and the claim to the benefit can be given up by contract. (Halsbury's Laws of England, Vol. XXVII, p. 196). There are many decided cases in India which recognise this principle. In *Ganga Bishnu v. Jay Mohan Ram* (102 L. C. 616) it was held that an agriculturist can waive the privilege of the non-attachability of his house under s. 60, Civil Procedure Code. In *Hukum Chand Oswal v. Taharunessa Bibi* (16 Cal. 504) there was an agreement in contravention of s. 257A of the old Civil Procedure Code. It was held that a suit on such an agreement was maintainable and that the agreement was not void under s. 23 of the Contract Act. It is laid down that the words 'any law' in s. 23 refer to some substantive law and not to an adjective law such as the Procedure Code is. The case of *Uzir Biswas v. Hardev Das* (1920, A. I. R. Cal. 424) related to the house of an agriculturist and it was held that he cannot object to its attachment in execution since he had created a charge on it by a compromise. In *Ramdhir v. Sheodutta* it is held that the protection given under s. 60, Civil Procedure Code, is for the benefit of the judgment-debtor and can be waived by him. In *Lila Ram v. Phusalsingh* (1927, A. I. R. Lah. 939) a voluntary transfer by an agriculturist judgment-debtor in satisfaction of a decree was held not prohibited by law. The document though not registered was held admissible for showing that the judgment-debtor had waived his right of objecting to the attachment. In Bombay a compromise in contravention of s. 15B of the Dekkhan Agriculturists' Relief Act was held to be not bad in law (*Shivayagappa v. Govindappa*, 37 Bom. 314, F.B.). In another case (*Basangounda v. Baslingappa*, 38 Bom. L. R. 593) a decree embodying a compromise in contravention of s. 5 of the Hereditary Offices Act was held to act as an estoppel until it was set aside. It would appear as if a different principle is laid down in *Shankarlal v. Raghunathdas* (37 Bom. L. R. 778). It is decided that the waiver of his status by an agriculturist does not preclude him from raising the plea of that status under s. 21 of the Dekkhan Agriculturists' Relief Act when he is sought to be arrested in execution of that decree. Certain remarks in the judgment of Murphy J. show that their Lordships confined the decision to the facts of the particular case. At page 783 there is the following remark :

"Ordinarily except in India under the Indian Limitation Act, and perhaps in one



or two other cases, it is open to an individual to waive a right he has or to concede an advantage given him by law; or so to speak, to barter it away for a valid consideration."

The case before their Lordships was decided on two broad principles namely that under the Dekkhan Agriculturists' Relief Act "the Court is bound to set the original contract aside, whatever the agriculturists may have bound themselves to and secondly that the Statute (D. A. R. Act) is based on public policy. In my opinion the 'general' principle that a party can waive a statutory right is not affected by this case. On the strength of the authorities cited above I hold that the compromises in question are legal and binding.

The matter can be looked at from another point of view. The agreement amounts to a charge on the future earnings of the judgment-debtor so far as the amount agreed to be deducted is concerned. In *Bansidhar v. Sant Lal* (10 All. 133) hypothecation of certain future indigo produce was held to be valid. In *Palaniappa v. Lakshmanan* (16 Mad. 429) an equitable assignment of proceeds of an appeal was held legal. The case of the *Co-operative Hindustan Bank, Ltd. v. Surendranath De* (59 Cal. 667) is an authority for holding that hypothecation of future moveables creates a lien. It is stated that such a lien may be enforced by a suit. In *Lagdir Nanji v. Surandra Mohun* (1938, A. I. R. Cal. 606) it is held that an assignment by way of charge on future property is a perfectly valid assignment in equity which will attach to the property. From this point of view also the compromises in question are valid. (See also *H. V. Law and Co., Ltd. v. Pulubharilal Singh*, 59 Cal. 1372)."

Both the Post Master General and the judgment-debtor, Gangaram, made separate applications in revision to the High Court.

*R. A. Jahagirdar*, Government Pleader, for the applicant. The order of attachment is illegal. The order made under O. XXI, r. 48, is subject to the provisions in s. 60(i) which says that the salary shall not be liable to attachment. The agreement made by the judgment-debtor is illegal both under s. 60(i) of the Civil Procedure Code, and s. 6(f) of the Transfer of Property Act.

I submit that the decision in *Governor General in Council v. Magniram Mayachand*<sup>1</sup> is wrong.

As to the maintainability of the application under O. XXI, r. 58, my submission is that the application is maintainable. The Post Master General is interested in the property and is also possessed of the property. On this point the case of *Brown v. Hanson*<sup>2</sup> and the case of *Calcutta Port Commissioners v. Bhubaneswar Prasad*<sup>3</sup> are in my favour. In the latter case it was held that the petitioners had *locus standi* to make the application.

The compromise in the present case amounts to a transfer of the salary of a public officer. Section 6(f) of the Transfer of Property Act is based upon public policy. Section 23 of the Indian Contract Act is also clear. I contend that it was not open to the debtor to waive the benefit since both s. 60(i) and s. 6(f) are founded on public policy.

Choses in action are not assignable whether they are salaries of high officers or they are the wages of officers of a lower grade.

Reference was made to *Shankarlal v. Raghunathdas*,<sup>4</sup> *Gaekwar Baroda State Railway v. Hafiz Habib-ul Haq*,<sup>5</sup> *Joggeswar Mahata v. Jhapal Santal*,<sup>6</sup>

1 (1938) Civil Rev. Application No. 372 of 1937, decided by Wassoodew J. on March 7, 1938, (Unrep.).

2 (1932) 35 Bom. L. R. 360.

3 [1938] 1 Cal. 433.

4 (1934) 37 Bom. L. R. 778.

5 (1938) 40 Bom. L. R. 811, P.C.

6 (1923) I. L. R. 51 Cal. 224.

A. C. J. 1941 *Ashutosh Sikdar v. Behari Lal Kirtania*,<sup>1</sup> Broom's Legal Maxims, pp. 452 and Halsbury, Vol. IV, p. 400.

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Y. V. Dixit, for opponent No. 1. It is said that no portion of the salary could be attached. This is not correct since the present case is governed by s. 3 of Act IX. of 1937.

The first question is whether the application is maintainable. I submit that the Post-Master General has no *locus standi* to make the application. The application purports to have been made under O. XXI, r. 58, of the Civil Procedure Code. It cannot be said of the applicant that he has interest in the property attached. That is a requirement of r. 59. In a claim petition under r. 58 the third party has to show interest in the property attached adversely to the judgment-debtor and it could hardly be suggested that that is the case here. The case of *Brown v. Hanson*<sup>2</sup> is distinguishable. In the Calcutta case the application was not one under O. XXI, r. 58.

First, as to the argument based upon s. 60(i). In the present case the debtor agreed to have a portion of his salary attached in order to secure his release from arrest. Section 60 confers upon him a benefit which it would be open to him to waive. His salary was Rs. 41 and he agreed to have Rs. 6 only attached. This agreement need not be regarded as contrary to public policy. See Halsbury's Laws of England, (Hailsham's edn.), Vol. VII, p. 168, and see also *Griffiths v. The Earl of Dudley*.<sup>3</sup>

Further, the decisions in *Jagan Nath v. Allah Dad*<sup>4</sup> and *Rajindar Kumar v. Chetan Lal*<sup>5</sup> are in my favour.

The case of *Shivayagappa v. Govindappa*<sup>6</sup> supports my contention. There was a breach of s. 15B of the Dekkhan Agriculturists' Relief Act and it was held that the compromise was not bad in law. *Basangouda v. Basalingappa*<sup>7</sup>, in which the compromise was contrary to s. 5 of the Watan Act, is also in my favour. Therefore, even if the compromise was contrary to the provisions of s. 60(i) of the Civil Procedure Code and to s. 6 of the Transfer of Property Act, the compromise need not be regarded as illegal and contrary to public policy.

DIVATIA J. These two revisional applications have been preferred against one judgment of the Small Causes Court Judge at Poona.

The facts leading to the applications are shortly these :—On July 25, 1935, the father of opponents Nos. 1 to 4 obtained a decree for Rs. 236 against one Gangaram, employed as a postman in Poona. In 1938 the decree-holder filed a darkhast and prayed for the judgment-debtor's arrest. After he was arrested there was a compromise between him and the decree-holder on January 7, 1939, whereby it was agreed that the judgment-debtor's officer should withhold every month Rs. 6 out of his salary of Rs. 41 per month until the decretal amount was satisfied. The judgment-creditor made an endorsement on the agreement to the effect that an order may be passed to with-

1 (1907) I. L. R. 35 Cal. 61, 74,  
F.B.  
2 (1932) 35 Bom. L. R. 360.  
3 (1882) 9 Q. B. D. 357.  
4 [1939] A. I. R. Lah. 539.

5 [1940] A. I. R. Lah. 65.  
6 (1913) I. L. R. 37 Bom. 614,  
S.C. 15 Bom. L. R. 768, F.B.  
7 (1935) 38 Bom. L. R. 593.

hold Rs. 6 per month from his salary, and on the same day the learned Judge ordered the agreement to be recorded. The amount was not received by the judgment-creditor and he therefore filed darkhast No. 1251 of 1939 for executing the decree and prayed for attachment of the judgment-debtor's salary to the extent of Rs. 258. On March 14, 1939, the Small Causes Court sent an order under O. XXI, r. 48, to the Post Master General at Bombay asking him to send Rs. 6 every month to the Court in satisfaction of the decree. Thereafter on July 31, 1939, an application was made by the Post Master General to the Court out of which the first of the two revision petitions arises.

That application purports to have been made under O. XXI, r. 58, of the Civil Procedure Code, on the ground that the order was illegal as no portion of the judgment-debtor's salary was liable to attachment under s. 60 (i) of the Code of Civil Procedure. It was also urged that the agreement between the judgment-creditor and the judgment-debtor on which the order of attachment was based being a voluntary transfer of a public officer's salary was also illegal and opposed to public policy under s. 6(f) of the Transfer of Property Act as well as under s. 23 of the Indian Contract Act. It was further urged that this right of exemption from attachment and the restriction against voluntary transfer cannot be waived by the judgment-debtor as the attachment as well as transfer were void on the ground of public policy. It was therefore prayed that the attachment of the portion of the judgment-debtor's salary be raised and the order under O. XXI, r. 48, served on him should be cancelled.

On August 2 of the same year the judgment-debtor also applied to the Court to the same effect urging that the attachment was void under s. 60 of the Civil Procedure Code, and that the agreement entered into by him with the judgment-debtor was also void. The second revision petition arises out of this application.

Both these applications were heard together and the learned Judge framed issues as to whether the Post Master General was entitled to file the application, whether the judgment-debtor was entitled to waive the benefit under s. 60 of the Civil Procedure Code and whether the compromise by which the benefit had been waived was illegal and against public policy. He held that the Post Master General was not entitled to file the application, that the judgment-debtor was entitled to waive the benefit of s. 60 and that the compromise was neither illegal nor against public policy. For these reasons he rejected both the applications, and hence the Post Master General as well as the judgment-debtor have come to this Court in revision.

The main questions arising in both the applications are the same. With regard to the maintainability of the application by the Post Master General, the learned Judge held that it is not competent to the Post Master General to apply under O. XXI, r. 58. That rule provides that where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection. Rule 59 provides that the claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in,

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or was possessed of, the property attached. The learned Judge was of opinion that the Post Master General had no interest in the salary due to the judgment-debtor nor was he possessed of the same. Rule 60 says that the Court has to investigate as to whether for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him and there too the learned Judge was of opinion that it cannot be said that the Post Master General came within its provisions. Now the Post Master General's application was to set aside the order of attachment which the learned Judge sent to him under O. XXI, r. 48. Under that rule where the property to be attached was the salary or allowance of a public officer, the Court may order that the amount shall, subject to the provisions of s. 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct, and that upon notice of such order the officer shall withhold and remit to the Court the amount due under the order. It is provided under sub-r. (3) that every order made under that rule shall bind the Government while the judgment-debtor was within the local limits to which the Civil Procedure Code for the time being extended and that the Government shall be liable for any sum paid in contravention of this rule. The application purports to have been made under O. XXI, r. 58, and there is some force in the argument that he was not entitled to apply under the provisions of that rule read with rr. 59 and 60. But in my opinion there can be no doubt as to the Post Master General's right to apply to the Court if he thought that the order which he was asked to obey related to an attachment which is illegal and prohibited by statute. Order XXI, r. 48, is expressly subject to the provisions of s. 60 and all that he was doing was to bring to the Court's notice the illegality of the order especially as the Government would be liable for any sum paid in contravention of this rule. That would not amount to sitting in judgment over the order. It is only an application by a person who would be affected by the order that it should be vacated on the ground of illegality. The authority on that point which comes nearest to this case is in *Calcutta Port Commissioners v. Bhubaneshwar Prasad*<sup>1</sup>. There the judgment-debtor was a servant of the Commissioners for the Port of Calcutta and an order of attachment of his salary was sent to the Port Commissioners. They informed the Court that the wages of the judgment-debtor could not be attached as he was a seaman under the Indian Merchant Shipping Act. The judgment-debtor also applied in execution stating that his wages were not attachable. The Court, however, rejected that petition holding that the salary was not exempt from attachment and informed the Port Commissioners by a letter to send the attached sum to the Court. Thereupon the Port Commissioners applied to the High Court in revision to set aside that order. On behalf of the decree-holder an objection was taken to the *locus standi* of the Port Commissioners to apply to the Court for setting aside the attachment. It was held, however, that the Port Commissioners having received a direction from the Court in accordance with the provisions of O. XXI, r. 48, of the Civil Procedure Code, they were entitled to apply to the Court for setting aside the order of attachment. It was further held that under sub-r. (3) of that rule the Govern-

ment would be held liable for any sum paid in contravention of the direction of the Court and that therefore it cannot be said that they had no grievance. Their application was, therefore, entertained by the Court and the preliminary objection overruled. On similar reasoning, the Post Master General in the present case is entitled to come to the Court because the direction under O. XXI, r. 48, was also sent to him by the Court and he is affected by the order. I do not think, therefore, that the application of the Post Master General is not maintainable simply on the ground that it purports to be made under O. XXI, r. 58, which in terms may not apply to the facts of the case. In fact in one decision reported in *Secy. of State v. Ishar Das*,<sup>1</sup> the Court went to the length of holding that the Secretary of State's objection to the attachment of salary came under O. XXI, r. 58. Even though one may not go so far, it cannot be said that the application is not maintainable. It can even be preferred under the inherent jurisdiction of the Court.

On the merits it is contended on behalf of the applicants that the order of the learned Judge was illegal inasmuch as he has misapplied the provisions of s. 60 of the Civil Procedure Code as well as s. 6 (f) of the Transfer of Property Act. Under s. 60, proviso (i), the salary or allowance of a public officer or servant up to a certain limit shall not be liable to attachment or sale, and under s. 6 (f) of the Transfer of Property Act the salary of a public officer cannot be transferred whether before or after it has become payable. It is common ground that a postman is a public servant.

Taking the provisions of the Transfer of Property Act first, the learned Judge was of opinion that it did not apply to the agreement in the present case because the agreement created only a charge on his salary and the charge did not amount to a transfer. It is, however, clear that the learned Judge has erred in construing the agreement between the parties. The agreement was that the decree-holder was to receive Rs. 6 per month from the judgment-debtor's salary from his superiors before it was paid to him and that an order should therefore be passed on the defendant's officer to withhold Rs. 6 from his pay until the balance was satisfied. It means that that much part of his salary was transferred to the decree-holder for his decretal debt until it was satisfied. It does not amount to creating a charge on a part of the salary but it purports to assign the same in favour of the decree-holder who can recover it from the postal authorities. The agreement therefore amounts to a voluntary transfer and the judgment-creditor's application is to attach Rs. 6 every month out of the salary so assigned. Thus the case falls both under s. 6 (f) of the Transfer of Property Act and s. 60 of the Civil Procedure Code. It is obvious that the object of both these provisions of the prohibition of voluntary as well as involuntary transfers of the same kind of property must be the same. That object cannot be anything else except public policy or interest.

As observed in Halsbury's Laws of England (Hailsham Edition), Vol. IV, para. 869, p. 471 :

"There are some choses in action which have never been assignable ; and broadly speaking, it may be said that the ground of their non-assignability is denoted by that comprehensive expression 'public policy'. Thus public policy forbids that effect should be given to assignments of pensions and salaries of public officers payable to

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them for the purpose of maintaining the dignity of their office, or to assure a due discharge of its duties."

The question then is whether it is open to a person to contract himself out of these provisions or to waive their benefit. It is no doubt a general rule that any one may renounce a law introduced for his own benefit. But that rule applies only to rights and benefits of a personal and private nature created under an agreement or granted by law. There is a clear distinction between a contractual or a statutory right created in favour of a person for his own benefit and a right which is created on the ground of public interest and policy.

The rule of waiver cannot apply to a prohibition based on public policy. In *Graham v. Ingleby*,<sup>1</sup> Baron Alderson observes (p. 657):—"The principle upon which cases proceed is well founded and it is this that an individual cannot waive a matter in which the public have an interest. This principle has been recently applied by the Privy Council in *Gaekwar Baroda State Railway v. Hafiz Habib-ul Haq*<sup>2</sup> and by the Calcutta High Court in *Joggeshwar Mahata v. Jhupal Santal*.<sup>3</sup> Our High Court has similarly applied it to the rights created in favour of agriculturists in *Shankarlal v. Raghunathdas*.<sup>4</sup>

The learned advocate for the opponent has relied on a decision in *Shivayagappa v. Govindappa*.<sup>5</sup> It was held there that a compromise decree in a suit under the Dekkhan Agriculturists' Relief Act was not bad in law because it was not made in compliance with the special provisions of s. 15-B of that Act. That decision has, however, no application to the facts of the present case. The agreement there was in substitution of the provisions of s. 15-B and it was held that the decree based on the agreement was not unlawful or contrary to public policy. It was further held that that section would apply only where the Court in its discretion directed that the amount due was payable by instalments and that it should not be applied by analogy whenever a compromise was entered into.

The learned advocate for the opponents further relied upon two recent decisions of the Lahore High Court. The first one is in *Jagan Nath v. Allah Dad*.<sup>6</sup> There an employee of the North Western Railway had consented to a compromise decree in favour of his creditor agreeing to pay the decretal amount by monthly instalments. There being a default in payment of the instalments the decree-holder took out execution and attached the judgment-debtor's salary. Although the judgment is not quite clear, presumably the decree-holder was, under the compromise, given the right to satisfy the decree from the judgment-debtor's salary. It was held that the latter must be deemed to have contracted himself out of any benefit that s. 60 conferred upon him in the matter of the attachment of his salary and that it was open to him to waive that benefit. Reliance was placed upon a former decision in *Chittar Mal v. Mt. Ram Devi*<sup>7</sup> in which it was held that there was nothing in s. 60 to prevent an agriculturist voluntarily selling or otherwise alienating his house. Applying that authority by analogy it was held that a public officer can also enter into a compromise on similar terms with regard to the attachment of his

1 [1848] 1 Exch. 651.

2 (1938) 40 Bom. L. R. 811, P.C.

3 (1923) 1. L. R. 51 Cal. 234.

4 (1934) 37 Bom. L. R. 778.

5 (1913) 1. L. R. 37 Bom. 614,  
s. c. 15 Bom. L. R. 768, F.B.

6 [1939] A. I. R. Lah. 539.

7 [1935] A. I. R. Lah. 164.

salary. The effect of s. 6 (f) of the Transfer of Property Act was not considered. With respect, the decision is, in my opinion, wrong even under s. 60 of the Civil Procedure Code. As I have shown above, the compromise being opposed to public policy, a decree giving effect to it is also vitiated and cannot be executed by attachment of the salary.

The second case is reported in *Rajindar Kumar v. Chetan Lal*.<sup>1</sup> That was a case of a servant in the postal department. There again there was an award decree between the judgment-creditor and the postal servant. The question for decision was whether the provisions of s. 60 of the Civil Procedure Code could be waived by the judgment-debtor. It was held that that section was a prohibition only against forcible attachment and there was nothing in law to prevent a judgment-debtor from agreeing to the attachment of half of the salary even though it is exempt from attachment. Here also the provisions of s. 6 (f) were not considered. The same criticism would apply to this decision as to the former decision in *Jagan Nath v. Allah Dad*. In my opinion no distinction could be made between a forcible attachment under s. 60 of the Civil Procedure Code and a voluntary transfer under s. 6 of the Transfer of Property Act, if both these provisions are governed by public policy.

As a result, therefore, it must be held that the attachment of the salary as well as the transfer thereof are illegal and opposed to public policy. The decision of the lower Court is reversed and the rules in both the applications are made absolute with costs. Rule made absolute with costs in the stay petition also.

**BROOMFIELD J.** The principal point in these revision applications is whether a public officer, whose salary is exempt from attachment under s. 60 (i) of the Civil Procedure Code, can contract himself out of this statutory provision. The public officer in question is a postman or postal peon now drawing a salary of Rs. 41. A creditor got a decree against him for Rs. 236 and had him arrested, and in order to escape from arrest he agreed with his creditor that a sum of Rs. 6 per mensem should be deducted from his pay until the debt was paid. The executing Court acting on this agreement made an order under O. XXI, r. 48. This order was objected to both by the Post Master General and by the judgment-debtor, but the executing Court, the learned Small Causes Court Judge, Poona, overruled the objections, and revision applications have been made to this Court by both the Post Master General and the judgment-debtor.

Order XXI, r. 48, under which the salary of a public officer may be attached is expressly made subject to s. 60. The learned Small Causes Court Judge took the view that the exemption can be waived, relying on the principle which is expressed in the maxim *quilibet potest renunciare juri pro se introducto*. But to this principle there are many exceptions. If the privilege is purely personal, if the interests of third parties are not affected and in particular if there is no question of public interests or policy, no doubt the maxim is good law. But where a privilege is conferred for reasons of public policy, it is very well settled that it cannot be waived. My learned brother

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A. C. J. has referred to authorities on that point and I shall only mention the dictum of Lord Westbury cited by Mr. Justice Mookerjee in *Ashutosh Sikdar v. Behari Lal Kirtania*.<sup>1</sup> He said that the words "*pro se*" were introduced into the maxim, "to show that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation."

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The learned Judge below was apparently of opinion that no question of public policy was involved. But that view is obviously untenable. No other reason for the enactment of s. 6 (f) of the Transfer of Property Act can be suggested except public policy, and, as Sir Dinshah Mulla has pointed out in his commentary on the Act, it is opposed to public policy that the public officer should transfer the salary of his office, for the salary is given for the purpose of upholding its dignity and the performance of its duties.

On behalf of the opponent it was argued that in this particular case the agreement need not be regarded as contrary to public policy, because the amount to be withheld was only Rs. 6 out of a salary of Rs. 41. But the answer, to that is that the legislature has fixed the amount of salary which is to be exempted in the interests of public policy and it is not for the Courts to say that it is sufficient to reserve a lesser amount.

Although the learned Small Causes Court Judge seems to have taken the other view, it seems to me to be beyond dispute that this agreement was obnoxious to the provisions of s. 6(f) of the Transfer of Property Act. It was to all intents and purposes a transfer of the judgment-debtor's salary as it fell due in the future. The agreement must also be regarded as void under s. 23 of the Indian Contract Act.

We were referred to certain cases, decisions of single Judges in which it has been held that the provisions of s. 60 of the Civil Procedure Code can be waived. But there was no discussion there of s. 6 of the Transfer of Property Act, and with all deference to the learned Judges who decided those cases I am not prepared to follow them.

The other point which has been argued is whether the Post Master General has any *locus standi* to contest the order of attachment. The learned Small Causes Court Judge held that he had not, relying on r. 59 of O. XXI. There are no doubt difficulties in the way of holding that the Post Master General's objection came within the terms of r. 58 under which it purported to be made. The difficulty seems to me to lie not so much in the terms of r. 59, which are sufficiently general, but in the fact that the subsequent rr. 60 and 61 suggest that the sort of objection contemplated in these rules is an objection by a person claiming some interest in the property for himself and adversely to the judgment-debtor. However this may be, similar applications have been held to come under r. 58, e.g. in the case to which my learned brother has referred, *Secy. of State v. Ishan Das*,<sup>2</sup> and in *Calcutta Port Commissioners v. Bhubaneswar Prasad*<sup>3</sup> it was held that a public body was entitled to appear and object to an order under O. XXI, r. 48, in respect of one of their employees. The reason given for this view was that they would be liable for any sum attached in contravention of the direction of the Court by reason of sub-r. (3) of r. 48. So that it could not be said that they had no grie-

<sup>1</sup> (1907) I. L. R. 35 Cal. 61,  
74, F.B.

<sup>2</sup> [1936] A. I. R. Lah. 761.

<sup>3</sup> [1938] 1 Cal. 433.



vance and must be held that they had a *locus standi* to make the application.

In *Shamus Patter v. Abdul Kadir Ravuthan*<sup>1</sup> their Lordships of the Privy Council said that even in the absence of an express provision in the Code "every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties." Where an order is made against Government or a public body, and when the law imposes liability in case the order is not obeyed, as is the position here, it would in my opinion be unreasonable and unjust to hold that it is not open to Government or to the public body as the case may be to move the Court and contend that the order is not justified by the law, and there must I think be inherent power in the Court to consider such an application. This view has also been taken in *Prem Chand v. Mulkh Raj*.<sup>2</sup>

We have only been referred to one case in which it has been held that the disbursing authority in a case of this kind is not competent to apply to the Court, and that is a decision of Mr. Justice Wassoodew in *Governor General in Council v. Magniram Mayachand*.<sup>3</sup> The facts there were not the same. The Postal Officer to whom an order under O. XXI, r. 48, had been sent refused to obey the order on the ground that it was contrary to s. 60. The decree-holder made Government a party and after hearing the parties it was directed that the prohibitory order should be returned to the Postal Department for necessary action. Government then filed a revision application. Mr. Justice Wassoodew said that having regard to the provisions of O. XXI, r. 48, the officer of the Postal Department could not sit in judgment over the order of the executing Court and he also said that the Court alone has to decide whether the salary is attachable or not and it is principally a question between the judgment-debtor and the decree-holder with which the officer is not concerned. With all deference to the learned Judge, we consider that, though the Court's order must of course be obeyed and there is no question of the officer to whom it is sent sitting in judgment over it, there is nothing in law which prevents him protesting against the validity of the order. There can be no reason why an officer of Government should be in a worse position in that respect than an ordinary party. We are, moreover, unable to agree with the dictum of the learned Judge that in cases like this there is nothing but a question between the judgment-debtor and the decree-holder with which Government is not concerned. If, as we think, questions of public policy are involved, Government is undoubtedly concerned in the matter. The question cannot be regarded as purely academic since the public officer whose pay is attached or sought to be attached may not always be willing to make an application himself, and if no application could be made by Government or the public body, the provisions of s. 60 of the Code and of s. 6 of the Transfer of Property Act might become a dead letter.

I agree, therefore, with the order proposed by my learned brother.

*Rules made absolute.*

1 (1912) L. R. 39 I. A. 218, 223,  
s. c. 14 Bom. L. R. 1034.

2 [1939] A. I. R. Lah. 380.

3 (1938) Civ. Rev. Application

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*Indian Succession Act (XXXIX of 1925), Sec. 219—Letters of administration—Joint grant—Persons standing in equal degree of kindred to deceased—Discretion of Court.*

Under s. 219 of the Indian Succession Act, 1925, the Court has a discretion whether, or not, to grant joint letters of administration to persons who stand in equal degree of kindred to the deceased. It is not bound to make a joint grant; it may grant letters of administration to any one of them.

*Stoney v. Stoney*,<sup>1</sup> followed.

PETITION for letters of administration.

A Parsi by the name of Ijiarji Behramji died on April 25, 1916, leaving behind him his widow, Rudibai, and four daughters, Awabai, Virbai, Dinbai and Motibai.

After Ijiarji's death, his widow, Rudibai, and daughter, Awabai, took out letters of administration to his estate. They brought a suit against Ijiarji's brothers and a nephew to recover Ijiarji's property in their possession. A decree was obtained in the suit and a darkhast was filed by them to execute that decree, but both of them died subsequently and the decree remained unexecuted. The property of Ijiarji, which was the subject-matter of the suit, was in possession of a receiver appointed by the First Class Subordinate Judge's Court, Thana.

Awabai died leaving her husband and three minor daughters.

Virbai died leaving three children.

Motibai then applied for letters of administration *de bonis non* to the estate of Ijiarji.

Dinbai, who was older than Motibai, had sold away her interest in her father's estate, but she objected to the granting of letters of administration to Motibai alone. She alleged that Motibai had also disposed of her interest in the estate and submitted that she was entitled with Motibai to a joint grant. Motibai produced a decree declaring the assignment of her interest in the estate to be null and void.

The Assistant Judge, who heard the petition, held that Motibai was beneficially entitled to a share in the estate of her father and granted letters of administration to her.

Dinbai appealed to the High Court.

*L. G. Khare*, for the appellant.

*R. S. Dixit*, with *K. L. Agaskar*, for the respondent.

BEAUMONT C. J. The question on this appeal is whether the appellant or respondent No. 1 should be granted letters of administration *de bonis*

\* First Appeal No. 304 of 1939,  
from the decision of S. M. Kaikini,  
Assistant Judge, Thana, in Civil Suit

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1 (1923) I. L. R. 2 Pat. 508.

*non* to the estate of one Ijjarji, a Parsi, who died in 1916. Letters of administration were granted after a suitable interval, that is in 1924, to the widow and one daughter. The parties seem to have been litigating ever since, and the estate has not been administered. We are told that in fact nothing has been done towards the administration of the estate. The widow and the daughter, who were the administrators, have died, and an application was made by the plaintiff, who is another daughter, for letters of administration *de bonis non*, and that was opposed by defendant No. 1, who is an elder daughter. The learned Assistant Judge refused to grant letters of administration to defendant No. 1, because she admitted that she had disposed of the whole of her interest in the estate. She alleges that the plaintiff has also disposed of her interest. But the plaintiff has succeeded in obtaining a decree from the Subordinate Judge of Dahanu declaring the assignment of her interest in the estate to be null and void. The learned Assistant Judge, from whose decision this appeal is brought, took the view that the plaintiff was entitled to receive grant.

The question as to the persons entitled to a grant in the case of a deceased, who is not a Hindu, Mahomedan, Buddhist, Sikh or Jain, is determined by s. 219 of the Indian Succession Act, 1925. Sub-clause (c) provides that if there is no widow, or if the Court sees cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate. I apprehend that that means who would be beneficially entitled to the estate, if nothing had intervened to prevent them being so entitled. That is to say, the Court has to look at the rules for the distribution of the intestate's estate and find out who according to those rules would be entitled to the estate, if there was any estate, because the whole estate may be going to creditors. I doubt whether the fact of one of the beneficiaries having assigned her share is relevant. Now, here the appellant and respondent as two daughters stand in equal degree of kindred to the deceased and under sub-clause (d) are equally entitled to administration. It is argued therefore for the appellant that she is entitled with the respondent to a joint grant.

The respondent has referred us to *Stoney v. Stoney*<sup>1</sup> in which case the learned Chief Justice in his judgment refers to s. 204 of the Indian Succession Act then in force, which corresponds to s. 219 of the present Act, and comes to the conclusion that the Court is not bound to grant joint letters of administration to the parties entitled in equal degree, and that *prima facie* the Court should lean against joint administration. That decision was given in 1923, that is to say, before the present Indian Succession Act was passed, and the wording of the relevant section was maintained. So that one may assume that the legislature was not minded to overrule that decision. Whether I should have arrived at the same conclusion myself, it is not necessary to consider, because the construction put upon the Act is an eminently sensible one, and I think, we may follow it. If we have any discretion in the matter, it seems to me perfectly clear that

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A. C. J. it is not desirable to grant joint administration to the two daughters who are quarrelling and who belong to a family which, owing to family disputes, has managed to evade winding up this estate for more than twenty years.

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I think, therefore, the appeal must be dismissed with costs.

MACKLIN J. I agree.

*Appeal dismissed.*

Beaumont C.J.

*Before Mr. Justice Divatia.*

1941

RAGHUNATH AMBAIDAS SHET CHITODE

v.

March 4.

DWARKABAI JAGANNATH SHET CHITODE.\*

*Hindu law—Maintenance—Widow—Joint family—Claim for arrears of maintenance during husband's life-time—Right attaches to property in which her husband has interest—Liability of person in possession of such property—Suit brought against coparcener for arrears of maintenance after husband's death—Right of widow for maintenance not similar to right of creditor.*

Under the Hindu law the right of a wife or a widow for maintenance against the husband as well as the members of her husband's joint family is not the same as the right of a mere creditor against the estate arising out of contract, but is a right which attaches to her status as a member of the joint undivided family. In the case of a widow this right attaches to the undivided share in the property which her husband would have got by partition if he had been alive and she is entitled to follow the property in the hands of the coparcener taking it. The property is liable as much for arrears of past maintenance as for future maintenance. The right to demand the arrears exists against the husband or the surviving coparcener or any person who has inherited his separate property.

The rule that a creditor cannot follow the property in the hands of a surviving coparcener, unless it has been previously attached during the lifetime of the deceased coparcener, does not apply to the case of a Hindu widow both for arrears of maintenance as well as for future maintenance.

The claim of a Hindu widow for arrears of maintenance, which have accrued due during the lifetime of her husband, is not a personal cause of action which dies with his death, but it exists against the husband's property which comes to the hands of either his heir or his surviving coparcener.

*Lakshmi Devi Amma v. Nagamma*,<sup>1</sup> referred to and followed.

SUIT for arrears of maintenance.

The plaintiff Dwarkabai's husband, one Jagannath, and his brother the defendant, Raghunath, were members of a joint Hindu family. She was married to Jagannath in 1924. She alleged that her husband, her mother-in-law and the defendant, treated her with cruelty and that about the middle of 1926 she was driven out of the house by her husband.

\* Second Appeal No. 448 of 1939, from the decision of T. B. Shanbhag, Assistant Judge, Jalgaon, in Appeal No. 138 of 1937, confirming the decree

passed by R. H. Mirajkar, Subordinate Judge, Yawal, in Regular Civil Suit No. 720 of 1935.

1 [1925] A. I. R. Mad. 757.

Jagannath married a second wife and died in 1934. The defendant was the sole surviving coparcener and was in possession of the entire joint family property. The plaintiff filed a suit on September 19, 1935, against the defendant claiming arrears of maintenance from September 24, 1926, down to the date of the suit at the rate of Rs. 500 per year.

The defendant in his written statement contended *inter alia* that the plaintiff was never ill-treated by any one, that she did not stay with her husband although repeated attempts were made to fetch her, that she was not driven out of the house, that the joint family was not liable for the plaintiff's claim for arrears of maintenance during her husband's lifetime, and that he was willing to pay Rs. 75 as maintenance for the year 1935-36.

The Subordinate Judge awarded arrears of maintenance at the rate of Rs. 300 per year for the period of nine years claimed in the suit. He passed a decree for Rs. 2,700 with costs in favour of the plaintiff.

On appeal the Assistant Judge confirmed the decree.

The defendant appealed to the High Court.

A. G. Desai, for the appellant.

P. B. Shingne, with P. B. Gajendragadkar, for the respondent.

**DIVATIA J.** This appeal arises in a suit by the plaintiff to recover Rs. 4,000 by way of arrears of maintenance from the joint family estate in which her deceased husband had a half share. The plaintiff is the widow of one Jagannath who died in the year 1934. Her marriage took place in 1924, but two years thereafter she had to leave her husband's house on account of excessive cruelty and ill-treatment by her husband and mother-in-law. Thereafter she remained in her father's house and in 1935, after the death of her husband, she brought the present suit to recover the arrears of her maintenance at the rate of Rs. 500 per year from 1926 up to the date of the suit in September, 1935. The claim is confined to this period and does not extend to her future maintenance out of the joint family property. The defendant is her husband's brother who has taken the whole of the family property by survivorship. The plaintiff was met with the plea that she was not driven out of the house but she went away of her own accord, that she was maintained all along by her father and that the defendant was not, therefore, liable for the maintenance claimed by her. It was also contended that the claim, which was restricted to arrears of maintenance during her husband's lifetime and for one year after his death, cannot be enforced against the defendant who has taken the property in his independent right as a surviving coparcener.

Both the lower Courts have granted the plaintiff's claim to the extent of Rs. 300 per year, and have decreed the amount of Rs. 2,700 for the arrears of maintenance for nine years. The finding of the lower appellate Court is that the plaintiff was exceedingly ill-treated, that she was put in fear of her life, and that notwithstanding her submission to these cruelties, she was driven out of her husband's home for no fault of hers. It was also found on the evidence that the income of the joint family property was between Rs. 4,000 and Rs. 5,000 a year during the period in dispute, and the defendant as a surviving coparcener was now in possession of the whole of the family in-

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come. There was another widow of Jagannath as well as his mother who were also entitled to maintenance out of the joint family estate, and taking that fact into consideration the lower Courts have allowed the plaintiff Rs. 300 per annum.

The defendant now appeals against that decree, and the principal point urged on his behalf is that he as a surviving coparcener is not bound to pay any amount for arrears of maintenance. The contention is that whatever may be the defendant's liability for the future maintenance of the plaintiff which is not claimed in the present suit, there is no liability for arrears inasmuch as it was only a personal claim against Jagannath for which the latter might have been liable if the suit was brought during his lifetime, but that cause of action does not survive on his death with the result that the property which the defendant gets by survivorship is not in any way responsible for the plaintiff's claim. It is also contended that if the arrears of maintenance are to be regarded as analogous to a debt due by the husband to the plaintiff, the defendant is not liable after the husband's death unless the husband's share had been attached during his lifetime in a suit by the plaintiff as a creditor.

The latter argument may be disposed of first. It is clear that under the Hindu law the right of a wife or a widow for maintenance against the husband as well as the members of her husband's joint family is not the right of a mere creditor against the estate arising out of a contract, but is a right which attaches to her status as a member of the joint undivided Hindu family. It is a cardinal principle of Hindu law that although she is not a coparcener taking interest by birth, she is a member of the joint family and continues as such even after her husband's death. Uptil the passing of the recent Act of 1937, by which the right to a share was given to her after her husband's death, she had a right during as well as after her husband's lifetime of demanding maintenance as well as residence from the property, whether it is undivided or divided, belonging to her husband. It has been laid down in a number of decisions that this right of a widow attaches to the undivided share in the property which her husband would have got by partition if he had been alive. As I have recently observed in the case of *Secretary of State v. Ahalyabai*,<sup>1</sup> this right of maintenance attaches to the property itself which is taken by the surviving coparcener, and it has been treated as a burden on inheritance with the result that the widow is entitled to follow such property in the hands of the coparcener taking it. This proposition is conceded by Mr. Desai on behalf of the appellant in so far as her right to future maintenance is concerned. But I am of the opinion that it also applies to the arrears of maintenance accrued due, because if the property belonging to the husband is liable for her maintenance, it must be liable as much for arrears as for future maintenance. It is true that the amount as well as the period for which arrears are to be decreed will depend upon the exigencies of the widow and the facts of each particular case, but the right to demand the arrears does exist whether against the husband or against the surviving coparcener or any person who has inherited even the separate property of

her husband. That being so, the rule that a creditor cannot follow the property in the hands of a surviving coparcener unless it has been previously attached during the lifetime of the deceased coparcener, cannot apply to the case of a Hindu widow both for arrears of maintenance as well as for future maintenance.

The next point is whether a claim for arrears, which have accrued due during the lifetime of the husband, is such a personal claim as would die with his death. In *Ramabai wife of Bhikaji Bhaskar v. Trimbak Ganesh Desai*<sup>1</sup> our High Court allowed a claim for maintenance in favour of a wife, who had been deserted by her husband, as against the manager of a joint family although the husband was alive. It was held that the husband had gone away out of the family and his share in the property remained in possession of the manager of the joint family. The manager was therefore liable for the wife's claim for maintenance on the principle of Hindu law that the undivided share of the husband in the family property is liable for the wife's claim for maintenance. Here, the husband is now dead and the cause of action against the husband for arrears of maintenance for eight years no doubt arose during his lifetime. But was the widow bound to sue during his lifetime? If the widow is entitled to sue for arrears of maintenance, it would not matter whether the arrears claimed accrued during her husband's lifetime or thereafter so long as there is property against which they can be enforced. It would follow from the principle that the husband's property was always liable, that even for arrears of maintenance the surviving coparcener would be liable if he is in possession of the husband's share.

There is at least one decision, though not in the authorised series of reports, which applies to the facts of the present case. That is a decision of the Madras High Court in *Lakshmi Devi Amma v. Naganna*.<sup>2</sup> There maintenance was claimed by the wife of a Zamindar who had abandoned her after having treated her with habitual cruelty. She lived away from him for nearly twenty-three years and then sued him for arrears of maintenance for twelve years preceding the suit. The husband died during the pendency of the suit and his two sons were brought on the record in his place in the suit. The claim for arrears of maintenance for twelve years was decreed against the sons on the ground that the death of the husband pending the suit did not deprive her of her rights of maintenance and that she could enforce the rights against the husband's heirs at law. The decision is based on two grounds, firstly, that the obligation of a husband to maintain his wife is one arising not out of contract but out of the status of marriage, that is a liability created by the Hindu law and that it could be enforced against the property belonging to the husband in the hands of the surviving coparcener as well as the heir. Secondly, the general rule of a personal action dying with the person does not apply to the right of a Hindu wife against her husband for maintenance, that there was an obligation arising out of status, that under the Hindu law although the wife of a coparcener may not be entitled to a share in the estate of the family or to enforce a partition, there was no doubt as to her being entitled to maintenance from the joint family estate,

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1 (1872) 9 B. H. C. R. 283.

2 [1925] A. I. R. Mad. 757.

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that on the death of the husband the true legal representatives in the action would be the surviving coparceners of the family, or the personal legal representatives of the deceased husband, and that the arrears of maintenance due and payable to a wife by her husband could also be held to be a debt within the meaning of the Hindu law, which has regard only to undischarged obligations and to which the distinction between debts and damages was foreign.

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*Divatia J.*  
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With respect I entirely agree with the reasons given by the learned Judges in that decision. The only difference between that case and the present is that here the suit is brought one year after the death of the husband, while there the suit was filed against the husband and he died during the pendency of the suit. But the point involved is the same, namely, whether the claim for arrears accrued due during the lifetime of the husband is a personal cause of action or whether it is one against the property in the hands of either the heir or the surviving coparcener. It is no doubt true that the husband's liability to maintain his wife is personal in its nature. That does not, however, mean that the liability is only of the nature of a personal obligation, and therefore affords only a personal cause of action. It is also a liability which attaches to property. What is meant by personal liability of the husband is that it could be enforced not only against the property belonging to the husband, but in absence of such property also against the person of the husband by his arrest and detention in prison. It has been held that though the future maintenance cannot be assigned, arrears of maintenance can be assigned by a widow. That is to say, it has been regarded as a debt which could be transferred, and it is so because it is a debt which can be enforced against any person. If the husband had been sued during his lifetime, he would clearly have had no answer to the wife's claim, and there is no reason why the surviving coparcener, whose share in the estate is enlarged by the husband's death, should not be bound to pay not only future maintenance but also arrears of maintenance accrued due during the husband's lifetime, if the right of maintenance is founded upon the property of her husband and is not merely a personal obligation.

Mr. Desai sought to make a distinction between an heir and a surviving coparcener but no such distinction could be recognised with regard to the claim of a widow for maintenance which is founded not upon the nature of the succession but upon possession of the property belonging to the husband. The principle is that whoever has got the property is liable for the widow's maintenance. If the heir is liable, much more would the surviving coparcener be liable inasmuch as he was a member of the joint family along with the deceased, and, therefore, liable to maintain his widow who is also a member of the joint family.

I think, therefore, both the lower Courts were right in holding that the defendant was liable for the plaintiff's claim for arrears.

The other contentions are with regard to the amount as well as the period. So far as the period of maintenance is concerned, the recent decision of the Privy Council in *Ekradeshwari Bahuasin v. Homeshwar Singh*<sup>1</sup> is a clear



authority for the proposition that a widow is entitled to maintenance as well as arrears thereof from the date of her leaving her husband's residence, although she does not prove that she had incurred debts in maintaining herself.

Then with regard to the amount, both the lower Courts have held that Rs. 300 per year would be a reasonable amount. Looking to the income of the family, which is about Rs. 4,000 to Rs. 5,000 per year, I do not think that I would be justified in interfering with the discretion which the lower Courts have exercised on the facts in granting Rs. 300 per year for arrears of maintenance.

It is unfortunate that the widow did not pray for future maintenance in this suit which is confined only to the arrears. However, I am told that a separate suit has been filed by her for future maintenance. This suit being confined to arrears, there is no question of making any distinction between future maintenance and arrears, and the lower Courts were, therefore, justified in viewing the evidence only from the standpoint as to whether the widow was entitled to arrears and, if so, how much.

The decree of the lower appellate Court is, therefore, confirmed and the appeal is dismissed with costs.

*Appeal dismissed.*

#### PRIVY COUNCIL.

[*On appeal from the High Court of Judicature at Allahabad.*]

*Present :*

LORD ATKIN, LORD THANKERTON, AND SIR GEORGE RANKIN.

MAHARANI HEMANTA KUMARI DEBI

*v.*

GAURI SANKAR TEWARI.

1940

December 4.

*Hindu law—Endowment—Dedication—Complete or partial dedication—Relinquishment of property by donor—Ghat on the Ganges at Benares—Ghatias of Benares—Right of ghatias over the ghat—Practice—Suit decreed as prayed, not a proper form of order.*

Under Hindu law, the dedication of property to religious or charitable uses may be complete or partial. In the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object, but also where the owner retains the property in himself and grants the community or part of the community an easement over it for certain specified purposes.

*Jaggamoni Dasi v. Nilmoni Ghosal*,<sup>1</sup> referred to.

<sup>1</sup> (1882) I. L. R. 9 Cal. 75.

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Under Hindu law in the usual case of complete dedication made to an idol the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is by no means the only form of dedication known to the law and is very different from anything that can ordinarily be inferred from the public user of a highway. From the standpoint of the Hindu law it is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated.

*The Chairman, Howrah Municipality v. Khetra Kristo Mitter*,<sup>1</sup> referred to.

Whether the property be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it descends and is alienable in the ordinary way, the only difference being that it passes with the charge upon it.

The land or other property of a bathing ghat on the banks of the Ganges at Benares dedicated to such a purpose, is dedicated to an object both religious and of public utility, notwithstanding that it is not dedicated to any particular deity; but from such dedication it cannot be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object.

The river bank at Benares is a sacred and historical spot with a powerful claim to the regard of a pious Hindu; but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication; rather does it begin by acts of user which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety.

The ghatias of Benares as members of a class have no customary right to claim exclusive possession of portions of a public bathing ghat by placing platforms or canopies over them in order to carry on their profession. No individual ghatia can have any right by custom to exclusive possession of any parts of the ghat either by prescription or lost grant.

A right to stand, sit or squat on a ghat for the purposes of exercising the profession of ghatias may be acquired by consent of the owner of the ghat.

It is the usual but not correct practice to order "that the plaintiff's suit as prayed be decreed" without formally stating the terms of the various orders, declarations and injunctions which the Court is granting.

There was a ghat on the bank of the river Ganges as it flowed past the city of Benares, which the plaintiff's predecessor had purchased and rebuilt in the year 1814. No express dedication of the ghat to the public was proved by the production of a deed of endowment or otherwise. No manager was ever appointed, nor was it shown that the plaintiff or her predecessor had purported to act as superintendent, sebaite or mutawalli. They were treated as owners

whenever there was disrepair of the ghat, which they repaired at their own expense. They closed it to bathers on proper occasions and levied tolls on the keepers of shops at festivals. Their expenditure on the ghat often exceeded their receipts and they never wished to make a profit from the tolls. There was evidence as to agreements taken from ghatias upon nearby ghats :—

*Held*, that the above evidence pieced together showed that the plaintiff had a proprietary right in the ghat and the soil underneath it.

THE plaintiff Maharani Hemant Kumari Devi sued to establish her proprietary right to a ghat on the river Ganges at Benares which was known as the Prayag Ghat and to which the Hindu pilgrims resorted for bathing and for performance of religious ceremonies. She also sought to eject the defendants from the ghat. The defendants, who were ghatias engaged in assisting pilgrims in the performance of their religious rites, disputed the plaintiff's claim to proprietorship and to her right to eject them.

Benares or Kashi was a holy city for the Hindus. The river Ganges or Ganga was held sacred by the Hindus and more particularly in its passage by Benares. A pilgrimage to Benares was incomplete without bathing in the river and bathing was not efficacious without the performance of essential religious ceremonies. The performance of religious rites required the presence of a priest. From times immemorial classes of priests known as ganga-putras, sons of the Ganga, and ghatias, or men of the ghats, ministered to the pilgrims resorting to the river ghats or banks for the performance of religious ceremonies.

"They (ghatias) place takhats (wooden platforms), make kachcha (temporary) chabutras on the steps of the ghat, put up palm leaf umbrellas to afford shelter to the pilgrims from the sun and the rains. They shift their positions at the ghat according to the rise and fall of the river and look after the clothes and other articles which are entrusted to them by the bathers. They provide 'asan', kusha, rori, comb, mirror and chandan to the pilgrims after the completion of their baths and also recite 'tarpan' and 'sankalp' for those who ask for them and assist the bathers in their religious performances. They also tie cows to induce the people to acquire the merit of 'Gaudan' by spending a few pice. In lieu of the services which are rendered by them, they receive alms in the shape of pice, half pice, dal, kichri, grain, vegetables, sweets, and thus eke out their livelihood. They have been plying their profession in this manner from times immemorial."

Wealthy and pious Hindus built ghats of masonry structure with steps down to the river and dedicated them to the public. The predecessor-in-title of the plaintiff built a ghat called the Prayag Ghat and dedicated it to the public.

On February 15, 1929, the plaintiff brought the suit alleging that she was the owner of the ghat; that the defendants who were ghatias had been sitting on the ghat with her leave; that they had abused the leave by putting temporary platforms which were causing inconvenience to the bathers and pilgrims; that the defendants were causing damage to the ghat by cutting holes in the stairs and pavement and fixing poles, by constructing fire hearths, &c.; that the defendants were mere squatters and had no right to sit on

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the ghat as ghatias without her leave ; and that she was unwilling to permit them to sit on the ghat. She prayed for a declaration that she was the owner of the Prayag Ghat and that the defendants had no right to sit on the ghat. She prayed for a decree ordering the ejectment of defendants from the ghat and for removal of the railings; planks, fire hearths, canopies, etc., which might be found to have been placed by the defendants on the ghat. She also sought for a permanent injunction restraining them from using as ghatias any portion of the ghat.

The defendants' principal pleas were that they belonged to the community of ghatias which had been engaged for centuries in assisting the Hindu pilgrims at the ghat ; that their services were essential for the performance by the Hindu public of their religious ceremonies ; that the plaintiff had, by reason of the dedication of the ghat, ceased to be its owner ; and that they had a right to continue to sit on the ghat as ghatias. They also pleaded that they had acquired a right whether by grant, prescription or custom to the portions of the ghat habitually occupied by them and that they had a right to retain their paraphernalia on the ghats for the proper and efficient discharge of their duties as ghatias.

The trial Judge held that the ghat had been dedicated to the public, but, in his opinion, such dedication did not divest the donor of his right of ownership. He also held that the ghatias had acquired no rights by adverse possession or by custom and that they were liable to be ejected. In the result, he passed a decree as claimed by the plaintiff.

The defendants appealed to the High Court. On March 27, 1935, Thom and Iqbal Ahmad JJ. were of the opinion that the appeal should be heard by a full bench. Accordingly, on January 3, 1936, a full bench of the High Court, consisting of Sir Sulaiman C. J., Bajpai and Ganga Nath JJ., held that as the ghat had been dedicated to the public, the plaintiff could not claim ownership over it and she was not entitled to the declaration that the ghat was her property. In their view, the plaintiff was manager of the ghat and was entitled to maintain the suit. As to the position of the ghatias, they held that the ghatias had not acquired any right by prescription nor were they entitled to occupy portions of the ghat exclusively by custom. The public, however, had a right to be served by ghatias and as such the ghatias by reason of their being ghatias and as members of the public would be entitled to sit on the ghat and receive remuneration for their services. The ghatias were, however, not entitled to put up takhats, &c., as that would interfere and restrict the right of the public. In the result, they refused the declaration sought by the plaintiff that she was the absolute owner of the ghat and also rejected her claim to eject the defendants from the ghat. They, however, upheld her claim to a decree for the removal of the railings, planks, fire hearths, earth-mounds, canopies, bamboo poles, &c., which might be found to have been placed by the defendants (58 All. 818).

The plaintiff appealed to His Majesty in Council.

*C. S. Rewcastle K. C.* and *C. Sidney Smith*, for the appellant. The ghat came to the plaintiff's estate by purchase. She and her predecessors-in-title

have always treated the ghat as being part of their own property, and have spent considerable sums in repairs accordingly.

The presence of ghatias is in no way essential to the carrying out of holy bathing rites, and they did not exist before 1821. Evidence was before the High Court with regard to the position in other ghats which ought to have made it impossible to hold that the defendants had the right which the Court has accorded them. Ghatias in other ghats were proved only to be sitting there by leave and licence of the owners, and the evidence clearly showed that those ghatias were not protected by any custom, or by any right by grant or prescription to any specific part of any ghat. The Court should have made similar findings with regard to the defendants here. It is submitted that if the defendants have no right or duty to minister to members of the public visiting the ghat in order to bathe, they cannot lay claim to specific sites on the ghat. The two claims are inseparable; the first is clearly not maintainable, therefore the second, it is submitted, necessarily fails.

Next, there cannot be any valid ground for holding that the plaintiff is a mere mutawalli of the ghat; what dedication of the ghat for use by the public for bathing has taken place is not such as to have deprived the plaintiff's predecessors of their full ownership. The law relating to dedication of highways is applicable. That law in India is the same as in England: *Maharaj Bahadur Singh v. Paresh Nath Singh*.<sup>1</sup> [Counsel referred by name to the leading English cases on dedication].

*J. M. Parikh*, for the respondents. The respondents ghatias claim nothing but a right to sit on the ghat, and of that right they ought not be deprived by ejectment. They are prepared to refrain from causing any obstruction because they are only concerned to perform the ceremonies for which they frequent the ghat. What is given to these Brahman ghatias by the bathers is not alms, it is a pious gift. The services which the ghatias render to bathers are essential to the proper use of the ghat for bathing purposes. The ghatias have the right to frequent the ghat both as members of the public and because of their function of ministering to the needs of the pilgrim bathers. It is no part of the respondents' case that they are entitled to occupy any specific part of the ghat, or that they have any proprietary right in its soil. [Counsel referred to *Vidya Varuthi Thirtha v. Balusami Ayyar*.<sup>2</sup>]

Next, it is submitted that the ghat is the subject of a dedication at Hindu law. Such a dedication is complete, and left the plaintiff's predecessors, as it now leaves her, a mere mutawalli of the ghat. The Mitakshara recognises no such limited dedication as that for which the plaintiff contends. The dedication has clothed the ghat with the character of a public trust; it is trust property in which the plaintiff can have no rights of ownership. The suggestion that the ghat is subject only to a limited dedication for the purpose of granting the public a right of passage to and from the river is untenable. This is a full dedication, the donee being the ghat itself, in

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1 (1904) I. L. R. 31 Cal. 839.

2 (1921) L. R. 48 I. A. 302,  
s. c. 24 Bom. L. R. 629.

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the absence of any temple. From the fact of the dedication it follows that the public should be afforded all facilities in and about the performance of religious duties at the ghat. The principle laid down in *Chotalal Lakhmi-ram v. Manohar Ganesh Tambekar*<sup>1</sup> is applicable.

These ghatias, it is submitted, are clearly persons whose rights, by virtue of long-established practice, should be protected. There is even evidence that succession is operative among them.

[LORD THANKERTON. The plaintiff here sues as owner. She can only be debarred from suing in that capacity if, as you contend, a dedication has taken place which has deprived her predecessors of their ownership.]

This is a very ancient dedication. A dedication is analogous to a gift. Counsel referred to Mulla's Hindu Law (8th ed.), s. 406 and to Macnaughten's Hindu Law (1829), pp. 213-217. The Mitakshara nowhere suggests that the kind of right which flows from dedication can be conferred apart from the property itself. There is no power under the Mitakshara to make a gift of incorporeal property : see Mulla, ss. 406, 407.

*P. V. Subba Row*, following, referred to *United Provinces District Gazetteer*, at p. 242, Havel's "Benares, The Sacred City" and to Monier Williams' "Non-Christian Religious Systems" at p. vii, and submitted that the ghat was public property of which the plaintiff or her predecessors had assumed ownership.

*Rewcastle*, in reply. There is no authority for the proposition that a dedication can only be complete in the sense of passing the proprietary rights in the property dedicated. See *Jaggamoni Dasī v. Nilmoni Ghosal*.<sup>2</sup>

*Cur. adv. vult.*

SIR GEORGE RANKIN. The sanctity which Hindu thought and feeling attribute to the Ganges and the special veneration which its stream commands at it flows past the holy city of Benares (Kashi) are manifested by the temples and bathing ghats upon the banks. The efficacy of its waters to wash away every form of sin and pollution is widely accepted doctrine among the orthodox and brings the Hindu pilgrim in large numbers seeking to acquire religious merit and advantage. According to evidence given in the present case "Mankarnika, Dasaswamedh, Panch Ganga, Assi and Barna are the *panch tirthas* of Kashi : one who comes to Kashi on pilgrimage has to visit all these five places." In this appeal their Lordships are concerned with a bathing ghat which is known as the Prayag or Puthiya ghat and which is covered by the name Dasaswamedh—the name of a mohalla of the city.

The suit was brought on February 15, 1929, in the Court of the Additional Subordinate Judge of Benares. The plaintiff was Maharani Hemanta Kumari Debi, widow of the last male owner of the Puthiya Raj estate. She claimed to be owner of the ghat. She will be referred to as "the plaintiff" notwithstanding that pending this appeal she has by relinquishment accelerated the interest of her husband's reversioners who have been joined with her as appellants to His Majesty in Council. She impleaded six sets of defendants,

1 (1899) L. R. 26 I. A. 199,  
s. c. 2 Bom. L.R. 516, I.L.R.

24 Bom. 50.  
2 (1882) I. L. R. 9 Cal. 75.

fourteen persons in all, alleging that they belonged to a class of Brahmins known as ghatias and that they, and their predecessors, had been allowed by the owners of the ghat to sit on different portions of it in order to gain a livelihood by receiving alms and gifts from pilgrim bathers. She complained that the defendants were abusing the permission granted to them, by altering the condition of the steps, putting down platforms of earth and wood, erecting canopies, and blocking up the free space to the detriment of the utility, cleanliness and beauty of the ghat. She alleged that the defendants were mere squatters; that she had been willing to allow them to continue to sit on the ghat if they would execute written agreements for the proper conduct of the ghat; but that they had failed or refused so to do. She asked for relief in different forms—a declaration that she was the owner of the ghat and that the defendants had no right to sit on any portion of it; an order of ejectment of the defendants; an order for removal of the various obstructions put up by the defendants; and an injunction restraining the defendants “from using any portion of the said Prayag ghat as ghatias in any season of the year and from sitting and squatting over the same for the purposes of collecting *dan dakshina* from the bathers.”

A number of written statements were filed. The defendants numbered 2, 8 and 11 pleaded that they were mere servants of other defendants. The main defence as pleaded on behalf of the rest denied the plaintiff's proprietary right and set up that the ghatias were a community whose business and duty it was to assist bathers; that a ghat necessarily involved a right on the part of some members of this community to occupy portions of it by the use of seats or platforms of the kind known as *chaukis* or *takhts*; that this right was a form of property heritable and transferable by the Hindu law; that the defendants and their ancestors had been in occupation of definite sites on the ghat for hundreds of years; and that they had been guilty of no impropriety. They maintained that a right to occupy sites on the ghat by laying out *chaukis* and *takhts* had become vested in them by lost grant, prescription or custom.

The learned trial Judge heard more than twenty witnesses and by his judgment (June 25, 1930) came to the conclusion that the plaintiff's ownership of the ghat was proved and that she had a right to sue as owner notwithstanding that the ghat was dedicated to the use of the public for purposes of bathing. He found that the ghatias do not belong to any particular class or community but are called ghatias because they sit on the ghats. He thought that there was nothing in any Shastra to show that their presence at the ghat is indispensable for the performance of religious ceremonies or that a bath in the Ganges would not yield any spiritual benefit unless accompanied by gifts to them. He found that in the case of plaintiff's ghat and neighbouring ghats the ghatias had sat by leave and licence of the owners. He negatived the existence of any customary right in the defendants and found that at no time had any grant of any interest in the ghat been made to them. He further held that they could have no claim by prescription to an exclusive right to occupy any specific portion of a bathing ghat dedicated to the use of the public. In the result he found for the plaintiff, but, follow-

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ing a practice which is not to be commended, he contented himself with ordering "that the plaintiff's suit as prayed be decreed" without formally stating the terms of the various orders, declarations and injunctions which he was granting, save by this reference to prayers in the plaint which might well have been improved by revision.

An appeal to the High Court was taken by a number of the defendants.

On March 27, 1935, it came before a division bench, who, in referring it to a full bench, recorded an order mentioning that before them it was not in dispute that the plaintiff was owner of the ghat or that the defendants or their predecessors had sat on different portions of the ghat for generations; also that the defendants did not claim any right by virtue of adverse possession but that they did claim a right of property in the ghat in respect of their long use of it for the purpose of assisting the bathers. A single judgment was given by the full bench (Sulaiman C. J., Bajpai and Ganga Nath J.J.) on January 3, 1936. The learned Judges maintained the decree of the trial Judge in so far as it directed removal of railings, planks, canopies and other articles of obstruction but discharged the trial Judge's order of ejectment and the injunction granted by him to restrain the defendants from using the ghat as ghatias or sitting or squatting over the same. They discharged also the declaration made by the trial Judge that the plaintiff was owner of the ghat.

The plaintiff upon this appeal complains of these variations and asks that the decree of the trial Judge be restored.

In the view of the learned Judges of the full bench the right claimed by the defendants may be divided into two parts: (1) a right to exclusive possession over specific plots of land and to place platforms and canopies over them; (2) the right to minister to the needs of the bathing public and to receive alms and gifts for their services. As regards the first, the full bench found some difficulty in appreciating the nature of the right claimed, but they found that ghatias as members of a class have no customary right and that the individual defendants could have no right by custom to exclusive possession of any parts of the ghat. The claim to such a right by prescription or lost grant was also held to be bad. The full bench considered it to be proved that the *takhts* and canopies had been obstructions leaving little space for passage, injurious to the pavement and dangerous to the public using the ghat. In their Lordships' view, the reasons given by the learned Judges in their judgment fully justify their order for removal of the obstructions, and their rejection of the defendants' claim to have acquired any rights in this ghat whether by custom, prescription or grant. The defendants have not appealed from the High Court's decree.

But the full bench set aside the trial Judge's decree of ejectment and the injunction granted by him on the ground that such relief would interfere with the right of "the bathing public" to take to the ghat persons who may help in the proper performance of "spiritual ablutions" and ceremonies. It would be inconvenient, in a suit not constituted for the purpose, that an attempt should be made to define with exactness the extent of the user which the public have as of right in this ghat. But if it be assumed that any bather



may bring with him his own priest or his own friend to assist in ceremonial ablutions, this is not in their Lordships' view a valid reason for refusing to the plaintiff an order in ejectment together with a properly framed injunction. The defendants have been sitting on the ghat for the purpose of carrying on their occupation there and have claimed to be entitled to exclusive possession of parts of the ghat as a right of property. If the plaintiff's ownership and possession entitle her to relief, then, upon it appearing that the defendants have no such rights as they claim, she is as well entitled to an order that the defendants should remove themselves as to an order for removal of their canopies. They are not persons who come with bathers to the ghat but persons who cumber the ghat in order to intercept the bathers and who do so continuously habitually and as an occupation or profession. A right to stand, sit or squat on the ghat for the purposes of exercising the profession of ghatias may be acquired by consent of the plaintiff, but as matters stand it is not the right of any of the defendants.

As the rights claimed by the defendants have not been established, it is not clear that they have anything to gain by disputing whether the plaintiff is owner of the ghat or is merely the hereditary superintendent of a religious endowment. In either case she would be entitled to maintain a suit in respect of the grievances complained of, and to obtain the same or similar relief. But as the plaintiff sued as owner and as the full bench appear to have held that she was a mere manager or mutawalli, it is right to consider whether the trial Judge's declaration of the plaintiff's ownership was well founded.

A bathing ghat on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a dharamsala or a math, notwithstanding that it be not dedicated to any particular deity. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this from particular circumstances of a given case, but, in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. That the dedication of property to religious or charitable uses may be complete or partial is as true under the Benares as under the Bengal school of Hindu law. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object, but also, as Mr. Mayne in his well-known work was careful to notice, "where the owner retained the property in himself but granted the community or part of the community an easement over it for certain specified purposes" (Hindu Law and Usage, 6th edn., 1900, s. 438, p. 567). In *Jaggamoni Dasi v. Nilmoni Ghosal*<sup>1</sup> the plaintiff's ancestor had built a temple and bathing ghat, as well as a room and another ghat for

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use by persons at the point of death. The defendant having used the ghat for the landing of goods, Field J. observed (p. 76) :—

“There is here no deed of endowment, and no evidence has been taken as to the exact purpose and object of this so-called endowment. The first question which suggests itself is whether the plaintiff's father, in building these temples, this *antorjoli* room, and this ghat, intended to give to the Hindu community a right of easement over the soil, or intended to transfer the ownership of the buildings as well as the ownership of the soil to such community. It by no means necessarily follows that, because the plaintiff's father erected this ghat and this *antorjoli*-room, and allowed the Hindu community to use them for the purposes set out in the plaint, he intended to divest himself of the ownership of the soil, &c.”

The judgment of the full bench in the present case is open to criticism in respect that it does not take due account of this distinction. Speaking of the tolls collected from shopkeepers on the ghat at festivals, the learned Judges, though noticing that no trustee or manager had ever been appointed and that the plaintiff and her predecessors had bought the land, built the masonry steps and had always looked after and repaired the ghat, say :—

“The ghat having been dedicated to the public, it is not conceivable that the plaintiff or her predecessors could have ever wished to appropriate its income to their private use, nor has the plaintiff made any attempt to show that its income was ever appropriated by her or her predecessors. It therefore appears that the plaintiff and her predecessors realised the income of the ghat and made repairs as a manager or mutwalli and not as an absolute proprietor ... The plaintiff is not entitled to a declaration of an absolute proprietary title in the ghat, as the same has been dedicated to the public, and the plaintiff has only the right of reversion if ever the ghat ceases to be used as such.”

Another passage deals with the right of the defendants as follows :—

“The ghat having been dedicated to the public, the defendants could not have acquired any right under any grant or prescription which might interfere with or limit the rights of the public. As already stated, there is no difference in principle between the dedication of a ghat to the public and the dedication of a highroad.”

Now there is the very broadest distinction between saying that the plaintiff's ownership is not absolute because it is qualified by the public's right of user for purposes of bathing, and saying that the plaintiff is not the owner at all, but a mere mutawalli in whom nothing vests because her predecessor had dedicated the ghat in the full sense of divesting himself completely of all interest therein. When in English law the owner of land is said to have dedicated it for a highway it is not intended or implied that his right of ownership has been divested. On the contrary if any member of the public exceeds the permitted user, a right of action in trespass arises to the dedicator or his successor in title by virtue of his ownership and possession : *St. Mary, Newington v. Jacobs*<sup>1</sup> and *Harrison v. Duke of Rutland*.<sup>2</sup> Dedication in the full sense known to the Hindu law is a different matter. In the usual case of complete dedication made to an idol, for example, the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is however by no means the only form of dedication known to the Hindu law and is very different from anything that could ordinarily be in-

1 (1871) L. R. 7 Q. B. 47.

2 [1893] 1 Q. B. 142.

ferred from the public user of a highway. From the standpoint of the Hindu law "it is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated." *The Chairman, Howrah Municipality v. Khetra Kristo Mitter*,<sup>1</sup> (per Mookerjee J., at p. 348). When the dedication is only partial the property in some parts of India might none the less in common parlance be described as *devottar*; but whether it be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it would descend and be alienable in the ordinary way; "the only difference being" as Mr. Mayne observes in the passage already referred to in this judgment "that it passes with the charge upon it." (Hindu Law and Usage, 6th edn., 1900, s. 438, p. 567).

The conclusion of the full bench that the plaintiff had only the right of reversion if ever the ghat ceases to be used as such appears to have been drawn from the mere fact that the ghat was "dedicated to the public." But a review of the history of the ghat and the conduct of the plaintiff and her predecessors is required to determine whether the river bank at this spot was dedicated in such sense as to make an end of private ownership therein. The written statements of the defendants set up that "the land on the bank of the holy River Ganges between the two confluents of Baruna and Assi rivulets in the city of Benares is waqf property from time immemorial the same having been dedicated to the Hindu community at large." The exceeding sanctity of the river is not of itself a reason why a pious benefactor of the public should do more than provide access to its waters. Whether the question be limited to the ghat in suit or be enlarged by consideration of the evidence about neighbouring ghats, it seems to their Lordships that there is no substantial ground for holding that the plaintiff's predecessors or any of them had divested themselves of all property in this ghat and had accepted the position of having a mere right of management. No express dedication has been proved by production of a deed of endowment or otherwise. No manager has ever been appointed. Not one instance has been shown in which the plaintiff or any predecessor has purported to act as superintendent, sebaite or mutawalli. On the contrary they have been treated as owners whenever by disrepair the ghat has attracted the attention of public authority. They have repaired and substantially improved the ghat at their own expense. They have closed it to bathers on proper occasions and have levied tolls on the keepers of shops at festivals. That their expenditure upon the ghat has exceeded their receipts and that they would not wish to make a profit from the tolls is probable enough, but in no way tends to prove that they have parted with all right as owners of the soil. The evidence as to agreements taken from ghatias upon nearby ghats is strong to show that in them the proprietors have retained their rights of ownership notwithstanding that the ghats are public bathing places. The learned trial Judge very reasonably thought that the evidence was over-

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<sup>1</sup> (1906) 10 C. W. N. 1044, s. c. 4 C. L. J. 343.

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whelming to show the plaintiff's proprietary right, and their Lordships, though bearing well in mind that there was a bathing ghat at this spot before the purchase of the plaintiff's predecessor in 1814, think that there is little to support a contrary view. The river bank at Benares is a sacred and historic spot with a powerful claim to the regard of a pious Hindu : but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin, as a rule from an immediate and express act of dedication : rather does it begin by acts of user which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety. It may well be doubted whether a complete abandonment of the owner's rights is at all usual in the case of public bathing ghats : though it might be common enough in the case of tanks dedicated to the public for bathing purposes : even then the ownership of the banks would be another matter.

Their Lordships are of opinion that the declaration made by the trial Judge as to the plaintiff's ownership as well as his order of ejectment against the defendants was correct. They think that the terms of the permanent injunction to be granted to the plaintiff should restrain the defendants from frequenting the Prayag ghat, without the consent of the plaintiff or her successor in title, for the purpose of acting as ghatias thereon, and from sitting or squatting upon the same without such consent in the exercise of the profession or occupation of ghatias.

They will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court dated January 3, 1936, be set aside and that the decree of the Additional Subordinate Judge of Benares dated June 25, 1930, be restored, with the variation mentioned as to the terms of the permanent injunction. The respondents will pay the costs of the plaintiff in the High Court and of the appellants in this appeal. The appellants must, however, pay to the respondents the costs of the application to restore the appeal, which had been dismissed for non-prosecution, as directed by the Order in Council of July 25, 1939, and there must be a set-off as regards these costs.

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*Appeal allowed.*

Solicitors for appellant : *Douglas Grant & Dold.*

Solicitor for respondents : *Harold Shephard.*

[On appeal from the High Court of Judicature at Patna.]

Present :

LORD ATKIN, LORD THANKERTON, AND SIR GEORGE RANKIN.

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*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Personal decree—Mortgagee of leasehold—Whether privity of estate or privity of contract between such mortgagee and lessor.*

In the case of a mortgage of leasehold interest, as between the lessor and the mortgagee of the leasehold interest from the lessee, there is neither a privity of estate such as to render the latter liable for the burdens of the lease, nor is there a privity of contract between them in respect of the rent and lessee's covenants, irrespective of the fact that the mortgagee has entered into possession of the mortgaged property.

Where, therefore, the lease creates a charge on the lessee's interest in the leasehold property for payment of rent or other obligations and in pursuance of such charge the leasehold property is sold and the sale proceeds are not sufficient to satisfy the claim of the lessor, the lessor cannot apply for a personal decree against such a mortgagee for any deficit under O. XXXIV, r. 6, of the Civil Procedure Code, 1908.

*Ram Kinkar Banerjee v. Satya Charan Srimani*<sup>1</sup> referred to.

*Williams v. Bosanquet*,<sup>2</sup> distinguished.

APPEAL from a judgment and decree of the High Court, Patna, dated February 18, 1938, which reversed a judgment and decree of the Subordinate Judge of Dhanbad in the district of Manbhum, dated December 6, 1934.

On April 24, 1907, defendant No. 1, C. J. Smith, predecessor of respondents No. 2, executed two kabuliyats in favour of the plaintiff's (respondent No. 1's) predecessor-in-title, one in respect of the surface rights in 650 bighas of Mouzah Jinagara for a term of 999 years at a fixed annual rent of Rs. 650 and the other in respect of the sub-soil rights in those 650 bighas, likewise for a term of 999 years, at a specified rate of royalty on the coal raised each year, with a minimum annual royalty of Rs. 975. In the former kabuliyat, liberty was given to the lessee "to transfer the leasehold land by sale, gift or otherwise," but it was declared nevertheless that "the leasehold land remains wholly hypothecated for the amount of rent and the amount of rent will be treated as the first charge." In the second kabuliyat there were similar provisions, namely :—" (8) that for the amount of royalty the leasehold land and the machineries and (*illegible*) remain wholly hypothecated. If I make default in payment of the amount of royalty you will be competent to realise the same by selling the leasehold land. In regard to the same I or my heirs or successors-in-interest shall have no objection ; (9) that I shall be competent to transfer the leasehold land by gift sale or otherwise according to my wish. But thereby there will be no obstacle to the priority of dues, i.e., the transferee will remain wholly bound to pay the amount of royalty ;

1 (1938) L. R. 66 I. A. 50,  
s. c. 41 Bom. L. R. 672.

2 (1819) 1 Bro. & B. 238.

P. C. (13) that I as well as my heirs and successors-in-interest remain wholly  
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On February 4, 1920, defendant No. 1 mortgaged *inter alia* his rights under the kabuliyats to the appellants-mortgagees to secure repayment of amounts to be advanced to him from time to time by the mortgagees on current account up to a maximum amount of Rs. 3 lacs. Defendant No. 1 undertook to repay "the full amount of the floating balance" on February 4, 1923, and to pay "interest at the rate of eleven per cent. per annum on the balance for the time being due on the said cash credit loan account by monthly payments with half-yearly rests."

Under the liberty given the mortgagees eventually took possession of the mortgaged leaseholds by collecting rents and profits from the mortgagor's sub-lessees.

On April 20, 1928, the receiver of the Jharia raj instituted a suit against defendant No. 1 to recover arrears of rent and royalty with cess and interest under the two kabuliyats for the period April, 1917, to April, 1928. He provisionally fixed the amount to be recovered at Rs. 31,058-11-6, but asked for an account of the coal actually raised during the said period and for leave to adjust his claim on the taking of such account. The prayers were for an account and for reliefs as in a mortgage suit, namely, a decree for payment of the amount found due on the account and, in default of payment by a date to be fixed by the Court, for realisation of the decretal amount by sale of the leasehold properties with tools, machineries and boilers, &c.

On June 12, 1929, the plaintiff and the third respondents arrived at a compromise whereby the latter undertook within a month to submit correct accounts of raisings of coal for the period claimed, and it was declared that the plaintiff would have no right either to sell that company's sub-lease or to a personal decree against the company, in other words, that "in case of default of payment of the decretal amount to be ascertained by final decree the decretal amount may be realised by sale of the right title and interest" of the second respondents and the mortgagee company.

On June 14, 1929, a preliminary decree for account was passed on contest against the second respondents, on compromise against the respondent company, and *ex parte* against the mortgagee company.

No accounts having been submitted, a commissioner was appointed to take accounts, and on December 9, 1929, judgment was given on the basis of the commissioner's report and a preliminary decree for sale passed on contest against the second respondents, on compromise against the respondent company, and *ex parte* against the mortgagees for the payment of Rs. 2,90,000-11-6 by June 9, 1930, and, on default, the decretal amount was ordered to be realised by sale of the interest of the second respondents and the mortgagees in the property under charge.

On August 30, 1930, the Subordinate Judge passed *ex parte* a final decree for sale of the interests of the second respondents and the mortgagees and on June 25, 1931, they were sold and purchased by the plaintiff for Rs. 1,00,000.

On June 23, 1934, the plaintiff (the receiver having in the meantime been discharged) made the present application in the Court of the Subordinate Judge for a personal decree under O. XXXIV, r. 6, for the recovery of the

balance of the decretal amount from the second and third respondents and the mortgagees.

The latter objected in writing that they were not and never had been the plaintiff's tenants; that there never had been any contract between them and him for payment of his dues on account of rent, royalty or commission; that there was not and never had been any privity of contract or privity of estate between the parties for payment of such dues; that by the sale in execution of the final decree the mortgagees' mortgage interest had been destroyed since the plaintiff had the first charge, but that the mortgagees were not personally liable for the balance of the decretal amount. The second and third respondents also filed written objections.

On December 6, 1934, the Subordinate Judge gave judgment stating that at the hearing the plaintiff had withdrawn his claim for a personal decree against the respondent company, but pressed his claim against the second respondents and the mortgagees.

As regards the former it was conceded that they were liable to the extent of the assets of the lessee which had come to their hands in respect of arrears of royalty, &c., which fell due six years before the suit was brought. As regards the mortgagees, the Judge considered that the sole question of their liability turned upon the point whether on the basis of the mortgage bond their position could be said to be that of assignees of the leasehold property. He said that the bond made it clear that the mortgagor did not thereby transfer his whole interest to the mortgagees so as to make the latter liable for the payment of rent to the lessor by virtue of privity of estate. He held, therefore, that the plaintiff was not entitled to a personal decree against the appellant.

Against that judgment the plaintiff filed an appeal in the High Court contending that the mortgagees should not have been exonerated.

The High Court (Terrell C. J. and Fazl Ali J. allowed the appeal: see *Raja Shiva Prasad Singh v. Tom Smith*, 1938, I. L. R. 17 Pat. 499).

The mortgagees appealed to His Majesty in Council.

*J. M. Pringle*, for the appellants.

*C. S. Rewcastle* and *R. K. Handoo*, for the respondents.

SIR GEORGE RANKIN. The controversy in this case has reference to 650 bighas of coal land in Mouza Jinagara in the District of Manbhum in Bihar. In these, the appellants, the Jagadamba Loan Company, Limited, are mortgagees of certain leasehold interests which were granted by the Jharia raj as zemindar to one Charles Smith upon the terms of two kabuliyats, dated April 24, 1907. By one of these instruments Charles Smith took settlement of the surface rights for 999 years at an annual rent of Rs. 650: by the other sub-soil rights were settled with him for the same period upon certain terms as to payment of royalty which need not here be set out. The rent for the surface rights was secured by a provision that "the leasehold land remains wholly hypothecated for the amount of rent and the amount of rent will be treated as the first charge. As regards the sub-soil rights the provision was "that for the amount of royalty the leasehold land and the machineries remain wholly hypothecated. If I make default in payment of the amount of royalty you will be competent to realise the same by selling the leasehold land."

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The appellants' mortgage is dated February 4, 1920. It was executed by the lessee Charles Smith. It recited that several sub-leases had in the meantime been granted by him one being in favour of the Jinagara Coal Company, Limited. It provided that the appellants should from time to time make advances upon a cash credit loan account and that Charles Smith, the mortgagor, should repay the same with certain interest on February 4, 1923. Subject to a proviso for redemption it conveyed to the appellants all the estate and interest of the mortgagor including his right to rent and royalties from sub-leases. The mortgagor covenanted that during the subsistence of the security he would pay all rents, royalties, taxes, etc. and observe the covenants of the head leases. In case of the mortgagor's default in payment of the principal and interest when due the appellants were to be entitled to enter into possession of the mortgaged premises and receive the rents, issues and profits thereof, and in case of the mortgagor's default in payment of the rents, royalties or taxes due in respect of the lands the appellants were to be at liberty to enter into possession without being accountable as a mortgagee in possession.

It is agreed that the appellants eventually collected certain rents and profits from sub-lessees of Charles Smith and in this sense entered into possession; but the dates and other particulars of the appellants' action do not appear from the record submitted to the Board. It is not suggested that the appellants at any time paid rent to the Jharia raj in respect of the leasehold interests in mortgage to them.

The suit out of which this appeal arises was brought in the Court of the Subordinate Judge at Dhanbad on April 20, 1928. It was brought on behalf of the raj as lessor against Charles Smith (the first defendant) as lessee and certain other parties as sub-lessees. The appellants were not originally impleaded: they were added as parties on January 4, 1929, but took no steps to contest the suit until after it had resulted in a sale as hereafter mentioned. The plaint claimed large sums as due to the raj for rent and royalty in arrear in respect of the 650 bighas, prayed that an account of the raisings of coal should be had to ascertain the sums due for royalty, claimed that the arrears were a first charge on the leasehold properties, and asked for enforcement of the charge by sale. Certain accounts having been taken as directed by the trial Judge on June 14, 1929, a preliminary decree for sale was made on December 9, 1929, and a final decree on August 30, 1930. The sale took place on June 25, 1931. After setting off the sale proceeds against the amount due to the raj, a large sum remained due and unpaid, and on June 23, 1934, application was made on behalf of the raj under O. XXXIV, r. 6, of the Civil Procedure Code, for a personal decree for the deficiency against the estate of Charles Smith, the lessee, (who had died pending suit) against one of his sub-lessees, and against the appellants. The deficiency was said to amount to a lac of rupees.

This claim was resisted by the appellants who lodged an objection dated July 28, 1934, maintaining that between themselves and the raj as lessors there was neither privity of contract nor of estate.

The learned Subordinate Judge on December 6, 1934, upheld the objection and refused to make a personal decree against the appellants, but on appeal



the High Court at Patna (Terrell C. J. and Fazl Ali J.) reversed his decision and passed a decree on February 18, 1938, against the appellants for the sums due to the raj for rent and royalties in respect of the six years before suit.

From this decree an appeal has now been brought to His Majesty in Council. The appellants, as a new ground of objection in addition to those previously insisted on, have relied upon the fact that the plaintiffs agreed to exclude from the sale the interest of certain sub-lessees, and say that in any case the property which was included in the decree for sale was neither "the mortgaged property nor a sufficient part thereof" within the meaning of r. 5(3) of O. XXXIV. Whether upon this new ground the appellants could resist a personal decree for the deficiency under r. 6 of that Order, is however a question which their Lordships do not find it necessary to discuss or decide.

Since the decision of the High Court in this case, the position of a mortgagee of leaseholds has been considered by the Board in *Ram Kinkar Banerjee v. Satya Charan Srimani*.<sup>1</sup> It was there held that in India even in the case of an English mortgage a legal interest remains in the mortgagor: hence the interest taken by the mortgagee is not an absolute interest and is not such as to render him liable for the burdens of the lease by reason of privity of estate. In that case however the mortgagees had not entered into possession of the properties mortgaged.

In the present case no question arises of novation by reason of the appellants having paid rent to the raj or otherwise. Their Lordships have however to consider whether the appellants have become liable for the rents and royalties by reason of their entry into possession of the mortgaged property. They are not of opinion that privity of estate can result from entry into possession in the case of a person who has taken a transfer from the lessee of an interest which is not the whole interest in the term.

The High Court were of opinion that the appellants were liable by reason of privity of contract, and in support of this view cited Dallas C. J. in *Williams v. Bosanquet*<sup>2</sup> (p. 263):—

"... and, even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns, and the Defendants here are the assigns of the lessee: it is, therefore, a contract between the lessor and the assignee, that is, in this case, between the Plaintiff and the Defendants."

Before relying upon this *dictum* it would be necessary to enquire whether the principle which it expresses has been accepted in the law of England and how it consists with the doctrine, generally accepted, that the assignee's liability to the lessor can be brought to an end by his assigning the premises over to another. But in their Lordships' view the principle of the decision in *Ram Kinkar Banerjee's* case<sup>1</sup> is inconsistent with there being privity of contract between the lessor and the mortgagee in respect of the rent and lessee's covenants. If the lessee retains part of his original interest in the term, the mortgagee cannot be liable to the lessor for the whole of the rent and covenants: and cannot without apportionment be liable for any part thereof,

<sup>1</sup> (1938) L. R. 66 I. A. 50,

<sup>2</sup> [1819] 1 B. & B. 238.

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whether or not he enters into possession. The transferee of a partial interest in the term cannot be taken to have promised the lessor to discharge any part of the burdens of the lessee. It would be somewhat remarkable if the lease in *Ram Kinkar's* case was not thought to be one in which "the contract is with the lessee and his assigns"; yet no suggestion is to be discovered to the effect that the mortgagees were liable by privity of contract. Their Lordships are of opinion that the principle of that decision is equally inconsistent with privity of contract as with privity of estate as a ground of claim against the mortgagee of leaseholds in such a case as the present.

They will humbly advise His Majesty that this appeal be allowed, the decree of the High Court dated February 18, 1938, set aside and that of the Subordinate Judge dated December 6, 1934, restored. The first respondent will pay the appellants' costs in the High Court and of this appeal.

R. C. C.

*'Appeal allowed.*

Solicitors for appellants : *H. S. L. Polak & Co.*

Solicitors for respondents : *Douglas Grant & Dold.*

[*On appeal from the High Court of Judicature at Calcutta.*]

*Present :*

LORD ATKIN, LORD THANKERTON, AND SIR GEORGE RANKIN.

MAHARAJA SRIS CHANDRA NANDY

v.

RAKHALANANDA THAKUR.

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November 11.

*Indian Evidence Act (I of 1872)—Rules of evidence—Strict application by Court—Rules not to be waived at Judge's will.*

The Indian Evidence Act, 1872, being a statute which purports to contain the whole law of evidence applicable in India, is imperative. It is, therefore, not open to a Judge to exercise a dispensing power to admit evidence inadmissible by virtue of the Act because it appears to him that the irregular evidence will throw light upon an issue being determined. The principles of exclusion of evidence adopted by the Act must be applied strictly and cannot be relaxed at the discretion of the Court.

THE facts appear fully from the judgment.

The plaintiffs Rakhalananda and others were a family of Brahmin priests. They claimed that they were entitled to a charge on the estate represented by Maharaja Sris Chandra Nandy for an annual britti of Rs. 4,000. The claim was upheld by the Courts in India. The defendants appealed to His Majesty in Council.

*J. M. Tucker K. C.* and *W. Wallach*, for the appellants.

*Sir Thomas Strangman K. C.* and *C. Bagram*, for the respondents.

LORD ATKIN. This is an appeal from the High Court of Judicature at Fort William in Bengal who affirmed a decree of the Additional District Judge 24 Parganas in favour of the plaintiffs, the present respondents. The plaintiffs are a distinguished family of Brahmin priests, Thakurs of Shrikhanda : and their claim is for a declaration that they are entitled to a charge on the Kasim-

bazar Raj Estate represented by the defendants for an annual britti of 4,000 rupees payable by half-yearly instalments and for a money decree for arrears amounting to Rs. 13,260. The defences to the suit are in substance that the plaintiffs never had a legal right to the britti, and that in any event it was not charged upon the estate. These issues were raised in the proceedings and have been decided in favour of the plaintiffs in both Courts. The history of the claim begins with the founder of the Raj fortunes one Krishna Kanta Nandy. He appears to have been a Hindu of comparatively humble origin who by his abilities attracted the attention of Warren Hastings, became his Diwan, and died in the year 1778 proprietor of large possessions in about twelve different districts and in Calcutta. After his death his son Loknath appears to have been given the title of Maharajah of Kasimbazar by Warren Hastings, and the property to which he and his descendants have succeeded is known as the Kasimbazar Raj Estate. The case of the plaintiffs is that Krishna Kanta Nandy established two deities, Radhagovinda and Lakshminarayan, at Shrikhanda, the plaintiffs' home, and granted the plaintiffs a britti of Rs. 4,000 for the worship of the two deities : and at the same time charged his Raj estate with the payment of the britti. The plaintiffs and their successors, it is said, became the gurus of Krishna Kanta Nandy and his family and its successors : they have conducted the worship and service of the deities ever since.

The learned Assistant District Judge found that the plaintiffs had established the whole of their case. A permanent grant of britti was made by Krishna Kanta Nandy who had established at the home of the plaintiffs the two deities and provided the britti for securing their service and worship. To secure the permanent payment he had charged it upon the estate. The learned High Court Judges were not able to find that Krishna Kanta Nandy had established the deities, but they concurred in the finding that he had made a permanent grant, and had charged it upon the Kasimbazar estate.

Their Lordships are of opinion that no evidence was given sufficient to support these findings. As they will point out later, both Courts erred in admitting as valid evidence of tradition given by and on behalf of the plaintiffs : and when the admissible evidence is considered there is none to justify the finding of a permanent grant or of a charge. The evidence establishes the following facts : that from the time of Krishna Kanta Nandy the sum of Rs. 4,000 has been paid annually to the plaintiffs and their successors as britti : that they have continuously conducted the worship and service of the two deities : and that until about the year 1897 such worship was conducted on behalf of the holder of the Raj and that the plaintiffs were the gurus of his family. The succession of the Raj family is relevant. Krishna died in 1778 and was succeeded by his son Loknath who first received the title of Maharajah. There is nothing to indicate that this is an impartible estate. Indeed what little evidence there is on the point indicates the contrary, but in fact there only appears to have been one person at a time entitled in the line of descent. Loknath was succeeded by Harinath who died in 1832, who was succeeded in turn by his son Krishnanath, who died in 1844 without issue. His widow Rani Swarnamayi succeeded to the estate and possessed it for over fifty years until her death in 1897. On her death the estate reverted

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to Krishnanath's mother Rani Hari Sundari. She, who must have been a very old lady at the time, in the same year transferred her interest to the next successor Manindra Chandra Nandy the sons of her daughter Gobinda. The estate thus passed out of the direct male succession. Manindra had for his gurus another family the Thakurs of Jogeswardi, and had family deities other than Radhagovinda and Lakshminarayan. In 1923 Manindra Chandra Nandy executed a trust deed in favour of the firm of Ogilvy Gillanders & Co. and certain named trustees with the object that the firm should raise a loan for the Maharajah of £675,000 and pay off certain scheduled incumbrances and unsecured liabilities. The bulk of the Raj estate was assigned to the trustees by way of mortgage or trust to keep down the necessary charges, and create certain reserve funds including a sum of three lacs which the Maharajah estimated would be sufficient for his personal household expenses. The Maharajah covenanted *inter alia* that the property was free from all incumbrances other than those mentioned in the 4th schedule to the deed which did not include the charge now alleged to exist. In February, 1929, on the application of the Maharajah Manindra the estate was taken under the management of the Court of Wards by whom it is now managed subject to the provisions of the deed of trust of 1923. In 1929 the Maharajah Manindra died and was succeeded by the present Maharajah Sris Chandra Nandy. On April 10, 1929, the plaintiffs presented a petition to the General Manager of the Kasimbazar Raj Ward's Estate alleging that they had been receiving for generations from the estate an annual annuity allowance of Rs. 4,000, that they had been spending the said allowance as well as their own income towards the worship of several deities and other acts of piety : and asking for the payment of one year's arrears. It may be noticed that in this letter there is no suggestion of the establishment by Krishna Kanta Nandy of the two specified deities, or of a permanent grant by him, or of the creation of any charge. This request was refused by the Manager of the Court of Wards, and on June 28, 1929, the Maharajah Manindra wrote to him having been told by the plaintiffs of the refusal.

Kasimbazar Rajbari,  
June 28, 1929.

My dear Mr. Burrows,

I have read your letter No. 575ES/16-108 dated the 4th May, 1929 (a copy of which was forwarded to me) as also another letter No. 1565ES dated the 15th June, 1929 (shown to me) sent in reply to the letters of Sriji Rakhalananda Thakur of Shrikhanda.

The annual Britti payable to our spiritual guides, the Thakurs of Shrikhanda amounting to Rs. 4,000\* (Four thousand) has been paid by the Raj family of Kasimbazar from generation to generation, and I have been paying it all along during my management.

During Mr. Lyall's administration as he did not like to meddle with Religious and Spiritual matters, he left the matter with me of course leaving sufficient fund in my hands.

It is not of the nature of personal charity but has always been regarded as a charge upon the Estate. I have nothing to say regarding your decision. You may hold it or alter it if there be good reason for doing so, but this Britti, in my opinion, is legally enforceable against the Kasimbazar Raj Estate.

In this connection I would like to refer you to my letter No. 1/XII-4/3-G dated

the 19th April, 1929, in which I mentioned the recurring permanent grants which in addition to other commitments I am bound to make *viz.* 1. To spiritual guides of Shrikhanda and Jageswardihi, 2. Debkarjya and Debsheba &c. and to my letter to the Secretary Board of Revenue dated the 2nd February, 1929, with statements therewith attached, a careful perusal of which will clearly convince you that the above demand is a charge really, upon Kasimbazar Raj Estate and incidentally upon me as proprietor of the Estate and not in my personal capacity.

The following is an extract of the relevant portion of my letter to Mr. Fawcus, Secretary Board of Revenue dated the 2nd February, 1929, for your easy reference.

"I should like to state however in this connection that whereas I have these additional sources of income which are not covered by the Trust Deed I have at the same time additional demands on me for Debkarjya, Britti to spiritual guides and Brahmin Pundits and the maintenance of educational institutions which have been recognised by the family from generations past."

I shall be glad if you will consider all the facts relating to this matter and recommend to the Court for acceptance of the charge of paying Rs. 4,000 annually to the Thakurs of Shrikhanda which is in reality a charge on the Kasimbazar Raj Estate.

Yours sincerely,  
Manindra Chandra Nandy.

L. B. Burrows, Esqr., B. A.,  
Manager, Kasimbazar Raj Wards' Estate,  
2/1, Russel Street,  
Calcutta.

So far from regarding this letter as proof of a legal charge their Lordships are of opinion that it tends to negative such a claim. The Maharajah is obviously seeking to limit his personal liabilities : and is treating the continual payment of this britti as an instance of the "additional demands on me for debkarjya and britti for spiritual guides and Brahmin Pundits and the maintenance of educational institutions which have been recognised by the family from generations past." It seems obvious that the continuous recognition is to him another way of saying it has always been regarded as a charge upon the estate. It would not be suggested that the other "additional demands" in which this claim is included involved legal charges upon the property. It seems obvious the letter of the Maharajah, written in the circumstances set out in the letter, could not possibly outweigh the express covenant in the deed of 1923 that there were no incumbrances other than those scheduled.

In the result, therefore, there is no evidence at all of the establishment of the deities by Krishna, of any permanent grant by him of the britti, or of the creation of any charge upon any property. It is very significant that though the plaintiffs appear to have very complete records of their transactions from early times, no document is produced making or evidencing the grant or charge : and this alone is sufficient to cast doubt upon the claim. Moreover while it would not be unusual to assign particular lands as the source from which britti was to be paid and in this sense create a charge, it would seem to their Lordships very improbable that a vast estate should be charged as a whole with the payment of Rs. 4,000 a year. Their Lordships are not prepared to say that a valid charge could not be created upon what could be defined to be the whole of a man's property at the date of the charge. In the present case it should be noticed that not only is the charge claimed and

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decreed a charge upon the estate as it at present exists ; but it has been decreed without any condition that the families of the grantor or the plaintiffs should continue to exist, or that the plaintiffs should continue to perform the service and worship, sheva and puja, of the two named deities. This defect in the decree was admitted by counsel for the respondents who submitted an amended form of decree which would remedy the mistake. But for present purposes the point is the difficulty the plaintiffs are in in establishing any grant or charge with any sufficient certainty. Naturally if the continuous payments could not be explained without asserting some legal origin which would create the rights claimed, any Court would feel inclined to presume the necessary legal origin. But in the present case there are no facts which require a presumption of any lost grant either for the permanent gift of the britti or still less for it being constituted a charge. It appears to their Lordships the natural inference from the known facts that the original founder of the estate granted the britti in his lifetime : and that his successors from pious motives continued the grant to the plaintiffs' successors who continued to be the family spiritual guides, and served and worshipped the family gods. Without assuming any legal obligation it would in the circumstances have been strange if the britti had not been continued. The learned trial Judge working backwards, as it would seem from the fact that the payment was continued for several generations, has imputed to the founder the intention that it should continue for all those generations : and has so drawn the inference that he did in fact grant a permanent britti ; and took steps to secure its permanence by creating a charge, the uncertainty of the terms of which their Lordships have already discussed. The trial Judge it is true found that Krishna Kanta Nandy established the deities. The High Court have found that it would not be safe on the evidence to hold that the plaintiffs had established the case that the two deities were so established. Nevertheless they go on to say that they cannot express the definite opinion that the trial Judge was not right in his inference that the deities were so established. This conclusion appears to involve some confusion of thought. If it was not safe from the evidence for the appellate Court to draw a particular inference, it was not safe for the trial Judge to draw the inference. Not safe must mean that there is not evidence from which the inference can reasonably be drawn. There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases the appellate tribunal may select the inference they choose : but they can have no equal choice between an inference that is safe, and one that is unsafe.

But the conclusions of the two Indian Courts are not based solely on the evidence of which the substance has been stated above and which their Lordships have held to be insufficient. Both Courts relied on the evidence of some of the plaintiffs' witnesses speaking of a tradition in their family that Krishna Kanta Nandy had established the two deities, had granted the britti in perpetuity and had made it a charge upon the estate. Obviously this is hearsay evidence, and it is equally clear that it is not one of the claims of hearsay evidence admissible under the provisions of s. 32 of the Indian Evidence Act. The members of the High Court recognised this, but they made a statement as to the law of evidence which their Lordships feel bound

to state is entirely erroneous. They say, "It is to be noticed in this connection that s. 2(1) of the Indian Evidence Act repeals the whole of the English common law on evidence so far as it was in force in British India before the passing of the Indian Evidence Act, and that provision of the law in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself." This is of course correct. But they continue, "It must be recognised, however, that the principle of exclusion adopted by the Indian Evidence Act should not be applied so as to exclude matters which may be essential for the ascertainment of truth." It seems to their Lordships essential in the interests of the administration of justice in India that this mode of regarding the law of evidence should emphatically be stated to be unsound. What matters should be given in evidence as essential for the ascertainment of truth it is the purpose of the law of evidence whether at common law or by statute to define. Once a statute is passed which purports to contain the whole law it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it. It is, therefore, discarded for all purposes and in all circumstances. To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule. There is therefore no such principle as is suggested in the passage now under discussion. At the same time their Lordships wish to make it clear that apart from any rule of law the evidence in question so far from leading to the ascertainment of truth in fact for the reasons already given leads away from it. It is not remarkable that the learned Judges who gave leave to appeal in this case did not conceal some uncertainty as to the correctness of this part of the judgment. Their Lordships do not think it necessary to discuss at any length inferences drawn by both Courts from the absence of evidence by the defendants of the contents of their own books. They do not think that in the circumstances the comments are well founded. In the result therefore their Lordships are of opinion that this suit fails, and that the appeal should be allowed and the suit dismissed. Their Lordships will humbly advise His Majesty accordingly. They notice however that the late Maharajah Manindra clearly regarded the payment of the britti as being a personal obligation of his, and it would seem to follow in their opinion that the Court of Wards would be justified in making payment of the arrears up to the time of his death to the plaintiffs. This is not however a matter for decree in this suit. The respondents must pay the costs in the Indian Courts and of this appeal.

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*Appeal allowed.*

Solicitor for appellant : The Solicitor, India Office.

Solicitors for respondents : W. W. Box & Co.

## APPELLATE CIVIL.

Before Mr. Justice Broomfield and Mr. Justice Divatia.

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GOVIND KESHAV DANDAVATE

v.

March 28.

YESHWANT PANDHARINATH SHETE.\*

*Village Panchayats Act (Bom. IX of 1920)—Village panchayat—Right to collect taxes from persons occupying village sites—Whether such right can be farmed out—Validity of such contract—Indian Contract Act (IX of 1872), Sec. 65.*

Under the Village Panchayats Act, 1920, a village panchayat is not competent to farm out its right to collect taxes from persons occupying village sites. Such a contract, entered into by a village panchayat, is *ultra vires*.

*Municipal Council, Kumbakonam v. Abbahs Sahib*,<sup>1</sup> *Sholapur Municipality v. Shivram Bhagwant*,<sup>2</sup> and *Saundatti Municipality v. Shripadbhat*,<sup>3</sup> referred to.

But the village panchayat is entitled to recover the money due to it under such a contract under s. 65 of the Indian Contract Act, 1872.

*Harnath Kuar v. Indar Bahadur Singh*<sup>4</sup> and *Saundatti Municipality v. Shripadbhat*<sup>5</sup>, followed.

*Rudragowda v. Gangowda*,<sup>6</sup> distinguished.

*Municipal Board, Lucknow v. S. C. Deb*,<sup>7</sup> not followed.

SUIT to recover money under a contract.

The Village Panchayat of Rahuri (plaintiff) entered into an agreement with Govind Keshav Dandavate (defendant No. 1) whereunder defendant No. 1 was to collect the ground rent tax at the Rahuri weekly market from April 1, 1933, to March 31, 1934, in accordance with the rates fixed, and to pay to the plaintiff Rs. 2,300 in four instalments of Rs. 575 each. Defendant No. 1 paid the first two instalments and a further sum of Rs. 365 out of the third instalment. He failed to pay the balance of Rs. 210 of the third instalment and Rs. 575 of the fourth instalment.

The plaintiff sued defendant No. 1 to recover the amount due with interest at five per cent. per annum from the date of default. Defendants Nos. 2 and 3 were joined as parties as they stood sureties for defendant No. 1.

Defendant No. 1 contended *inter alia* that the plaintiff had no power to sell the right to collect taxes, that the weekly market was held on a site beyond the limits of the plaintiff's jurisdiction and the plaintiff therefore had no right to sell the right to collect taxes thereat, that the contract to collect taxes was not valid and the suit was not maintainable. He also contended that the plaintiff had failed to take steps mentioned in the contract on his failure to pay the instalments in time, that the plaintiff therefore had no right to sue, and that defendants Nos. 2 and 3 were discharged from their liability.

\* Second Appeal No. 620 of 1939, against the decision of R. H. M. Clayton, Assistant Judge, Ahmednagar, in Appeal No. 234 of 1937, reversing the decree passed by B. G. Murdeshwar, Subordinate Judge, Rahuri, in Civil Suit No. 356 of 1935.

1 (1911) I. L. R. 36 Mad. 113.

2 (1928) I. L. R. 52 Bom. 414, s. c. 30 Bom. L. R. 715.

3 (1932) 35 Bom. L. R. 163.

4 (1922) L. R. 50 I. A. 69.

5 (1932) 35 Bom. L. R. 163.

6 (1937) 39 Bom. L. R. 1124.

7 (1932) I. L. R. 8 Luck. 1, F.B.



Defendants Nos. 2 and 3 raised similar contentions.

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The Subordinate Judge held that the agreement sued on was not void on the ground that the plaintiff had no power to farm out the right to levy the ground rent tax, but it was illegal as it contravened one of the rules made by the District Local Board requiring that sums collected should be paid in daily at the plaintiff's office. He, therefore, dismissed the suit.

On appeal, the Assistant Judge held that the plaintiff could legally farm out the right in question and that the agreement was not illegal because of the breach of the District Local Board Rule. He reversed the decree of the lower Court and passed a decree in favour of the plaintiff making defendants Nos. 2 and 3 jointly and severally liable with defendant No. 1 for the decretal amount.

Defendants appealed to the High Court.

*J. G. Rele*, for the appellants.

*P. V. Nisure*, for the respondent.

BROOMFIELD J. The plaintiff in the suit, which has given rise to this second appeal, was the sarpanch of the village panchayat of Rahuri in the Ahmednagar district. Under the Village Panchayats Act of 1920 the panchayat has the right of levying certain taxes, and in particular, under the rules made by the District Local Board in accordance with s. 27 of the Act, it is entitled to recover ground rent in respect of sites occupied in the village market. By an agreement made on April 22, 1933, between the plaintiff representing the village panchayat on the one hand and appellant No. 1 on the other the right to collect these dues was leased to appellant No. 1 for a period of one year. The consideration for the agreement was the sum of Rs. 2,300 which was to be paid in quarterly instalments. There were two sureties who undertook to pay in case of default by appellant No. 1. Default was made in the payment of the third instalment which was only paid in part. The fourth instalment was not paid at all, and the plaintiff, suing on behalf of the village panchayat, claimed to recover from appellant No. 1 and the two sureties the sum of Rs. 974-10-2.

The trial Court dismissed the suit. The learned Subordinate Judge overruled an objection made by the defendants that the agreement sued on was void on the ground that the village panchayat had no power to farm out the right to levy the dues in question. But he thought that the agreement was illegal because it contravened one of the rules made by the District Local Board requiring that sums collected should be paid in daily at the panchayat office.

There was an appeal which was heard by the Assistant Judge. He agreed with the Subordinate Judge that the village panchayat could legally farm out the right in question, but he differed on the other point. In his view the agreement could not be regarded as illegal because of the breach of the District Local Board rule. He accordingly decreed the suit, and this second appeal has been brought by the principal debtor and one of the sureties. The other surety has not appealed.

It has been contended on behalf of the appellants that the agreement on which the suit was based is illegal and void for both of the reasons which were

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put forward in the lower Court. We do not think it necessary, however, to consider the point based upon the District Local Board rule, because, in our opinion, it is abundantly clear that the village panchayat was incompetent to farm out the right to collect these dues and the agreement was *ultra vires*. The relevant authorities on this point were not cited in either of the lower Courts. They are *Municipal Council, Kumbakonam v. Abbahs Sahib*,<sup>1</sup> *Sholapur Municipality v. Shivram Bhagwant*<sup>2</sup> and *Saundatti Municipality v. Shripadbhat*.<sup>3</sup> These authorities show that unless the power to enter into a contract of this kind is conferred by the Village Panchayats Act itself, which is not the case, the agreement is *ultra vires*. It is not necessary to discuss these cases because that position has been conceded by the learned advocate who appears for the respondent.

The position he has taken up is that granting that the agreement is *ultra vires* and void, the village panchayat is entitled to recover the money claimed by it in the suit under the terms of s. 65 of the Indian Contract Act which provides as follows :—

“When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

The first case to which Mr. Nijsure referred in support of his argument is *Abaji Sitaram v. Trimbak Municipality*.<sup>4</sup> That was a case of a contract by a Municipality which was not under seal as required by the Bombay District Municipal Act. It was held that nevertheless the Municipality was entitled to recover under the contract. But the case is not of much assistance for our purpose, because s. 65 of the Indian Contract Act is not discussed in the judgment, nor, it appears, was the decision based upon it. The Court relied on the English rule that though a contract must ordinarily be made under seal, still, where there is that which is known as an executed consideration, an action will lie though this formality has not been observed. Then we were referred to *Gulabchand v. Fulbai*,<sup>5</sup> a case of a marriage brokerage agreement void as opposed to public policy. The argument was put forward in that case that s. 65 has no application to contracts which are void *ab initio*. That argument appears not to have been accepted by the Court, vide the observations of Mr. Justice Batchelor at pp. 416 and 417 of the report. But though it was held that an action lay to recover money paid under the agreement, it was not by reason of s. 65. The Court held that it might be regarded as a suit for money had and received, and that as no material part of the illegal purpose had been carried into effect, the money paid was recoverable.

So far as these two cases go, therefore, the argument that s. 65 applies to a case like the present is not clearly made out. But there is a decision of the Privy Council in *Harnath Kuar v. Indar Bahadur Singh*<sup>6</sup> which makes the position clear. That was a case of a contract void *ab initio*, namely,

1 (1911) I. L. R. 36 Mad. 113.

2 (1928) I. L. R. 52 Bom. 414,  
s. c. 30 Bom. L. R. 715.

3 (1932) 35 Bom. L. R. 163.

4 (1903) I. L. R. 28 Bom. 66,

s. c. 5 Bom. L. R. 689.

5 (1909) I. L. R. 33 Bom. 411,  
s. c. 11 Bom. L. R. 649.

6 (1922) L. R. 50 I. A. 69.

the sale of an expectancy contrary to the provisions of the Transfer of Property Act. Nevertheless it was held that the case was governed by s. 65 of the Indian Contract Act, which, according to the true construction of its terms, includes an agreement void, in the sense of being not enforceable by law, from its inception. Moreover, in *Saundatti Municipality v. Shripadbhat*,<sup>1</sup> to which I have already referred, it was held by the learned Chief Justice and Mr. Justice Rangnekar in the case of a very similar contract, namely, an agreement by a Municipality to lease the levy of a tax, that the moneys paid under the agreement could be recovered under s. 65, although the point did not actually arise in the case because no such claim had been put forward.

In the course of the argument we were referred to *Rudragouda v. Gangowda*,<sup>2</sup> where it appears to have been held that s. 65 does not necessarily apply to all agreements void *ab initio*, and does not apply in particular where an agreement is of a fraudulent nature, known to be illegal and involving moral turpitude on the part of the plaintiff. We are not concerned in the present case with any such distinction, because there is no reason to suppose that this agreement was in any way fraudulent, or indeed that the parties were aware that it was illegal.

As against these authorities as to the applicability of s. 65, Mr. Rele for the appellants was only able to cite one case, *Municipal Board, Lucknow v. S. C. Deb*,<sup>3</sup> a full bench decision of the Lucknow Chief Court. That was a case of a municipal contract not under seal as required by law. It was held by the full bench that s. 65 could not be applied to such a case and that no action could be founded upon such a contract. The decision is contrary to *Abaji Sitaram v. Trimbak Municipality*,<sup>4</sup> which is an authority binding upon this Court, and, moreover, we are not concerned with the law as to contracts not under seal. The village panchayat has no seal, and it is not suggested that it cannot enter into contracts that are not sealed. Mr. Rele appeared to be of opinion that the judgments of the full bench in this case were opposed to the view that s. 65 can be applied to any contract which is void *ab initio*. It is by no means clear that this is the case, for, according to the head-note which is supported by a passage in the judgment of the learned Chief Judge, it was held that "a contract which is void from its inception and which is held to have been discovered to be so on the date on which it was reduced to writing would fall within the terms of s. 65 of the Indian Contract Act as a contract which has become void." But in any case the Privy Council decision in *Harnath Kuar v. Indar Bahadur Singh*<sup>5</sup> has not been discussed or referred to. In view of that decision and the view expressed by our own High Court in *Saundatti Municipality v. Shripadbhat*<sup>6</sup> we are clearly of opinion that an action lies under s. 65 in the present case.

It was urged on behalf of the appellants that the requirements of that section are not satisfied because it is not proved that they have received any advantage under the agreement. The suggestion is that they may not have

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2 (1937) 39 Bom. L. R. 1124.

5 (1922) L. R. 50 I. A. 69.

3 (1932) I L. R. 8 Luck. 1, F.B.

6 (1932) 35 Bom. L. R. 163.

4 (1903) I. L. R. 28 Bom. 66.

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recovered the dues, but that was not the case which they put forward at the trial. What they pleaded was not that they failed to recover the dues but that they had paid over what they had recovered, so that the entire sum due had, in fact, been paid to the plaintiff. Whether that was so or not was a question of fact, and it has been decided adversely to the appellants. We must hold, therefore, that they have received an advantage, namely, the sum claimed by the plaintiff, and that they are liable to restore it.

The only other point argued relates to the liability of the sureties under the agreement. In the body of the agreement, which is exhibit 40, it was provided as follows :—

“If I fail to pay instalment in time, the village panchayat may again sell by auction the rest of the period and if the Committee realizes less amount than the aforesaid total sum, the Committee may recover the deficit amount from me with costs by filing a suit against me.”

The surety bond at the end of the agreement provided as follows :—

“If Mr. Govind Keshav Dandavate (i.e. appellant No. 1) fails to pay the instalment as stated above regularly in time we both will pay the said amount to the Committee.”

Mr. Rele's argument is, firstly, that the sureties only made themselves liable to pay one instalment, and, secondly, that the village panchayat was entitled under the agreement to re-auction the right when the failure to pay the instalment first occurred, and, as this remedy was not availed of, the sureties are discharged. In our opinion, there is no force in either of these contentions. It is true that the word “instalment” ( *द्वारा* ) is in the singular in both cases, but nevertheless the meaning clearly is that the sureties made themselves liable to pay each and any instalment that was not paid regularly in time. We entirely agree with the Courts below on the construction of the agreement that the sureties were liable not merely for a single instalment but for the amount, whatever it was, that the principal debtor failed to pay. As regards the second point, it was clearly optional for the village panchayat whether it would have a new auction or not, and the fact that it did not see fit to avail itself of this right cannot be regarded as a discharge of the liability of the sureties.

Although, therefore, we are unable to agree with the grounds of the learned Assistant Judge's decision, we think that in effect his judgment is right and that the plaintiff is entitled to succeed.

The appeal, therefore, is dismissed with costs.

*Appeal dismissed.*

Before Mr. Justice Divatia.

SIDRAM PANDHARINATH MALWADKAR

v.

N. M. MAHALLYA.\*

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April 9.

*Provincial Insolvency Act (V of 1920), Sec. 68—Insolvent—Receiver—Sale of property by receiver—Insolvent's right to impeach the sale—"Person aggrieved"—Interpretation.*

An insolvent has no *locus standi*, under s. 68 of the Provincial Insolvency Act, 1920, to impeach a sale effected by the receiver in insolvency.

*Hari Rao v. Official Assignee, Madras*,<sup>1</sup> and *Sakhawat Ali v. Radha Mohan*,<sup>2</sup> followed.

*Kunda Singh v. Official Receiver*,<sup>3</sup> dissented from.

The expression "person aggrieved", as used in the section, means a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.

*Ex parte Sidebotham*: In re *Sidebotham*,<sup>4</sup> followed.

INSOLVENCY proceedings.

Sidram (applicant) was adjudicated insolvent by the First Class Subordinate Judge of Sholapur, and the opponent N. M. Mahallya was appointed receiver of his property.

On March 13, 1940, the receiver sold some property belonging to the insolvent.

Sidram applied to the Court, on April 3, 1940, to set aside the sale.

The trial Court rejected the application, observing as follows:—

"The application is opposed by the receiver who contends that the insolvent has no *locus standi* to impeach the sale made by the receiver. His contention seems to be valid in view of the remarks made in Mulla's Law of Insolvency in British India, p. 562, s. 840. Vide also 1926, A. I. R. Mad. 556."

On appeal, the Assistant Judge reached the same conclusion, for the following reasons:—

"Under s. 68 of the Provincial Insolvency Act, the insolvent is no doubt given the right to apply to the Court, but that is not an absolute right available to him in respect of any act or omission of the receiver. In order that he can avail himself of the benefit of the section, it has to be shown that he is aggrieved by the act of the receiver, which involves the further question, namely, whether he can feel aggrieved by such an act. Though, therefore, the insolvent is specifically mentioned in s. 68, unlike as in s. 8 of the Presidency-towns Insolvency Act, his remedy can arise only if he is aggrieved and not otherwise, that is to say, not merely because of his mention in the section. His rights are thus truly speaking the same as those of a person aggrieved. The expression 'person aggrieved' has been considered by James L. J. in *Ex parte Sidebotham* (14 Ch. D. 458, 465). Now on the making

\* Civil Revision Application No. 515 of 1940, against the decision of M. C. Shah, Assistant Judge at Sholapur, in Miscellaneous Appeal No. 31 of 1940, confirming the order passed by J. H. Chinmulgund, First Class Subordinate Judge at Sholapur.

in Insolvency Application No. 51 of 1938.

1 (1926) I. L. R. 49 Mad. 461, F.B.

2 (1918) I. L. R. 41 All. 243.

3 [1939] A. I. R. Lah. 499.

4 (1880) 14 Ch. D. 458.

A. C. J. of an adjudication order the whole of the insolvent's property vests in the receiver  
 1941 and the insolvent has no legal interest in such property thereafter and no *locus standi*  
 — in the administration of the estate. If so, he can have no legal grievance when his  
 SIDRAM property is sold by the receiver, nor could it be said that he has been refused some-  
 PANDHARI- thing which he has a right to demand.... See 1926, A. I. R. Mad. 556, I. L. R. 41  
 NATH All. 241. The case of 1939, A. I. R. Lah. 499 is distinguishable for it omits to  
 v. consider whether an insolvent can be regarded as a person aggrieved .. Section 68  
 MAHALLYA no doubt gives a right to the insolvent, but the right is available only in the case  
 — of an act or omission of the receiver when the insolvent could really feel aggrieved.  
 The case of the sale of the insolvent's property is not a case in which he can have  
 any legal grievance."

The insolvent applied to the High Court in revision.

S. S. Kavalekar, for the applicant.

N. V. Pardeshi, for the opponents.

DIVATIA J. This application arising under the Provincial Insolvency Act has been preferred by the insolvent. After the petitioner was adjudicated insolvent, the receiver appointed by the Court took charge of his properties and sold his house. An application was preferred by the insolvent to the First Class Subordinate Judge in insolvency for setting aside the sale on the ground that it was not properly conducted, that it did not fetch an adequate price and his estate, therefore, suffered a loss thereby. The application was resisted by the receiver on the preliminary ground that the insolvent had no *locus standi* to impeach the sale made by him as all the property of the insolvent had vested in him, and he had, therefore, no interest in it at the date of the application.

The application was made under s. 68 of the Provincial Insolvency Act, which provides as follows :—

"If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of....."

The learned Judge upheld the receiver's contention on the ground that the insolvent cannot be said to have been aggrieved by the act of the receiver, as at the date of the sale the property did not belong to the insolvent but was vested in the receiver for the benefit of his creditors. For that purpose the learned Judge relied on a recent full bench decision of the Madras High Court in *Hari Rao v. Official Assignee, Madras*.<sup>1</sup> The insolvent appealed to the District Court against that order. The learned Assistant Judge confirmed that order on the same ground that the insolvent cannot be deemed to be a person aggrieved by the act of the receiver. This revision petition is filed against that order in appeal.

It is contended that s. 68 expressly gives the insolvent the right to apply to the Insolvency Court against any act of the receiver which might operate to his prejudice. Reliance is also placed on s. 67 of the Provincial Insolvency Act which says that "the insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act", and it is urged that as the insolvent is interested in the surplus, he would be aggrieved if the property fetches an inadequate price on account of misfeasance

of the receiver in conducting the sale. But the question is whether he has a present interest in the surplus at the date of his application. The decision in *Hari Rao v. Official Assignee, Madras* is based on the authority of *Ex parte Sheffield*: In *re Austin*.<sup>1</sup> It was held there that the bankrupt, while undischarged, had no interest in the surplus beyond a mere hope or expectation. It is also held in *In re Leadbitter*<sup>2</sup> that the trustee in bankruptcy does not stand in the position of a trustee for the bankrupt, but he is a trustee for the creditors. The Allahabad High Court has held in *Sakhawat Ali v. Radha Mohan*<sup>3</sup> that the insolvent cannot be regarded as an aggrieved person in the sale proceedings conducted by the receiver. The question there was whether the insolvent had a right to appeal under s. 35 against an order of the insolvency Judge sanctioning the sale. The position would be the same in the case of an application to the Court under s. 68, because under both these sections the application or appeal could be made by the insolvent only if he was aggrieved by the receiver's act. As observed by James L. J. in *Ex parte Sidebotham*: In *re Sidebotham*<sup>4</sup> (p. 464) "A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

The Lahore High Court has held in *Kunda Singh v. Official Receiver*<sup>5</sup> that an insolvent has the right to apply to the Court against an act of misfeasance by the receiver in conducting the sale, but that decision does not consider the position in law that the insolvent has no legal estate in the property vested in the receiver and that his right to the surplus is a mere hope or expectation.

In my opinion, the lower Courts have rightly followed the Madras and Allahabad decisions in rejecting the insolvent's application on this preliminary ground.

The rule is, therefore, discharged with costs.

*Rule discharged.*

*Before Mr. Justice Broomfield and Mr. Justice Divatia.*

MULGUND CO-OPERATIVE CREDIT SOCIETY

*v.*

SHIDLINGAPPA ISHWARAPPA MANVI.

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*v.*

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April 9.

*Hindu law—Joint family—Debts—Bombay Co-operative Societies Act (Bom. VII of 1925), Sec. 54—Awards against manager how far binding on coparceners—Disclosure of status in pleadings whether necessary—Presumption that suit against manager is in representative capacity—Auction sale of joint-family pro-*

1 (1879) 10 Ch. D. 434.

2 (1878) 10 Ch. D. 388.

3 (1918) I. L. R. 41 All. 243.

4 (1880) 14 Ch. D. 458.

5 [1939] A. I. R. Lah. 499.

\* First Appeal No. 259 of 1938, from the decision of G. A. Balse, First Class Subordinate Judge, Dharwar, in Special Suit No. 28 of 1936.

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perty—"Right, title and interest"—Price paid at auction not less than valuation of property—Whether this is evidence that entire interest of coparceners was sold—Effect of sale under Bombay Land Revenue Code (Bom. V of 1879)—Partition suit by next friend of minors—Severance of status.

A decree against the manager of a joint Hindu family representing the family in respect of a debt contracted for family purposes is binding on all the members of the family and may be executed against the whole coparcenary property. A decree against the manager personally, even though in respect of a family debt, cannot be executed against the whole coparcenary property but only affects the manager's own interest.

In order that a decree against the manager of a joint Hindu family should bind coparceners not parties to the litigation it is not essential that the pleadings should expressly state that he was suing or being sued as manager.

*Madhgouda Babaji v. Halappa Balappa*<sup>1</sup> and *Lalchand Thakur v. Seogobind Thakur*,<sup>2</sup> referred to.

Where the manager of a joint Hindu family has contracted debts for family purposes and is sued in respect of those debts, there is a presumption that he is sued in his representative capacity, so that a decree against him will be binding on all the coparceners.

*Sakharam v. Devji*,<sup>3</sup> referred to.

It is not necessary that the plaintiff should state in distinct terms that the defendant is being sued as manager.

*Pirithpal Singh v. Rameshwar*,<sup>4</sup> *Madhgouda Babaji v. Halappa Ballappa*<sup>5</sup> and *Hori Lal v. Munman Kunwar*,<sup>6</sup> referred to.

The expression "right, title and interest" is an ambiguous one; it is quite consistent with the sale of every interest which the judgment-debtor may have sold, and it is a question of fact in each case what has in fact been sold.

*Rai Babu Mahabir Pershad v. Rai Manikunda Nath Sahai*,<sup>7</sup> referred to.

Where joint family property is sold at an auction sale and the price paid is not less than the valuation of the property made independently, it is good evidence that what was put to auction and sold was the entire interest of all the members of the joint family and not merely the individual interest of the manager who incurred debts in respect of which the property was sold.

A sale under the Bombay Land Revenue Code, 1879, in enforcing the provisions of the Bombay Co-operative Societies Act, 1925, has the same effect as a sale by a civil Court.

When a partition suit is brought on behalf of minor coparceners by their next friend, there is no severance of status unless and until a decree is made in the suit.

*Ramsing v. Fakira*<sup>8</sup> and *Ganapathy v. Subramanyan Chetty*,<sup>9</sup> referred to.

SUIT for declaration.

A Hindu joint family owned seven fields, survey Nos. 739, 831|1, 461|3, 462|2, 896, 819|2 and 919, in the village of Mulgund in Gadag taluka. The survey numbers were entered in the name of one Prabhappa, as manager of the joint family, in the register of record of rights.

1 (1933) I. L. R. 58 Bom. 348,  
s. c. 36 Bom. L. R. 327.

2 (1929) I. L. R. 8 Pat. 788.

3 (1898) I. L. R. 23 Bom. 372.

4 (1926) I. L. R. 2 Luck. 288.

5 (1933) I. L. R. 58 Bom. 348,

s. c. 36 Bom. L. R. 327.

6 (1912) I. L. R. 34 All. 549.

7 (1889) L. R. 17 I. A. 11.

8 (1938) 41 Bom. L. R. 195.

9 (1929) I. L. R. 52 Mad. 845.



Prabhappa borrowed from the plaintiff, Mulgund Co-operative Society, the following amounts—

- (1) Rs. 500 on July 31, 1926, for construction of a dam.
- (2) Rs. 400 on June 28, 1927, for household expenses.
- (3) Rs. 1,500 on March 31, 1937, for weeding and repairing a dam and a stone outlet for water in fields.
- (4) Rs. 46-8-2 on September 13, 1928, for purchasing cotton seeds.
- (5) Rs. 500 on January 20, 1928.

Prabhappa also incurred liability as a surety for one Virupaxappa who borrowed Rs. 200 from the plaintiff.

Prabhappa having failed to pay off the debts, the plaintiffs obtained, under s. 54 of the Bombay Co-operative Societies Act (Bom. VII of 1925), arbitration awards on January 23, 1930, in respect of them.

Prabhappa died after a darkhast to execute the awards was filed in the Court of the Subordinate Judge, Gadag. His nephew, one Murigeppa, and his sons were brought on the record. Murigeppa became the manager of the family and his name was entered into the record of rights. The plaintiff having failed to proceed with the darkhast it was dismissed on November 20, 1933.

The plaintiff thereafter applied to the revenue authorities for execution of his awards. In execution of the award for the first two loans survey No. 739 was put up for sale and the plaintiff purchased it for Rs. 1,501. In execution of the award for the third and fourth loans, survey Nos. 831, 461|3 and 462|2 were sold by auction and the plaintiff purchased them for Rs. 2,101. In execution of the award for the fifth loan, survey No. 896 was auctioned and the plaintiff purchased it for Rs. 1,700. In execution of the award for Prabhappa's liability as surety survey Nos. 819|2 and 919 were put up for sale and the plaintiff purchased them for Rs. 800.

The plaintiff Society obtained possession of these survey numbers through Court on November 6, 1935.

The defendant, Ishwarappa, had obtained a money decree for Rs. 7,000 in suit No. 77 of 1931, in the Court of the First Class Subordinate Judge, Dharwar, against all the members of the joint family and got those survey numbers attached before judgment.

The plaintiff applied to raise the attachment but its claim was negatived, the Court holding that he had purchased the share of Prabhappa only. The defendant in execution of his decree filed a darkhast (No. 170 of 1934) to sell the survey numbers. The plaintiff Society objected to the sale but its objection was allowed only to the extent of Prabhappa's share in the lands and was overruled as regards the shares of the other members of the joint family.

The plaintiff Society, thereupon, filed this suit for a declaration that it was the absolute owner of the lands by reason of the purchases at auction sales and that the lands were not liable to be attached and sold in execution of the decree passed in suit No. 77 of 1931 in favour of the defendant.

The plaintiff Society alleged that Prabhappa was the manager of the joint family, that he borrowed loans from the plaintiff Society for the purposes of the joint family, that all the members of the family were liable for the

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debts, that in execution of the awards obtained by the plaintiff, the survey numbers, which belonged to the joint family, were put up for sale and the plaintiff purchased them and became the absolute owner of the lands.

The defendant contended that Prabhappa was not the manager of the family, that the loans were not borrowed for family purposes, that only the interest of Prabhappa was sold at the auctions in execution of the award decrees, and that it was never mentioned that the right, title and interest of the whole joint family was to be sold and that the plaintiff had acquired no right to the lands.

The trial Court held that all the debts, except the debt of Rs. 200 which was incurred by Prabhappa as a surety, were contracted by Prabhappa as the manager of the joint family and for family purposes, but only the right, title and interest of Prabhappa were sold in execution of the award decrees. The Court dismissed the plaintiff's suit with costs.

The plaintiff-Society appealed to the High Court.

*R. A. Jahagirdar*, for the appellant.

*G. P. Murdeshwar*, for the respondent.

BROOMFIELD J. The appellant, who was the plaintiff in the Court below, is the Co-operative Credit Society of Mulgund in the Dharwar district. The suit was brought for a declaration that plaintiff is the absolute owner of the property in suit by right of purchase and that the property is not liable to be attached and sold in execution of a decree passed in suit No. 77 of 1931, which was brought by the respondent.

The suit property consists of seven fields which belonged to the joint family of one Prabhappa. He borrowed various sums of money from the plaintiff society. In January, 1930, the society obtained awards against him under s. 54 of the Bombay Co-operative Societies Act, 1925, the awards being made as provided there by an arbitrator nominated by the Registrar. Under the Act these awards may be executed either through the civil Courts or through the revenue officers under the provisions of the Bombay Land Revenue Code. It appears that the plaintiff first made an abortive application to the revenue authorities and then in June, 1932, he applied to execute the awards in the Court of the Sub-Judge of Gadag. During these proceedings Prabhappa, against whom execution was sought, died and his sons and his cousin Muri-geppa were brought on record. Muri-geppa contended that his interest could not be sold. Prior to this the minor sons of Muri-geppa by their next friend had filed a suit against Muri-geppa and Prabhappa's sons and their creditors for a declaration that the debts of Prabhappa and Muri-geppa were not binding on their shares. This was suit No. 112 of 1932. Possibly because of this litigation, although there is no evidence as to the reason, the plaintiff did not proceed with his darkhast and it was dismissed on November 20, 1933. In the suit brought by Muri-geppa's sons the present plaintiff and the present defendant both contended that Prabhappa and Muri-geppa were managers of the joint family and contracted debts for the family. The suit was dismissed in February, 1934, on the ground that as a bare declaration was sought it was barred by s. 42 of the Specific Relief Act. After abandoning his darkhast the plaintiff applied to the revenue authorities for execution of

his awards, and in October and December, 1934, seven fields were put up to auction and purchased by the plaintiff himself. He got possession in November, 1935.

The defendant-respondent in this appeal had brought a suit No. 77 of 1931 and obtained a money decree for Rs. 7,000 against Prabhappa, Murigeppa and the other members of the family. He had attached all the suit property before judgment in October, 1931. He got his decree in October, 1932. The plaintiff having purchased the lands applied to raise the defendant's attachment, but his claim was negatived, the Court holding that he had purchased the share of Prabhappa only, and an order was made that the rest of the property, i.e. the interest in it other than Prabhappa's, should be sold. Accordingly in March, 1936, the plaintiff brought this suit.

The plaintiff alleges briefly that Prabhappa was the manager of the joint family and the suit lands were accordingly entered in his name in the Record of Rights, that he had borrowed the loans from the plaintiff society for the expenses of the family and the benefit of the family estate, that all the members of the family were liable for the debts, that after Prabhappa's death Murigeppa became the manager and that after his purchase at the auction sales plaintiff became the owner of the lands.

The defendant contended that the award decrees were not binding on members of the family other than Prabhappa. He denied that the awards were passed against Prabhappa as manager, he denied that Murigeppa was manager after Prabhappa's death, he alleged that it was never mentioned that the right, title and interest of the whole joint family was to be sold and that the plaintiff had acquired no right to the plaint lands.

There was a preliminary issue with which we are not concerned and the main issues were (a) whether the debts for which the awards were passed in plaintiff's favour were contracted by Prabhappa as manager of the family and for family purposes; (b) whether the interests of all the members of the joint family were sold in execution of the awards. The trial Judge found the first issue in the affirmative in respect of all the debts except one, a small debt of Rs. 200 which Prabhappa had incurred as a surety, but he found on the second issue in the negative and held that in execution of the awards only Prabhappa's interest had been sold.

The learned advocate who appears for the respondent in this appeal has conceded that Prabhappa was the manager of the family. He was not prepared to concede that the debts were contracted for family purposes but he has not been able to make any effective answer to the reasoning of the learned trial Judge in paragraph 6 of the judgment, and in our opinion there can be no reasonable doubt that all the debts, except the small one already mentioned, were contracted for purposes of family necessity.

I therefore come to the second issue in the appeal, whether the interest of all the members of the joint family was sold or the interest of Prabhappa only. The learned trial Judge has relied on the sale proclamations which state that the right, title and interest of Prabhappa was to be sold and he disregarded the sale certificates, according to which the lands themselves described as the property of Prabhappa were stated to have been sold. So far he appears to be right. The sale certificates must be regarded as merely a record of what

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A. C. J. had been sold at the auction and what that was would depend on what was put to sale. But the learned Judge was wrong in assuming that the right, title and interest of Prabhappa necessarily meant his individual share in the lands only. As was pointed out by their Lordships of the Privy Council in *Rai Babu Mahabir Pershad v. Rai Markunda Nath Sahai*,<sup>1</sup> the expression "right, title and interest" is an ambiguous one. It is quite consistent with the sale of every interest which the judgment-debtor might have sold and it is a question of fact in each case what has in fact been sold.

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*Broomfield J.* Certain propositions of law in this connection may be said to be beyond dispute, viz., (a) that a decree against the manager of a joint family representing the family in respect of a debt contracted for family purposes is binding on all the members and may be executed against the whole coparcenary property, and (b), that a decree against the manager personally, even though in respect of a family debt, cannot be executed against the whole coparcenary property but only affects the manager's own interest. So that one of the principal questions that has to be decided here is whether these awards were passed against Prabhappa as representing the family of which he was the manager. Unless they were passed against him in his representative capacity, no more could be sold in execution of them than his own share. Now Prabhappa was not described as the manager in the award proceedings. But it has been held that in order that a decree against the manager of a joint family should bind coparceners not parties to the litigation it is not essential that the pleadings should expressly state that he was suing or sued as manager : *Madhgouda Bobaji v. Halappa Balappa*<sup>2</sup> and *Lalchand Thakur v. Seogobind Thakur*.<sup>3</sup>

The question is not whether the manager has been described as manager but whether in fact he represented the family in the proceedings in question. The learned advocate for the appellant has had to admit that there is nothing that can be said to be evidence to show that Prabhappa was proceeded against in his capacity as manager of the family. But there is good authority for the view that when the manager has contracted debts for family purposes and is sued in respect of those debts there is a presumption that he is sued in his representative capacity, so that a decree against him will be binding on all the coparceners. In *Sakharam v. Devji*<sup>4</sup> it was held that where a debt is incurred by a Hindu as manager of the family for family purposes, the other members of the family, though not parties to the suit, will be bound by the decree passed against him in respect of the debt ; and if in execution of the decree any joint property is sold, the interest of the whole family in such property will pass by the sale. This is the headnote in the case, but the propositions stated there, though they do not appear in so many words in the judgment, correctly represent the effect of it. It is to be noted moreover that in that case the litigation was not expressly brought against the manager of the family in his representative capacity, that is to say there was nothing in the record of the suit to show that that was the case.

In *Pithipal Singh v. Rameshwar*<sup>5</sup> the Court laid down this proposition.

1 (1889) L. R. 17 I. A. 11.

2 (1933) I. L. R. 58 Bom. 348,

s. c. 36 Bom. L. R. 327.

3 (1929) I. L. R. 8 Pat. 788.

4 (1898) I. L. R. 23 Bom. 372.

5 (1926) I. L. R. 2 Luck. 288.

Where the circumstances of the case clearly show that the person sued was the manager of a joint family and the property involved in the suit was family property, the natural and legitimate inference to be drawn should be that the defendant had been sued in the capacity of a manager. It is not necessary that the plaintiff should state in distinct terms that he is suing as manager or that the defendant is being sued as manager. This case was cited with approval by Mr. Justice Shingne in *Madhgouda Babaji v. Halappa Balappa*. Reference may also be made in this connection to *Hori Lal v. Munman Kunwar*.<sup>1</sup> In the circumstances of this case also we think it may fairly be assumed that as these debts were contracted by Prabhappa for family purposes when he was the manager of the family, the plaintiff society took proceedings against him in his capacity as manager and the awards are therefore binding not only against his own interest in the family property but against the whole coparcenary interest.

The learned trial Judge was of opinion that *Lalchand Thakur v. Seogobind Thakur* and *Sakharam v. Devji* were not applicable in the circumstances of the present case. His reasons were partly that he thought that the suit brought by Murigeppa's minor sons had put an end to the joint family. That, however, is contrary to *Ramsing v. Fakira*<sup>2</sup> and *Ganapathy v. Subramanyam Chetty*.<sup>3</sup> The true position is that when a partition suit is brought on behalf of minor coparceners by their next friend there is no severance of status unless and until a decree is made in the suit.

The learned trial Judge also attached importance to the fact that the plaintiff abandoned his proceedings in the Sub-Judge's Court and had recourse to the procedure under the Bombay Land Revenue Code. But this the society is permitted to do under the provisions of the Bombay Co-operative Societies Act and we are unable to see that this conduct of the plaintiff affects the principles laid down in the cases to which I have referred. We hold, therefore, that the awards were passed against Prabhappa as manager of the joint family.

It next remains to consider whether the whole estate or merely Prabhappa's interest in the estate was sold at the auction. Mr. Murdeshwar drew our attention to *Deendyal Lal v. Jugdeep Narain Singh*<sup>4</sup> and to *Baboo Hurdey Narain Saku v. Pundit Baboo Rooder Perakash Misser*.<sup>5</sup> These were both cases in which decrees were obtained against a father in execution of which his right, title and interest was sold. The Privy Council held that what was sold was merely his own interest, that is to say what he would get on partition, and not the whole estate. Both of these cases were governed by the Mitakshara law as applied to Bengal which is not in all respects the same as the law applicable in Bombay. In that connection I may refer to the observations of Sir Dinshah Mulla in his *Principles of Hindu Law* at pp. 304 and 354. Moreover *Deendyal v. Jugdeep Narain* has been distinguished in *Mussamut Nanomi Babuasin v. Modun Mohun*,<sup>6</sup> where it was pointed out that it was a decision on the special circumstances of the case and was not intended to lay down any general proposition that a sale of the right, title

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1 (1912) I. L. R. 34 All. 549, F.B.

2 (1938) 41 Bom. L. R. 195.

3 (1929) I. L. R. 52 Mad. 845.

4 (1877) L. R. 4 I. A. 247.

5 (1883) L. R. 11 I. A. 26.

6 (1885) L. R. 13 I. A. 1.

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and interest of the father in a joint family must be confined to his individual interest.

Mr. Murdeshwar also cited *Maruti Sakharan v. Babaji*,<sup>1</sup> where Sir Charles Sargent in a short judgment said that in the absence of special circumstances showing an intention to put up the entire interest of the family in the property sold in execution of a money decree against the father, only the interest of the father passes to the auction purchaser, and observed that in *Nanomi Babuasin v. Mohun Mohun*, *Minakshi Naidu v. Immudi Kanka Ramaya Kounden*<sup>2</sup> and *Rai Babu Mahabir Pershad v. Rai Markunda Nath Sahai*,<sup>3</sup> in which it had been held that the whole estate passed, there were special circumstances justifying that view. According to the latest pronouncement of the Privy Council on this subject, in *Sripat Singh v. Tagore*,<sup>4</sup> the Court in cases of this kind has simply to regard the substance of the transaction and not technicalities. Moreover, we are not satisfied that the circumstances existing in the cases just referred to were more conclusive than those in the present case.

The description of the suit property is given in the plaint. The first survey number is No. 896 and the value of that was assessed by the panch at Rs. 70 an acre. The plaintiff purchased it for Rs. 1,700 which works out at Rs. 71 an acre. The second field is No. 739. That was valued by the panch at Rs. 1,500 and plaintiff paid Rs. 1,501. Then there were three fields sold together. The panchas valued them at Rs. 70 an acre. The plaintiff purchased for Rs. 2,001 which works out at Rs. 70 an acre. The total area of the land sold was 82 acres and 6 gunthas. The price paid was Rs. 6,102, i.e., roughly Rs. 71 per acre which is slightly above the valuation of the panchas. That, we think, is fairly good evidence that what was put to auction and sold by the plaintiff was the entire land and not merely Prabhappa's half share in it. The learned trial Judge thought he saw an indication that plaintiff had purchased at an undervalue in case of one of the fields because in his execution application made in June, 1932, he valued it at Rs. 2,400 whereas he purchased it for Rs. 1,700, that being in accordance with the valuation of the panchas in August, 1934. It is quite possible, however, that the value may have fallen in the meantime, and in view of the valuation of the property as a whole and the total price paid it would, we think, be quite unreasonable to hold that the plaintiff purchased merely Prabhappa's individual interest.

It was contended on behalf of the respondent that sales of land by the revenue authorities under the provisions of the Bombay Land Revenue Code are not subject to the same rules and principles as sales in execution by the Court. It was said that there was no notice to other members of the family and that the proceedings in execution of the awards were all taken behind the backs of the coparceners. That, however, is not an accurate statement of the position. Notice is provided for by s. 166 of the Code and we may assume that the requirements of the Act were complied with since there is no evidence to the contrary. That being so, Murigeppa must have had ample notice, and in addition to that there were the sale proclamations.

1 (1890) I. L. R. 15 Bom. 87.

2 (1888) I. L. R. 16 I. A. 1.

3 (1889) I. L. R. 17 I. A. 11.

4 (1916) I. L. R. 44 I. A. 1.

s. c. 19 Bom. L. R. 290.

Mr. Murdeshwar also relied upon the fact that the property brought to sale was described as the property of Prabhappa (represented) by his heir Murigeppa, and he argued that that meant that the plaintiff was not selling more than Prabhappa's own interest. That inference we think is not at all justified, and in view of the fact that plaintiff was admittedly seeking to bring the entire property to sale before the civil Court, it is most unlikely that when he went to the revenue authorities he contented himself with selling Prabhappa's half share. Under the Bombay Land Revenue Code what is sold is no doubt the right, title and interest of the defaulter: see s. 155. But when default is made in payment of assessment and the land is sold, what passes is the entire land and not merely the interest of the defaulter in it. That is because assessment is paid on behalf of all persons having an interest in the land, but when the law allows the revenue procedure to be applied in other cases, as is allowed by the Bombay Co-operative Societies Act, the effect of a sale must, we think, be the same. We are not in fact impressed by the argument that a sale under the Bombay Land Revenue Code has not the same effect as a sale by a civil Court.

It may on the face of it seem to be a hardship that the whole estate should be sold in this way without any inquiry having been made into the claims of Murigeppa or other members of the family. But on the other hand all the grounds on which Prabhappa's coparceners could have objected to the sale have now been decided against them.

In the course of his argument Mr. Murdeshwar raised the question whether it is permissible for a Hindu manager to belong to a co-operative society with the result that disputes affecting the family may automatically be referred to arbitration as provided in the Bombay Co-operative Societies Act. We do not consider that this point falls to be decided in the present case. It is well settled that a manager has power to refer disputes to arbitration and prima facie we can see no reason why he should not borrow from a Co-operative Credit Society if in his discretion he thinks it for the benefit of the family to do so. But the only points we have to decide are whether the awards were passed against Prabhappa in his capacity as manager and whether in execution of the awards the entire property of the family was actually sold. We have found both these points in favour of the appellant and therefore the appeal must be allowed and the trial Court's decree set aside.

There will be a decree as prayed for in the plaint except as regards the fields Nos. 819 and 919 as to which the declaration will be that the plaintiff is the owner of Prabhappa's half share therein. As the plaintiff has substantially succeeded, we award him his costs in both Courts.

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*Appeal allowed.*

*Before Mr. Justice N. J. Wadia and Mr. Justice Macklin.*

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THE MUNICIPAL BOROUGH OF AHMEDABAD

v.

March 25. THE ARYODAYA GINNING AND MANUFACTURING CO., LTD.\*

*Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Secs. 110, 111†—*

*Appeal before Magistrate—Whether Magistrate a persona designata or ordinary Court—Admission of additional evidence by Magistrate whether permissible—Assessment whether can be challenged on appeal—Interlocutory orders passed by Magistrate on appeal—Jurisdiction of revising Court to interfere in revision against such orders.*

A Magistrate hearing an appeal under s. 110 of the Bombay Municipal Boroughs Act, 1925, is an ordinary Court and as such can allow additional evidence, oral or documentary, to be led before him.

In an appeal under s. 110 the question of the assessment itself can be challenged.

The words "decision upon any appeal" in s. 111 of the Act do not imply that the decision of the appeal referred to means the final decision. The revising Court, therefore, can interfere in revision with interlocutory orders passed by a Magistrate under s. 110 of the Act.

*Secretary of State for India v. Narsibhai Dadabhai*,<sup>1</sup> referred to.

\* Civil Revision Application No. 58 of 1941, against the order passed by D. G. Kamerkar, Extra Additional Sessions Judge at Ahmedabad, in Criminal Miscellaneous Application No. 141 of 1940, against the order passed by D. A. Patel, Special First Class Magistrate, Ahmedabad.

† Sections 110 and 111 run as under:—

110. (1) Appeals against any notice of demand issued under sub-section (3) of section 104 may be made to any Magistrate or Bench of Magistrates by whom under the directions of the District Magistrate such class of cases is to be tried.

(2) No such appeal shall be heard and determined unless—

(a) the appeal is brought within fifteen days next after service of the notice of demand complained of; and

(b) an application in writing, stating the grounds on which the claim of the municipality is disputed, has been made to the standing committee as follows:—

(i) in the case of a rate on buildings or lands or both within the time fixed in the notice given under section 81 or 82 of the assessment or alteration thereof, according to which the bill is prepared,

(ii) in the case of any other claim for which a bill has been presented under sub-section (1) of section 104 within fifteen days next after the presentation of such bill; and

(c) the amount claimed from the appellant has been deposited by him in the municipal office.

111. (1) Every entry in the assessment list made under the provisions of the Act against which no objection is made as hereinbefore provided, and the amount of every sum claimed from any person under this Act on account of any tax, if no appeal therefrom is made as hereinbefore provided, and the decision of the Magistrate or Bench of Magistrates upon any appeal shall, at the instance of either party, be subject to revision by the Court to which appeals against his or their decisions ordinarily lie.

(2) Effect shall be given by the Chief Officer to every decision of the said Magistrate or Bench of Magistrates on any appeal or any decision in revision on such appeal against any such entry or tax.

1 (1923) I. L. R. 48 Bom. 43,  
s. c. 25 Bom. L. R. 992.



APPEALS under s. 110 of the Bombay Municipal Boroughs Act, 1925.

The Aryodaya Ginning and Manufacturing Co., Ltd., (opponent), having its registered office at Ahmedabad, filed objections to the assessment list as framed by the Chief Officer of the Municipal Borough of Ahmedabad (applicant) under s. 81(1) of the Bombay Municipal Boroughs Act, 1925. These objections were heard by the appeal committee constituted under the Act and certain evidence was led before it. The assessment list was then duly authenticated.

The applicant Municipality thereafter issued against the opponent Mills notices of demand for levy of municipal taxes under s. 104(3) of the Act. The opponent appealed to the Special First Class Magistrate at Ahmedabad, under s. 110 of the Act, on the ground that the amounts demanded by the applicant were unduly high and unjustified, being based on an exaggerated valuation. The opponent applied to the Magistrate to be allowed to lead oral and documentary evidence regarding the values of the lands and buildings concerned in order to show that the valuation was inflated and exaggerated. The applicant contended that no such evidence could be allowed to be led at that stage as the opponent had every opportunity to produce evidence before the appeal committee. The learned Magistrate held that he was entitled to allow evidence to be led before him and observed as follows :—

“In the Municipal area of Bombay, under s. 217 of the Bombay City Municipalities Act, 1888, such appeals are heard and determined by the Chief Judge of the Small Causes Court and the procedure to be followed by him is laid down in s. 508 of the said Act and so there is no difficulty. It is to be noticed that in Bombay, the first objections against rental values entered in the assessment book are, under s. 163, made to the Municipal Commissioner who investigates and disposes of them like the appeal committee under the Municipal Boroughs Act (vide s. 165). In spite of this in disposing of the appeals under s. 217, the Chief Judge of the Small Causes Court has to summon witnesses and compel production of documents etc.... (vide s. 508). On the same analogy, it would not be unreasonable to expect that the Magistrate dealing with similar appeals under s. 110 of the Municipal Boroughs Act would also have to follow the same procedure and the practice of this Court as also of other similar Courts in the mofussil in this respect has been in fact the same. Evidence is allowed to be produced on both sides wherever this is considered necessary for the just and proper disposal of the appeals and no objection was taken so far by the Municipality, nor was its irregularity pointed out by any superior Court....

These appeals relate to the capital valuation of lands and building appertaining to the Mills and factories situated in Ahmedabad City. The valuations come to several lakhs of rupees in each case and the amounts of taxes involved are several thousands of rupees. The record before the Court consists of the valuation statements prepared by the Mill Valuation Officer of the respondent Municipality, the petition of objection, a statement of the appellants' engineer or secretary recorded before the appeal committee challenging the municipal valuations and in some cases giving the figures of his own valuation. There is nothing on record to show on what data the figures of valuation on either side are based. It would hardly be possible for this Court to arrive at a just and proper decision in these appeals simply by hearing the pleaders with the scanty material before it.

.... I am inclined to hold that this is a Special Court under s. 110 of the Municipal Boroughs Act analogous to the Chief Judge of the Small Causes Court at Bombay and like it, has to hear such evidence as is produced before it by the parties and as is relevant to the matters at issue in the interests of justice.”

The applicant applied in revision to the Extra Additional Sessions Judge

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A. C. J. at Ahmedabad under s. 111 of the Act against the order of the Magistrate.  
 1941 The learned Judge in dismissing the application observed as follows :—

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“ The decision of the Magistrate or Bench of Magistrates referred to in s. 111(1) is a final decision in appeal and not a decision upon a matter of procedure merely or upon a matter that does not determine finally the rights and obligations of the parties on either side. This appears to me clear from the expression ‘ and the decision of the Magistrate or Bench of Magistrates upon any appeal shall, at the instance of either party, be subject to revision by the Court to which appeals against his or their decisions ordinarily lie ’, occurring in the said s. 111(1). The Magistrate decided to proceed with the appeal, upon determining a matter of mere procedure. He did not decide the appeal itself. If there is an error in the procedure adopted by the Magistrate, the grievance can be remedied in revision under s. 111 by this Court only after a final decision of the appeal. This Court has no powers like those in s. 115 of the Civil Procedure Code, which can be exercised only by the High Court.”

The applicant applied in revision to the High Court.

*G. N. Thakor*, with *J. C. Shah*, for the applicant.

*M. P. Amin*, with *P. A. Dhruva*, for the opponent.

N. J. WADIA J. This application arises out of an order made by the Special First Class Magistrate, Ahmedabad, under s. 110 of the Bombay Municipal Boroughs Act (Bom. XVIII of 1925), by which the Municipality of Ahmedabad is governed. There was a revision application filed in the Court of the Extra Additional Sessions Judge against the Magistrate's order under s. 111 of the Act by the Ahmedabad Municipality. This application was rejected and the Municipality has applied in revision to this Court.

The order passed by the Magistrate was an interlocutory one and dealt with the question of the right of the opponent to lead oral and documentary evidence before the Magistrate in the appeal pending before him. The contention of the Municipality was that a Magistrate hearing an appeal under s. 110 of the Bombay Municipal Boroughs Act could not allow additional evidence, oral or documentary, to be led before him, but must decide the matter on the evidence already led by the parties before the standing committee of the Municipality under s. 81.

It is necessary to consider the scheme of the Act in connection with the imposition of taxes in order to understand the position taken up by the applicant Municipality. Under s. 73 of the Act the Municipality can impose certain specified taxes subject to the general or special orders made by Government. Among these taxes is a general water-rate or a special water-rate or both for water supplied by the Municipality which might be imposed on buildings and lands. Under s. 78, when a rate on buildings or lands or both is imposed, the Chief Officer has to cause an assessment list of all buildings or lands or lands and buildings in the Municipal borough to be prepared containing *inter alia* the valuation, based on capital or annual letting value, on which the property is assessed, and the amount of the tax assessed thereon. Under s. 80 after the assessment list has been completed the Chief Officer has to give public notice of it and of the place where the list may be inspected. Under s. 81 the Chief Officer is bound at the time of the publication of the assessment list under s. 80 to give public notice of the date before which

objections to the valuation or assessment in such list shall be made. Under sub-cl. (2) of the section such objections to the valuation and assessment of any property included in the list published under s. 80 have to be made by the owner or occupier or any agent of such owner or occupier to the standing committee by an application in writing stating the grounds on which the valuation or assessment is disputed; and under sub-cl. (3) the standing committee, after allowing the applicant an opportunity of being heard in person or by agent, has to investigate and dispose of the objections, cause the result thereof to be noted in the book kept under sub-cl. (2) of the section, and cause any amendment necessary in accordance with such result to be made in the assessment list. The sub-clause provides that the powers and duties of the standing committee under this sub-section may be transferred to any other committee appointed by the Municipality, or with the permission of the Commissioner, to any officer or pensioner of the Crown. When all the objections have been disposed of and the necessary corrections made in the assessment list it has to be authenticated by the signatures of the Chairman and at least one other member of the standing committee under sub-cl. (4) to the section; and under sub-cl. (6) the list so authenticated, subject to such alterations as may be made in it under s. 82, and subject to the result of any appeal or revision made under s. 110, is to be conclusive evidence for certain purposes. Under s. 104 the Chief Officer has to present a bill for the amount due to the Municipality and if the amount of the bill is not paid within fifteen days from the presentation of the bill the Chief Officer may cause a notice of demand to be served upon the person. Under s. 110 appeals against any notice of demand issued under s. 104 may be made to any Magistrate or Bench of Magistrates by whom under the directions of the District Magistrate such class of cases is to be tried; and s. 111 provides that the decision of the Magistrate or Bench of Magistrates upon any appeal is subject to revision by the Court to which appeals against his or their decisions ordinarily lie.

The opponent company appealed to the Special Magistrate, First Class, Ahmedabad, who was the Magistrate empowered to hear appeals under s. 110, on the ground that the amounts demanded by the Municipality were unduly high and unjustified, being based on an exaggerated valuation; and in order to prove its contention before the Magistrate the opponent applied to be allowed to lead evidence both oral and documentary. On behalf of the applicant Municipality it was contended that no such evidence could be allowed to be led at that stage as the opponent had had every opportunity to produce evidence before the appeal committee, to whom the functions of the standing committee under s. 81 had been delegated, and if the permission asked for were granted it would convert the Court into a Court of first instance. The learned Magistrate came to the conclusion that he was entitled to allow evidence to be led before him. There was a revision application against that order to the learned Additional Sessions Judge who held that the order of the Magistrate dealt with a mere question of procedure, and was not an order which finally decided the appeal, and that therefore he had no power to interfere in revision at that stage, his view being that the power of revision given to him by s. 111 could only be exercised when the appeal had been finally

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A. C. J. decided by the Magistrate, and that there was no right of revision under that section against a mere interlocutory order such as this.

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In our opinion the view taken by the learned Judge is wrong. The language of s. 111 of the Bombay Municipal Boroughs Act is very similar to the language of s. 115 of the Code of Civil Procedure. The latter section provides that the High Court may call for the record of any case which has been decided by any Court subordinate to it and in which no appeal lies, and may in certain circumstances interfere in revision. Section 111 of the Bombay Municipal Boroughs Act provides that the decision of the Magistrate or Bench of Magistrates upon any appeal shall be subject to revision by the Court to which appeals against his or their decisions ordinarily lie. There was at one time a considerable difference of opinion between the different High Courts whether the words "case decided" in s. 115 of the Code included part of a case, and whether the High Court could interfere in revision with interlocutory orders. The view taken by this Court was that the High Court has power to interfere in revision with interlocutory orders, and that the High Court would in the exercise of its discretion interfere with an interlocutory order if it came to the conclusion that the order was wrong, even though the order was one which could be challenged in an appeal from the final decree : vide *Secretary of State for India v. Narsibhai Dadabhai*.<sup>1</sup> There is no reason why the words "decision upon any appeal" in s. 111 of the Bombay Municipal Boroughs Act should be interpreted differently from the words "case decided" in s. 115 of the Code of Civil Procedure. There is nothing in the language of the former section which necessarily implies that the decision of the appeal referred to in that section means the final decision. The learned Sessions Judge was wrong in our opinion in the view which he took that he was not entitled to interfere in revision with the order made by the learned Magistrate.

The revision application made to this Court is against the order of the Sessions Judge as well as against the order of the Magistrate which the Sessions Judge refused to interfere with and it is therefore necessary to go into the merits of the question.

Mr. Thakor who appears for the applicant Municipality has urged three contentions before us. It is argued first that a Magistrate acting under s. 110 is merely an appellate authority upon whom no powers of taking evidence have been conferred by the statute, and that therefore no evidence could be taken by him. The Act undoubtedly does not contain any provisions giving specific powers to the Magistrate acting under s. 110 to take evidence, to summon witnesses, to order the production of documents or to administer oaths. But the Magistrate acting under s. 110 of the Bombay Municipal Boroughs Act is not a *persona designata* but an ordinary Court, whose decisions are subject to revision by the Court to which appeals from his decision would ordinarily lie, and, as has been recently held by this Court in *Lokmanya Mills Ltd. v. Municipal Borough, Barsi*,<sup>2</sup> a further revision application lies to the High Court against an order in revision passed by a Sessions Judge under s. 111 of the Bombay Municipal Boroughs Act from an order passed

1 (1923) I. L. R. 48 Bom. 43,  
s. c. 25 Bom. L. R. 992.

2 (1939) 41 Bom. L. R. 937.

by a Magistrate under s. 110 of the Act. In this respect the Magistrate acting under s. 110 of the Bombay Municipal Boroughs Act differs from the Magistrate dealing with appeals under s. 86 of the Bombay District Municipal Act, and from the Chief Judge of the Small Cause Court acting under s. 217 of the City of Bombay Municipal Act. In these cases the Magistrate or the Chief Judge is a *persona designata*, and this explains why in the City of Bombay Municipal Act it was found necessary to confer specific powers upon the Chief Judge to summon and enforce attendance of witnesses and compel them to give evidence and to compel the production of documents. No such special provision was necessary under the Bombay Municipal Boroughs Act because the appellate authority under s. 110 is a Court, and it has inherent powers to summon witnesses, to compel production of documents and to administer oaths. There is therefore no force in the contention that the Magistrate acting under s. 110 has no power to take evidence because such powers are not specifically conferred on him by the Act.

The next contention is that at any rate he is an appellate authority and cannot ordinarily take evidence, and that it would only be in special circumstances such as are dealt with in O. XLI, r. 27, of the Code of Civil Procedure, that he could allow evidence to be led in an appeal.

The position of a Magistrate acting under s. 110 is a very anomalous one. It was held in *In re Dalsukhram*<sup>1</sup> that a Magistrate hearing an appeal of the kind mentioned in s. 86 of the Bombay District Municipal Act was merely an appellate authority having jurisdiction given by the Act to deal with a question of civil liability, that he was not therefore an inferior criminal Court, and that a revision application against his order would not lie to the High Court on its criminal side under s. 435 of the Code of Criminal Procedure. In *Surat Municipality v. Hamiduddin*<sup>2</sup> the same view was taken by Mr. Justice Norman with regard to the provisions of ss. 110 and 111 of the Bombay Municipal Boroughs Act, and it was held that in such a case a revision application would lie to the High Court only on the civil side. The same view was taken in *Lokmanya Mills Ltd. v. Municipal Borough, Barsi*.<sup>3</sup> It may therefore be taken as settled that a Magistrate acting under s. 110 is an appellate authority having jurisdiction given by the Act to deal with a question of civil liability, and not a *persona designata*.

The question still remains whether a Magistrate acting under this section is in the position of a Court hearing a civil appeal as regards the taking of evidence, i.e. whether normally he would be bound to decide the appeal on the evidence already led before the lower tribunal, the standing committee of the Municipality, and could only allow additional evidence to be led before him in appeal under the special conditions laid down in O. XLI, r. 27, of the Code of Civil Procedure. The provisions of ss. 110 and 111 are peculiar. Although the authority upon which the appellate jurisdiction is conferred is a criminal Court, the matters which it is called upon to decide are of a purely civil nature, and it is for this reason that this Court has held that a second revision application against the Magistrate's order would lie to the High Court on the civil side, even though the revision provided by s. 111 lies to

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1 (1907) 9 Bom. L. R. 1347.

3 (1939) 41 Bom. L. R. 937.

2 (1937) 40 Bom. L. R. 387.

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another criminal Court, namely the Sessions Court. The fact that the appellate authority under s. 110 is a Court from whose decision a revision application lies to its superior Court, the Sessions Court, and a further revision application lies to the High Court, suggests that the Legislature must have contemplated that the Magistrate acting under s. 110 would base his decisions upon evidence which the revising Courts could consider. Section 81 of the Bombay Municipal Boroughs Act which provides for objections to the assessment list prepared by the Chief Officer being lodged before the standing committee, and which gives the standing committee power to investigate and dispose of such objections, does not give the standing committee any power to summon witnesses or to administer oaths or to compel the production of documents. All that the section provides is that the standing committee shall allow the applicant an opportunity of being heard in person or by agent. If this is the only evidence on which the standing committee can base its decision, and if the Magistrate hearing the appeal is not allowed to take any other evidence and is to be compelled to base his decision on the evidence already adduced before the standing committee, there will in most cases be very little material before the Magistrate to enable him to decide the appeal satisfactorily, and very little material on which the revising Courts can deal with applications made to them. In this connection it is significant that under the City of Bombay Municipal Act the Chief Judge of the Court of Small Causes, by whom as a *persona designata* appeals against any rateable value or tax fixed or charged under the Act can be heard and determined, is given specific powers by s. 508 of the Act to summon and enforce the attendance of witnesses, to compel them to give evidence, and to compel production of documents. The Act contemplates that in hearing an appeal under s. 217 the Chief Judge may allow evidence to be led, and it seems to us that a similar interpretation must be put upon the provisions of s. 110; and this conclusion derives support from the fact to which I have already referred that a Magistrate acting under s. 110 is not a *persona designata* but an ordinary Court, against whose decisions revision applications are expressly provided for by the Act itself. The learned Magistrate has pointed out that the evidence before the standing committee in this case consisted of valuation statements prepared by the valuation officer of the Municipality and the opponent's objections, and a statement prepared by the opponent's engineer. There was no evidence to show on what data the figures relied on by the two sides were based, and unless the Magistrate was permitted to take evidence it would be very difficult for him to come to any satisfactory decision on the appeal. It is true that s. 110 refers to the Magistrate exercising powers under that section as an appellate authority. But, as I have already pointed out, the provisions of this section, and of similar sections in the other Acts, are of a somewhat anomalous nature, and it would be difficult to regard the Magistrate's powers under this section as being strictly limited to those of an appellate Court. The fact that the tribunals from whose decisions the appeals are provided are tribunals which could not take evidence on oath or compel evidence to be given would itself require that somewhat wider powers than those of an ordinary appellate Court should be exercisable by the Magistrate under s. 110. It may be noted that s. 110 refers to appeals of this class

being "tried" by the Magistrate, a term which would ordinarily be used of original trials rather than of appeals. Taking into consideration the peculiar position of the Magistrate under s. 110 we think that he must have the power of taking evidence if he considers such evidence necessary. Since he is an authority deciding a question of civil liability his position is analogous to that of a civil Court, and the considerations which should govern him in deciding whether evidence should be allowed would be similar to those which would prevail with a civil appellate Court, though, for the reasons mentioned above, there would have to be considerably more latitude in such matters than a civil appellate Court could allow.

The third contention urged by Mr. Thakor for the applicant is that an appeal under s. 110 being not against the assessment but against the notice of demand, the question of the assessment itself could not be challenged at all in such an appeal except on some ground of illegality such as a wrong person being made liable. We are unable to put such a very restricted interpretation upon the language of s. 110. It is obvious that such an interpretation would deprive the persons taxed of all right of appeal except in an extremely limited number of cases, and it does not seem to have been the intention of the Legislature so to restrict the right of appeal.

The view taken by the learned Magistrate about his power to allow evidence to be led is in our opinion correct. He has in his order given reasons why in this particular case it was necessary to allow such evidence to be led. The rule will, therefore, be discharged with costs.

*Rule discharged.*

#### ORIGINAL CIVIL.

*Before Mr. Justice Kania.*

BAYABAI

*v.*

ESMAIL AHMED.\*

1941

March 5.

*Mahomedan law—Maintenance—Daughter—Duty of father to maintain daughter till marriage—Daughter claiming separate maintenance—Justifiable grounds for giving such allowance.*

Under Mahomedan law a father is under an obligation to maintain his daughter till her marriage, but he is not bound to provide her with separate maintenance, except in special circumstances.

Where a Mahomedan daughter lived with her mother who was divorced by her father, and the father married a second wife and became a lunatic, and the daughter claimed separate maintenance allowance :—

*Held*, that, under the circumstances of the case, she was entitled to such allowance during the life-time of the father till her marriage.

\* O. C. J. Suit No. 2053 of 1940.

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SUIT for maintenance.

The facts appear fully in his Lordship's judgment.

*M. Y. Haindaday*, for the plaintiff.

*M. S. Vakil*, for the defendant.

KANIA J. This is a suit filed by a daughter against her father for arrears of maintenance, separate maintenance, and a declaration that the father was liable to pay reasonable expenses which she may have to incur for her marriage.

The plaintiff was born at Mandvi (Surat) in 1920. Her mother was divorced by the defendant in December, 1931. On October 5, 1931, the defendant, through his attorneys, wrote to the plaintiff's mother's attorneys threatening to obtain possession of the plaintiff who was alleged to be wrongfully detained by her mother. In that letter the defendant offered to pay Rs. 15 every month, which the plaintiff's mother was asked to receive from the office of the defendant's attorneys, pending the steps which the defendant intended to take to obtain the custody of the plaintiff. No money was received by the plaintiff's mother, but she was thereafter divorced in December, 1931. On August 21, 1940, the plaintiff through her attorneys sent a letter of demand to the defendant claiming separate maintenance at Rs. 40 per month and arrears of maintenance. A reminder was sent on September 2, 1940, but the defendant sent no reply. In July, 1940, the present wife of the defendant filed a petition to adjudge the defendant a lunatic, and, as stated in the plaint, the Court-receiver was appointed the Committee on September 6, 1940. Thereafter the plaintiff sent letters of demand to the receiver. In that it was pointed out that the second wife of the defendant had omitted to mention in the petition the plaintiff as a relation and had obtained an order from the Court about the application of the income of the defendant's property without disclosing that fact. The Court-receiver informed the plaintiff that there was no order for payment to her of separate maintenance or arrears of maintenance. He, however, suggested that the plaintiff might stay with defendant's present wife and the minor son. That suggestion did not appeal to the plaintiff and the present suit was filed in November, 1940.

The first contention found in the written statement is that the plaint does not disclose any cause of action. While it is conceded that under Mahomedan law a father is under an obligation to maintain his daughter till marriage, there is no provision for separate maintenance of a daughter. It was further argued that if separate maintenance was claimed the necessary averments to justify the claim should be found in the plaint and it was contended that there were none in this case. It has been repeatedly pointed out that pleadings in India should not be very strictly construed. The plaintiff relied on two facts in support of her claim for separate maintenance : first, that her mother was divorced in 1931 and since then she has been living with her mother, and the other that the defendant had married again and was a lunatic. Under the circumstances it would be unreasonable to expect the plaintiff to stay with her step-mother. A third factor which was pointed out in Court was that the second wife of the defendant was so hostile to the plaintiff that she had even ignored the plaintiff's existence at the time of



making the petition to the Court and stating who the relations of the defendant were. The facts that the plaintiff has been living with her mother since 1931, that the defendant had married again and that he was now a lunatic, and that the plaintiff's name was not mentioned in the petition to adjudge the defendant a lunatic are not disputed. As the plaintiff relies on those facts only to establish her right to separate maintenance, I think they are found in the plaint and the annexures thereto. The first issue should therefore be answered in the affirmative.

On behalf of the plaintiff it was argued that in all text books on Mahomedan law it is recognised that a father is bound to maintain his daughter till her marriage. It was pointed out that in connection with the maintenance of a wife text books on Mahomedan law discuss the obligation of the wife to stay with her husband, and if separate maintenance was claimed, she must satisfy the conditions under which alone such a claim could be advanced. From those facts it was argued that in the absence of any express provision in the Mahomedan law a father was bound to maintain his daughter till marriage and the daughter's right to separate maintenance is assumed. There is no reported decision to which my attention has been drawn in which the Court had discussed this question in a civil litigation. I am unable to accept this contention in the wide terms it is advanced. The statement that in Mahomedan law a father is bound to maintain his daughter till marriage, does not necessarily include the contention that the daughter is entitled to stay where she liked and live as she liked, but the father must provide her with maintenance. In my opinion the Mahomedan law, like other systems of law, while putting an obligation on the father to maintain his children, gives with it a right to the father to keep the children in his house, unless according to the law governing the parties some other person is the lawful guardian of the person of the child. Under Mahomedan law it is recognised that till a daughter attains puberty her mother is the natural guardian of the person of the daughter. *Emperor v. Alyshabai*,<sup>1</sup> which has been followed in *Allah Rakhi v. Karam Ilahi*,<sup>2</sup> clearly establishes this point. While therefore a Mahomedan father is under an obligation in law to maintain his daughter till her marriage, if the daughter desires to claim separate maintenance i.e. maintenance allowance while she insists on living away from her father, she has to make out the necessary grounds for that. In default, if the father offers to keep her in the house and maintain her there, the daughter has no absolute right to separate maintenance. In my opinion the expression "absolute right" found in the text books in connection with the daughter's right to maintenance should be read as indicated above and not as giving to the daughter an unrestricted right to live as and where she liked and imposing an obligation on the father to provide separate maintenance for her, even though he may be willing to keep her in the house and maintain her there. In the present case, having regard to the fact that the plaintiff's mother was divorced in December, 1931, that the plaintiff was not called to live in the defendant's house and has not in fact lived there, coupled with the fact that the defendant is now a lunatic and the plaintiff if now called upon to stay in the defendant's house will

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1 (1904) 6 Bom. L. R. 536.

2 (1933) I. L. R. 14 Lah. 770.

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have to live with her step-mother, I think there is sufficient justification for permitting the plaintiff to stay away from the defendant's house at present, and her right under the circumstances to separate maintenance is established. The second issue must therefore be answered in the affirmative under the circumstances of the present case.

The plaintiff has claimed arrears of maintenance. On her behalf it was argued that if her right to be maintained is conceded, she is entitled to arrears of maintenance. In my opinion that argument is unsound. When the claim was made in August, 1940, the plaintiff had attained majority. Before that there had been no demand for maintenance on her behalf. The plaintiff's mother did not avail herself of the opportunity to receive Rs. 15 per month offered in the defendant's attorneys' letter of October, 1931. Since then the plaintiff has been maintained by her mother. I do not think these facts permit a claim for arrears of maintenance. If during the minority of the plaintiff someone had supplied necessities to her, not intending to do so gratuitously, that party may have a claim against the plaintiff. That however is not a claim for arrears of maintenance by the plaintiff. I do not find anything in Mahomedan law to sustain a claim for arrears of maintenance under the circumstances found in the present case. If after the plaintiff attained puberty a claim for maintenance had been made the defendant may have taken steps to obtain possession of the plaintiff as her lawful guardian. The defendant and the plaintiff's mother allowed the plaintiff to remain with the plaintiff's mother without any claim for maintenance being made by the plaintiff or by her mother, while the defendant did not take any steps to recover the custody of the plaintiff. Both sides having left the matters in that way I do not think it can be contended that there was a failure on the part of the defendant to provide maintenance. Without that assumption a decree for arrears is not justified. Under the circumstances I disallow the claim for arrears of maintenance before August, 1940. The third issue is accordingly answered in the negative for all claims prior to August, 1940.

In prayer (c) the plaintiff has asked for a declaration that the defendant is liable to pay the plaintiff reasonable expenses as she may have to incur for her marriage. It is not stated in the plaint that there is any near prospect of her marriage. The right of a daughter to obtain marriage expenses from her father rests on Mahomedan law. The right has not been denied in the correspondence. Under the circumstances a declaration, which can only be made under s. 42 of the Specific Relief Act, is not justified. Mr. Vakil appearing on behalf of the defendant has not contended that the plaintiff is not entitled to reasonable provision for her marriage expenses being made by the defendant or out of his property. Under the circumstances I do not think the declaration should be granted. The fourth issue is answered accordingly.

As in my opinion the plaintiff is entitled to separate maintenance under the circumstances of the case, it becomes necessary to determine at what rate the same should be allowed. The plaintiff lived with her mother since 1931 and is now about twenty years old. The estate of the defendant is in charge of the Court Receiver at present and the parties are agreed that the net average monthly rent of the properties comes to Rs. 120. There is no other substantial income producing estate belonging to the defendant. Out of this

income proper maintenance has also to be provided for the defendant, who is at present a lunatic, his wife, and his minor son aged about thirteen or fourteen years. The defendant, his wife, and the minor son are living together. Having regard to the present condition of the defendant it is certain that some extra expenditure has to be incurred on him. In my opinion, under the circumstances, Rs. 20 per month is a fair rate to be allowed to the plaintiff. I therefore order that the defendant do pay to the plaintiff maintenance at the rate of Rs. 20 per month commencing from August 1, 1940, till the plaintiff's marriage, during the natural life of the defendant. I have fixed August 1, 1940, because the plaintiff sent a letter of demand to the defendant in August in which she has claimed separate maintenance. As in my opinion she is entitled to separate maintenance there has been a failure to pay the same from August, 1940.

The plaintiff's out-of-pocket expenses in connection with the suit are stated to be Rs. 300 and on that footing I award the plaintiff Rs. 600 as costs of the suit against the defendant. The Court Receiver's costs, as representing the defendant, are fixed at Rs. 500. The Court Receiver as the Committee of the lunatic defendant is authorised to withdraw from the account of the estate of the defendant sufficient amount to pay the plaintiff's claim for maintenance up to date and her costs as also his own costs.

*Order accordingly.*

Attorneys for plaintiff : *Lala & Co.*

Attorneys for defendant : *Pereira, Fazalbhoy & Co.*

*Before Mr. Justice Kania.*

VAIKUNTH P. MUNIM

*v.*

PRAHLADSHANKAR K. SHUKLA.\*

1941

March 7.

*Adjournment—Suit against alien enemy—Defendant interned on outbreak of hostilities—Presence of defendant necessary in Court to defend action—Defendant's inability to appear in Court—Adjournment of suit whether permissible.*

When the presence of an alien enemy defendant appears to be essential in a Court in order to give instructions to his attorneys and counsel to cross-examine the plaintiff and his witnesses and such a person is interned and is therefore unable to appear in Court, the Court may adjourn the suit either till the defendant is permitted by law to appear and defend the action or *sine die* till the termination of the hostilities.

*Robinson & Co. v. Continental Insurance Company of Mannheim*,<sup>1</sup> referred to.

SUIT for money.

The facts are fully stated in the judgment.

*B. D. Boovariwalla*, for the plaintiff.

*A. G. Mulgaonkar*, for defendant No. 2.

\* O. C. J. Suit No. 90 of 1939.

1 [1915] 1 K. B. 155.

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KANIA J. The plaintiff filed this suit against the defendants to recover a sum of Rs. 2,000, alleging that he was employed as a salesman by the Continental Garage to sell their Diesel Trucks. The defendants were stated to be the owners of the said garage. The suit was filed on January 21, 1939. On behalf of defendant No. 2 a written statement and counter-claim was filed on February 15, 1939, in which the claim was disputed and it was contended that the plaintiff had wrongfully appropriated to himself the sale proceeds of a 10 H. P. new Adler Car. The counter-claim was to recover the sale proceeds of that car.

The parties thereafter made their affidavits of documents. That was the position when the war broke out in September, 1939. Defendant No. 2 being an alien enemy has been put in an internment camp since then. The plaintiff thereafter settled the suit with defendant No. 1 and the suit has now to proceed against defendant No. 2 only.

In January this year the suit came on the board of Blackwell J. when an adjournment was asked for on behalf of defendant No. 2. The attorneys had prepared no grounds for the application. The learned Judge thereupon made an order adjourning the suit till March and made the attorneys personally pay the costs of the adjournment. The matter has now come before me and an affidavit of Ramkrishna T. Pandit dated February 27, 1941, is filed in support of the application for further adjournment. That puts on record the correspondence which took place between defendant No. 2 and his attorney in respect of the prosecution of the suit. The application is on the ground that the presence of defendant No. 2 is necessary to prosecute his defence and counter-claim and in his absence it is not possible to do so. It is pointed out that instructions from defendant No. 2 are required for the plaintiff's cross-examination. The counter-claim is a part of the suit and is not a substantially different transaction.

On behalf of the plaintiff it is urged that because defendant No. 2 is an alien enemy he has absolutely no right to maintain the litigation. It is urged that under Government of India Notification, Political Department, dated April 4, 1940, rules and procedure are prescribed for the production of an internee in Courts. According to those rules, in a civil litigation, an internee cannot be removed from the internment camp for the purpose of appearing in civil Courts. Under sub-r. (3) of r. 12A in any case where the evidence of an internee is required for any proceeding in a civil Court, the provisions of s. 44 of the Prisoners Act apply. That section deals with the taking of evidence of a prisoner on commission. From this it is argued that the only procedure open to defendant No. 2 is to apply for a commission for his examination and the adjournment of the suit will defeat the plaintiff's claim. In this connection my attention has been drawn to *Robinson & Co. v. Continental Insurance Company of Mannheim*.<sup>1</sup> There the question arose during the last world war of 1914. In that case the claim was based on a policy of insurance. The policy was effected before the war and the loss was before the war. Pleadings were also closed before the war. On behalf of the defendant company it was argued that on the breaking out of hostilities all litigation

to which an alien enemy was a party should be suspended. That wide proposition, Bailhache J. refused to accept. His judgment is in two parts. In the first part the learned Judge considered the abstract question whether on the outbreak of hostilities every litigation pending in British Courts to which an alien enemy was a party should be suspended. He held that it was not suspended. He observed that according to British jurisprudence and civilisation a foreign enemy subject could defend an action filed against him before the war and as stated in Bacon's Abridgement, Vol. I, p. 183, an alien enemy can also take steps to compel the appearance of his witnesses and may have the benefit of discovery. The argument that to allow an enemy to defend would be helping the enemy was rejected. The second part of the judgment runs as follows (p. 161) :—

"In this case I understand that the presence of the alien enemy in this country at the trial is not necessary and is not contemplated, and no difficulty arises such as might otherwise be created by the impossibility of his getting here, ... It may be that in this case the war has so hampered the defendants in the preparation of their case, in their witnesses, or in other ways, that it would be right to grant them a postponement on those grounds. If any application is made to postpone the trial on grounds of that character it will be dealt with on its merits."

These observations clearly show that on the grounds mentioned therein an application for adjournment may be entertained.

In my opinion under the circumstances of the present case defendant No. 2 is entitled to the adjournment. The notification in the *Government of India Gazette* prevents defendant No. 2 from being brought into Court in a civil litigation. Sub-rule (3), which permits his evidence being recorded on commission, is framed so as to enable an internee to be examined as a witness. That may be in a case where he is not himself a party. If in this case his evidence alone was required and the case could have proceeded on that evidence, there would have been no necessity for an adjournment and I should have refused the application for adjournment. If the evidence of defendant No. 2 was taken on commission, he could only deny the alleged agreement mentioned in the plaint generally. His presence in Court appears to be essential in order to give instructions to his attorneys and counsel to cross-examine the plaintiff when he gives evidence. The agreement mentioned in the plaint to appropriate the sale proceeds of the Adler Car for commission earned by the plaintiff is oral and therefore the details of the alleged agreement are only known to the parties personally. If it is conceded that an alien enemy is entitled to defend an action brought against him, as observed by Bailhache J., in a proper case, where his presence is found essential and necessary for his defence, to refuse an adjournment will be denying him the right to defend. If under any conditions his presence in Court could have been procured, it would be his duty to take steps in that direction. The Government notification, as framed, in terms, is absolute and it appears that as matters stand now it is not possible for him to come out under any conditions and give instructions for cross-examination of the plaintiff and his witnesses when they give evidence. To refuse the application of defendant No. 2, under the circumstances, would be to refuse him the right to defend, which according to the British jurisprudence and civilization has always been recognised. I therefore can-

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not accept the plaintiff's contention that the adjournment should be refused.

It was argued that the custodian of enemy property was disposing of defendant No. 2's property and the result of the adjournment will be that when a decree is passed in favour of the plaintiff he will be unable to recover anything. I have no evidence in respect of the alleged attitude of the custodian of enemy property. Even if it were so, I consider that it would hardly be a ground to deny defendant No. 2 a right to defend. The plaintiff may take necessary action to prevent the distribution of the assets of the alien enemy while an adjudication of his claim is pending in Court, and he is unable to prosecute it because of circumstances over which he has no control.

The suit is therefore adjourned either till defendant No. 2 is permitted according to the law of the land to appear and give instructions to his solicitors to defend the action or *sine die* till the termination of the hostilities. Defendant No. 2 must pay the costs of this adjournment in any event as the adjournment is not occasioned by any fault of the plaintiff. Blackwell J. fixed those costs at Rs. 60 and I consider that figure as fair costs of this application. The custodian of enemy property will under this order be authorised to pay this sum out of the assets, if any, in his hands of defendant No. 2 or of the Continental Garage which is claimed by defendant No. 2 as his property if he is satisfied that the same belonged to defendant No. 2.

*Order accordingly.*

Attorneys for plaintiff : *Udwadia & Co.*

Attorneys for defendant No. 2 : *Mulgaonkar & Co.*

—  
*Before Sir John Beaumont, Kt., Chief Justice.*

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June 27.

MARY DO ROZARIO

v.

ERNEST DO ROZARIO.\*

*Deed of separation—Similarity to commercial contract—Covenant in deed that neither party shall have any claim against the other—Petition by wife for judicial separation and alimony—Whether such petition maintainable—Wife's costs.*

The Courts should give full effect to agreements of the nature of separation deeds. Such agreements are formed, construed and dissolved and are enforced on precisely the same principles as any commercial agreement. Courts will not enforce stipulations in such agreements which are illegal either as being opposed to positive law or public policy.

Observations of Lord Atkin in *Hyman v. Hyman*<sup>1</sup> referred to.

Petitioner and respondent, wife and husband, who were Christians, entered into a separation deed on September 25, 1934, under which the respondent made all the payments he was required to make. A clause in the deed provided—“Neither party from this day shall have any claim against the other party in respect of any matter or account.” The petitioner filed a suit in 1941 against

\* O. C. J. Matrimonial Suit No.  
260 of 1941.

1 [1929] A. C. 601, 625.

the respondent for judicial separation and alimony on the grounds of alleged cruelty before the deed of separation and desertion :—

*Held*, dismissing the petition, that the separation deed was a conclusive answer to the allegations of cruelty and desertion ;

that, as the separation deed was acted upon for seven years and no attempt had been made to set it aside, the Court could not ignore it ; and

that as long as the deed stood it could not be maintained that the respondent had deserted the petitioner without reasonable cause.

Observations as to the principles upon which costs are awarded to a wife in matrimonial suits.

PETITION for judicial separation and alimony.

The facts appear fully in his Lordship's judgment.

*J. C. Forbes*, for the petitioner.

*D. B. Desai*, with *P. P. Khambata*, for the respondent.

BEAUMONT C. J. This is a wife's petition for judicial separation and a consequential order for alimony.

The position is this. The parties, who are Christians, were married in 1932. They were married at Vienna, and soon after the marriage the husband came to India, and later in the year the wife followed him. The petition alleges that his sisters objected to his having married a European lady, and were not friendly towards her. In November, 1933, she went back to Vienna, and in April, 1934, returned to India. But the parties did not live together. They have not lived together since November 27, 1933, when the wife left India for Vienna. After her return in April, 1934, negotiations took place between the husband and the wife with regard to a separation, and the correspondence, which is annexed to the respondent's answer, shows that from August 6, 1934, until September 25, 1934, the husband and wife through their respective solicitors were negotiating with a view to the parties entering into a separation deed. It is not necessary to refer to that correspondence further than to say that it shows that the wife was being advised by independent solicitors, who were looking after her interest. This is not a case of the separation deed having been arranged entirely by the solicitors of the husband who brought in a tame solicitor to advise the wife to execute it. On September 25, 1934, the separation deed was executed. In the first clause the husband covenanted that the wife should live separate, and he agreed to make her certain payments. He was to pay her Rs. 1,500 down ; he was to pay Rs. 500 to her solicitors for costs ; he was to provide her with a passage back to Europe ; and on receiving a cable advice that she had reached Vienna a sum of Rs. 5,000 was to be placed to her credit at some bank in Vienna. Then in cl. II there is the usual covenant by the wife not to molest the husband and to allow him to live separately, and keep him indemnified against debts, and so forth, and not to institute any proceeding for restitution of conjugal rights. Then in cl. IV it is provided :

"Neither party from this day shall have any claim against the other party in respect of any matter or account."

That agreement was duly executed by the parties, the wife's solicitors attest-

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O. C. J. ing her signature, and the sums required to be paid by the husband were  
 1941 duly paid. But the wife says that they are now exhausted, and her case  
 is that she is practically destitute.

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u.

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Beaumont C.J. It is suggested by Mr. Forbes that it is not open to a husband to pay a lump sum to his wife and get rid of his liability to maintain her; but that question does not arise in these proceedings. It may very well be that in the Christian community a husband is under a common law liability in this country, as I think he is in England, to maintain his wife and save her from destitution, and it may be that the wife, having no means of livelihood, could maintain a suit to establish her right to maintenance notwithstanding the separation deed. I can see a considerable difference in principle between a separation deed, which provides for a weekly or monthly sum to be paid to the wife by way of maintenance, and an agreement, such as I have to deal with in this case, which provides only for payment of a single lump sum. It certainly seems strange that a husband by paying down a lump sum, whether large or small, can rid himself of his obligation to maintain his wife. However, that is not the question which I have to decide in this case. This is a matrimonial suit, and my jurisdiction to allow alimony, which is another name for maintenance, only arises on my granting a decree for judicial separation, there being no claim in this case to a divorce. Until I determine that I ought to grant a decree for judicial separation, no question of allowing alimony can arise. The jurisdiction of the Court is statutory, and I can only pass such a decree on proof of facts required by the statute to be proved. The only such facts relied on in the petition are cruelty and desertion. It is faintly suggested that there was cruelty, because seven or eight years ago there was some form of moral cruelty consisting mainly of the rudeness of the husband's sisters to the wife. But that is really a fantastic claim. The suggested cruelty is nebulous and was condoned by the separation deed.

With regard to desertion it is clear that a separation deed is a conclusive answer to a claim for desertion without reasonable cause. The deed constitutes a reasonable cause. Mr. Forbes has strenuously argued that this Court is not bound by the deed, that sitting as a Judge in a matrimonial cause I can ignore it, and he has referred to two cases, *Adamson v. Adamson*<sup>1</sup> and *Holroyd v. Holroyd*,<sup>2</sup> in support of his proposition. But in both those cases the husband had deserted the wife, and she had signed without any independent advice an informal document agreeing to live apart on payment of maintenance which the husband had failed to pay. No doubt, the Judges in those cases held that the document she signed did not really amount to an agreement to live apart. But this is an entirely different case. I have to deal with a formal separation deed entered into by the parties on the advice of their respective solicitors, acted upon for years and under which the husband has made all the payments he was required to make. No attempt has been made to set the deed aside, and in my opinion it is quite impossible for me to ignore it. Lord Atkin in *Hyman v. Hyman*<sup>3</sup> deals with separation deeds. He points out that such deeds were not recog-

1 (1907) 23 T. L. R. 434.

3 [1929] A. C. 601.

2 (1920) 36 T. L. R. 479.



nized by the Ecclesiastical Courts, but were enforced by the common law, though at one time not favoured by equity, but as a result of various decisions their effect had been recognized. Then Lord Atkin says (p. 625):—

“Full effect has therefore to be given in all Courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial Courts seems to suggest that at times they are still looked at askance, and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement, of whose nature indeed they sometimes partake. As in other contracts stipulations will not be enforced which are illegal either as being opposed to positive law or public policy. But this is a common attribute of all contracts, though we may recognize that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy.”

In my opinion, that passage correctly states the law, and there having been no attempt in this case to get the deed of separation set aside, I can only act upon it. As long as the deed stands, it seems to me apparent that it is impossible to maintain that the husband has deserted his wife without reasonable cause. That being so, the petition must be dismissed.

I have felt some difficulty with regard to the proper order to make in this case as to costs. The wife's petition has failed, but the general rule in matrimonial suits is that the wife is entitled to receive her costs from the husband, whether she is successful or not, and whether she is petitioner or respondent. That rule was introduced into England at a time when on marriage the whole of the wife's property vested in her husband, and, therefore, unless he was bound to pay the wife's costs, a husband could never be charged with matrimonial offences, and a wife could never defend herself against unjust charges. Although there may not be the same cogent reason for the rule now, it has not been altered, and still applies with its original force in a case like the present, where the wife has no separate property. But the rule is always qualified in this sense that the solicitor of the wife must have an honest belief in his case. I do not mean to say that he must be satisfied that his case is going to succeed, but he must consider that his client has a case which ought properly to be put before the Court. To apply the rule without any qualification would be to encourage unscrupulous attorneys to file suits in the matrimonial Court, which had no real justification, and were merely a means of making costs. But although the rule is qualified in that way, it is very important that attorneys, who are asked to take up a case on behalf of a wife who has no money, should feel that they can safely do so as long as they act properly. Now, in this case there is no suggestion that the petition was filed with a view to making costs; I have no doubt that the real object of the petition was to secure maintenance for the wife, who is no doubt badly in need of it. But I feel grave doubt whether the wife's attorney really supposed that there was the slightest chance of obtaining a decree for judicial separation; and if I thought that the claim was preferred in this Court merely to bring pressure to bear on the husband taking advantage of the rule which allows the wife her costs in any event, I should decline to give her any costs. But Mr. Forbes, counsel for the petitioner, says that

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O. C. J. the form of the proceedings was based on his advice. His view was that  
 1941 the only possible way of getting maintenance was to apply to the matrimonial  
 Court for judicial separation, and he assures me that he thought that there  
 ROZARIO was a chance of getting a decree for judicial separation. I think the peti-  
 v. tioner's attorney was entitled to rely on counsel's advice, and in so doing  
 ROZARIO must be taken to have acted bona fide in filing the petition. I propose,  
 — therefore, to make the usual order that the husband pay the wife's costs.  
 Beaumont C.J.

*Petition dismissed.*

Attorneys for petitioner : *Charles Eastley & Co.*

Attorneys for respondent : *S. F. B. Tyabji & Co.*

### CRIMINAL APPELLATE.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Macklin.*

1941

EMPEROR

v.

June 11.

CHHOTALAL BAPALAL.\*

*City of Bombay Police Act (Bom. IV of 1902), Secs. 27(2A) and 128—Externment order—Disobeying such order—Prosecution for breach of order—Prior convictions under Bombay Children Act, 1924—Whether such conviction comes within the meaning of s. 27(2A) of City of Bombay Police Act—Separate offences in the course of same transaction—Convictions on two counts—Whether such convictions are to be treated as separate convictions within the meaning of s. 27(2A).*

A conviction under the Bombay Children Act, 1924, prior to its amendment by Act VII of 1936, can be taken into account in passing an externment order under s. 27(2A) of the City of Bombay Police Act, 1902, though such an action is contrary to the spirit of the amended Bombay Children Act.

The convictions referred to in s. 27(2A) of the City of Bombay Police Act need not be convictions arising in the course of separate transactions or convictions passed on separate dates. Thus the offence of house-breaking under s. 457 of the Indian Penal Code and the offence of theft under s. 380 committed in the course of the same transaction and punished separately amount to two convictions and not one within the meaning of s. 27(2A).

*Per Beaumont C. J.* The Legislature in enacting s. 27(2A) did not contemplate that the practice of some Magistrates of convicting accused persons on more than one count in respect of the same transaction would involve two convictions within the meaning of that section. The obvious intent of that section seems to be that a man is not to be externed under it unless on more than two occasions he has shown that he does not intend to live within the law.

\* Criminal Appeal No. 83 of 1941, by the Government of Bombay, against the order of acquittal passed

by K. J. Khambata, Presidency Magistrate, Fourth Court, Girgaum, Bombay.

APPEAL against acquittal.

On June 30, 1941, the accused Chhotalal was served with an order of externment for two years made against him by the Commissioner of Police, Bombay, under 27(2A) of the City of Bombay Police Act, 1902. The order was based on the following convictions against him—

- (1) On March 17, 1933, under ss. 380—109 of the Indian Penal Code.
- (2) On January 3, 1936, under s. 224 of the Indian Penal Code.
- (3) On March 23, 1939, under ss. 457 and 380, Indian Penal Code,

when he was given two months' rigorous imprisonment on each count, the sentences were to run concurrently.

The accused was given a railway ticket to Thana and was seen off as far as Thana by a police constable on January 31, 1941. Two days after this the accused was found in Bombay and was arrested. He was prosecuted under s. 128 of the City of Bombay Police Act for disobeying the order in the Court of the Presidency Magistrate, Fourth Court, Bombay, and he pleaded guilty to the charge.

The Magistrate, however, refused to accept the plea of guilty, and proceeded to consider the validity of the Police Commissioner's order. He held that the first and second convictions could not be taken into account under s. 27(2A) of the City of Bombay Police Act and acquitted the accused. In the course of his judgment he observed :—

"Taking the second item first, it was admitted by the learned Police Prosecutor that that was a conviction under s. 224, Indian Penal Code, and, therefore, could not have been taken into consideration by the Police Commissioner for the purpose of making the externment order under s. 27 (2A) because this section clearly states that the accused must have been convicted more than twice of *offences punishable under Chapter, XII, XVI or XVII* of the Indian Penal Code; and s. 224, Indian Penal Code, does not fall within any of those Chapters.

As regards the first item in the convictions-slip, that is one of a date when the accused must have been a 'child' as now defined by the Bombay Children Act; and he was consequently ordered to be detained in the Willingdon Boys' Home. Under the present scheme of the Bombay Children Act, an offence by a child is not to be regarded as a *conviction*. That Act carefully avoids all use of the word 'conviction' or 'convicted', and uses the expression 'is found to have committed an offence'. Formerly, no doubt, offences by children were treated as convictions, and their finger impressions taken and a record kept. But since the amendment of the Children Act in 1936, whenever a Court finds a child to have committed an offence, that finding is not to be regarded as a 'conviction'. Mr. Dhurandhar argued that the offence first mentioned in the conviction-slip of the accused is of the year 1933, that is of a time when such offences were regarded as convictions; and, therefore, the Commissioner was justified in taking this into account. I am of opinion, however, that that item cannot be taken into consideration. When the Police Commissioner made his externment order, which was on January 3, 1941, the amended Children Act had been in force for nearly five years; and in my judgment he ought to have given weight to the present scheme of the Children Act as explained above. Referring to s. 48 of the Children Act, Mr. Dhurandhar further contended that an offence by a child was not to be treated as conviction for the purpose of enhancement of sentence, but that it might be taken into consideration by the Commissioner of Police for the purpose of s. 27(2A). I think, however, that since there is no such thing as a *conviction* with reference to an offence by a child, the argument of Mr. Dhurandhar is not sound. The whole object of the Legislature in making the amendment in the Children Act in 1936 was to make it clear that offences by children were not to be regarded as convic-

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tions; and it would, therefore, be violating the Children Act both in letter and in spirit if now the Commissioner of Police treats as a 'conviction' an offence of which a person had been found guilty when he was a child.

If, therefore, the first and the second items mentioned in the convictions-slip are removed, it is obvious that the externment order could not have been made in the present case, because the accused was not "convicted *more than* twice of offences under Chapter XII, etc."

With regard to the third item in the convictions-slip, that was a conviction under ss. 457 and 380, Indian Penal Code, that is for house-breaking and theft. Both these were committed in the course of the same transaction. There was only one incident and one trial though there were charges on two separate counts. And though for each count of the charge a separate sentence has been awarded for technical reasons, the sentences were made to run concurrently. (The trial was before myself in this very Court). Strictly speaking, therefore, the accused was convicted only *once*, though on two counts. Mr. Dhurandhar's argument that the accused must be regarded as having been convicted *twice* at that trial, is one which I cannot accept. Section 27 (2A) uses the words 'convicted more than twice of offences punishable under Chapter XII, etc.', and does not use the words 'convicted on more than two charges or counts', or 'convicted for more than two offences'. On Mr. Dhurandhar's argument, if a person were put up in a rioting case and convicted under ss. 143, 148 and (say) ss. 323, 325 and 426, then he must be regarded to have been convicted *five times*—which I think would be a wrong view of the situation. The expression "more than twice" in sub-s. (2A) means on at least three separate occasions. If at one trial arising out of one transaction, the accused were convicted on several counts, that does not mean that he is convicted several *times* separately. I, therefore, think that the third item in the convictions-slip of the present accused must be regarded as a conviction *once* and not *twice*.

The result is that even if the first item, namely, the offence committed by the accused when he was a child, were to be treated as a "conviction" for the purpose of s. 27 (2A), still in the present case, the accused has been convicted only twice and not *more than twice*. In my judgment, therefore, in the present case the material before the Commissioner of Police was such that he could not have based his externment order thereon. It fell short of the requirements of s. 27(2A)."

The Government of Bombay appealed against the order of acquittal.

*B. G. Rao*, Assistant Government Pleader, for the Government of Bombay.  
*T. N. Walavalkar* (appointed), for the accused.

BEAUMONT C. J. This is an appeal by Government against the acquittal of the accused by the learned Presidency Magistrate, Fourth Court. The accused was charged under s. 128 of the City of Bombay Police Act with having disobeyed an externment order passed against him by the Commissioner of Police under s. 27(2A) of the Act. The accused admitted the making of the order, its service upon him, and his return to Bombay within the time prohibited by the order. But the learned Magistrate, quite rightly, refused to accept a plea of guilty, without considering the question whether the externment order passed by the Commissioner of Police was a valid order. He held that it was not a valid order and accordingly acquitted the accused.

Sub-section (2A) of s. 27 of the City of Bombay Police Act was added by amendment in the year 1936, and is in these terms :

"(2A). It shall be further competent to the Commissioner of Police to direct any person who, not having been born in the City of Bombay or the Bombay

Suburban District, has been convicted more than twice of offences punishable under Chapter XII, XVI or XVII of the Indian Penal Code, to remove himself in like manner from the City of Bombay and not to enter the said City or the Bombay Suburban District."

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It is obvious that that section confers upon the Commissioner of Police power to interfere very drastically with the liberty of the subject. The scheme of the sub-section is that if a person not born in Bombay comes to Bombay and abuses the hospitality extended to him by his adopted city, he may be expelled, and no one, I think, could complain that a provision of that sort is unjust. If liberty is abused, it may be taken away. The test to be applied in determining whether a person has committed a breach of the hospitality of his adopted city is that he should have been convicted more than twice of certain offences, being offences in respect of coining, offences against the person, and offences against property. That is the test; and if a man has been convicted more than twice of such offences, the Commissioner of Police has a discretion, which he is not bound to exercise, to extern him.

Now, the previous convictions on which this externment order was based were three. First, on March 17, 1933, the externee was convicted by a Magistrate under s. 380 read with s. 109 of the Indian Penal Code, and was ordered to be detained in the Willingdon Boys' Home for two years. The sentence shows that he was at that time a child or a young person. The Magistrate in convicting stated that he was at that time between fourteen and fifteen years of age. The offence was a petty one of assisting others to steal a piece of lead piping from Beach Candy. Secondly, on January 3, 1936, the accused was convicted under s. 224 of the Indian Penal Code and ordered to be detained in the Borstal School at Dharwar for three years. But as s. 224 of the Indian Penal Code does not fall within the Chapters of the Indian Penal Code referred to in s. 27(2A) of the City of Bombay Police Act, that conviction cannot be taken into account. Thirdly, on March 23, 1939, the accused was convicted under ss. 457 and 380 of the Indian Penal Code and was sentenced to two months' rigorous imprisonment on each count.

As to the first conviction the learned Magistrate came to the conclusion that a conviction of a child was not a conviction which could be taken into account under s. 27(2A). The position as to that is this :—

Under the Bombay Children Act of 1924 it was the practice, when a child was found to have committed an offence, to convict that child, and at that time "child" was defined as a person under fourteen years of age. But it is to be noticed that s. 48 provided that when a child was convicted of an offence, the fact that he had been so convicted should not have any effect under s. 75 of the Indian Penal Code or s. 565 of the Code of Criminal Procedure, which latter section would subject him to an order to report his residence to the police after his discharge from prison. It is obvious that such an order is much less serious than an externment order, but s. 27(2A) of the City of Bombay Police Act was not in force when the Bombay Children Act was passed. In 1936 the Bombay Children Act was amended, and in every case reference to a conviction of a child is omitted and the phrase is substituted "when a child is found to have committed an offence." So that since 1936 a child cannot be convicted, but before 1936 a child could be convicted.

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*Beaumont C.J.*

Under the amended Act a child is defined to mean anyone under the age of sixteen. It is impossible, I think, to suggest any sound reason why an externment order against an adult can be based on an offence committed by him as a child before 1936, but cannot be based on such an offence committed after 1936. Technically, however, I think that the Commissioner was right in treating this conviction of the child as a conviction within s. 27(2A), but I must say that to my mind it is shocking to find an order of externment from the city where he has lived for many years made against a man of twenty-two years of age, because at the age of fourteen he committed a petty theft. But that is what it comes to, because without the conviction of the child there was no power to make an externment order against the man. It seems to me that to make such an order is absolutely opposed to modern views on the subject of child criminality, which refuse to treat a child as a criminal, and is moreover in defiance of the spirit of the Bombay Children Act of 1936.

The other point, which arises, is this. The third conviction, as I have said, was under two sections of the Indian Penal Code, ss. 457 and 380, that is, house-breaking and theft in a dwelling house, both offences having arisen in the course of the same transaction. The learned Magistrate thinks that they only amount to one conviction within s. 27(2A) of the City of Bombay Police Act, and no doubt in ordinary parlance a conviction for two offences arising out of the same transaction would be regarded as a conviction for a single offence. But the exact point came before a bench of this Court in *Emperor v. Ishwarlal Chhaganlal*,<sup>1</sup> the judgment in which was not before the learned Magistrate. In that case the Court pointed out that, though it would be a harsh order on the part of the Commissioner to treat as two convictions under two sections of the Indian Penal Code in respect of matters arising out of the same transaction, still it was impossible to say that the convictions were not separate. Offences arising out of the same transaction can be tried together under s. 235 of the Criminal Procedure Code; but the Magistrate is not bound to try them together. He might pass separate orders in separate trials, although the offences arose out of the same transaction. If we are to uphold the learned Magistrate's view on this point, we should have to read into s. 27(2A) after the words "has been convicted more than twice of offences punishable under Ch. XII, XVI or XVII of the Indian Penal Code" some such words as "and not arising in the course of the same transaction." The Court cannot add such words to the section, and to do so might involve the Commissioner in an awkward inquiry, because it is not always easy to say when offences arise in the course of the same transaction. In my view, we are not justified in saying that the convictions referred to in s. 27(2A) must be convictions arising in the course of separate transactions, or convictions passed on separate dates, but at the same time I have no doubt whatever that the Legislature did not contemplate that the practice of some Magistrates of convicting accused persons on more than one count in respect of the same transaction would involve two convictions within the meaning of s. 27(2A). The obvious intent of that section seems to be that a man is not to be externed under it unless on more than two occasions he has shown that he does not intend to live within the law.

1 (1941) 43 Bom. L. R. 511.

If this had been an isolated case, I should not have thought it necessary to make these observations, and I should have supposed that the Commissioner had some special reason for exercising his discretion in the way he has. But this is not an isolated case. The learned Magistrate has pointed out that during the last six months at least three instances have come to his notice in which the Commissioner has made an externment order on a conviction of the accused at a time when he was a child. And there are nine other Magistrates, and most externment orders do not come before the Courts. Moreover, this is the second case in this Court within a few months in which the Commissioner has based an externment order on convictions on two counts in the same transaction. In my opinion, there is a case for inquiry by the authorities as to the principles upon which the powers of the Commissioner under s. 27(2A) are being exercised, and for consideration whether those powers should be curtailed in the sense indicated above.

In the result, we think the order of externment was justified, because there had been a conviction of the accused when he was a child, and he had been convicted subsequently of two offences, although they constituted in substance only one offence. Therefore, technically he had been convicted more than twice, though substantially he had not. Having regard to the view which we take of this case, we propose to pass a nominal sentence. We allow the appeal, convict the accused under s. 128 of the City of Bombay Police Act, and sentence him to simple imprisonment until the rising of the Court.

MACKLIN J. I agree that on technical grounds we have no option but to allow the appeal, and I entirely associate myself with the remarks made by the learned Chief Justice as to the violation of the spirit of the Bombay Children Act which this case discloses.

*Appeal allowed.*

### CRIMINAL REVISION.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

EMPEROR

*v.*

JOSEPH ABDULLAHI.\*

1941

June 20.

*Defence of India Rules, 1939, Rule 6(5)†—Sentence—Gravity of offence to be taken into consideration in awarding sentence—Practice.*

\* Criminal Revision Application No. 179 of 1941, with Criminal Revision Applications Nos. 174 and 180 of 1941, from convictions and sentences recorded by Oscar H. Brown, Chief Presidency Magistrate, Bombay.

† Rule 6 runs as follows :—

6. (1) No person shall, without the permission of the Central Government, enter, or be on or in, or pass over, or loiter in the vicinity of, any prohibited place.

(2) Where in pursuance of sub-rule (1) any person is granted permission to enter, or to be on or in,

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Offences under the Defence of India Rules, 1939, r. 6, differ very much in their gravity and they should not be dealt with by any rule-of-thumb sentence. If there is any reason for supposing that a man has entered a prohibited area with a view to obtaining information which might be useful to an enemy, he would deserve a severe sentence. Similarly if a man has entered a prohibited area knowing full well that it is prohibited, having climbed over a fence or eluded a sentry or done something of that sort, he would deserve a more severe sentence; but a man who has entered a prohibited area without appreciating that it is such an area should not be dealt with so severely.

The applicant, Joseph Abdullahi, a Persian subject, was found within the prohibited area of the Alexandra Docks, Bombay, on March 7, 1941. He was arrested and charged with the offence punishable under r. 6(5) of the Defence of India Rules, 1939. His defence was that he was selling carpets on a public road outside the Alexandra Docks, that some sailors approached him to buy carpets and one of them induced him to go to the docks so that other sailors might purchase the carpets, that no one prevented him from entering into the prohibited area, that he did not know that the area was prohibited, that there was no notice prohibiting any one from entering into the dock area, and that he entered into the prohibited area only with the object of selling the carpets.

The Chief Presidency Magistrate, Bombay, convicted him of the offence charged and sentenced him to three months' rigorous imprisonment.

The applicant Barukh Alishah (Cr. Rev. App. No. 180 of 1941) was a Palestine British subject and also a carpet merchant. He was found within the prohibited area of the Alexandra Docks on March 7, 1941, and was arrested and charged similarly. He put in a defence similar to Joseph Abdullahi, but he was also convicted by the Chief Presidency Magistrate and sentenced to three months' rigorous imprisonment.

The applicant Shelemy Banin (Cr. Rev. App. No. 174 of 1941) was found within the prohibited area of the Alexandra Docks, on May 7, 1941, and was arrested and charged with the offence punishable under r. 6(5) of the Defence of India Rules. His defence was that he wanted to ship certain goods to Aden and he went to the docks to inquire whether he could obtain shipping space in S. S. *Jehangir* which was in the docks, that he wanted to meet his shipping agent to make arrangement for shipping the goods, that he was not

or to pass over, a prohibited place, that person shall, while acting under such permission, comply with such orders for regulating his conduct as may be given by the Central Government.

(3) Any police officer, or any other person authorised in this behalf by the Central Government, may search any person entering, or seeking to enter, or being on or in, a prohibited place, and may detain any such person for the purpose of searching him:

Provided that no female shall be searched in pursuance of this sub-

rule except by a female.

(4) If any person is in a prohibited place in contravention of this rule, then, without prejudice to any other proceedings which may be taken against him, he may be removed therefrom by any police officer or by any other person authorised in this behalf by the Central Government.

(5) If any person is in a prohibited place in contravention of any of the provisions of this rule, he shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both.



aware that the Alexandra Docks came within prohibited area, and that he did not see any notice prohibiting any entry therein.

The Chief Presidency Magistrate convicted him of the offence charged and sentenced him to three months' rigorous imprisonment.

All the three applicants applied in revision to the High Court.

|                                                             |   |                                                                                                                                               |
|-------------------------------------------------------------|---|-----------------------------------------------------------------------------------------------------------------------------------------------|
| Criminal Revision Applications Nos.<br>179 and 180 of 1941. | { | <i>V. K. Pratap</i> , with <i>Zaiwalla &amp; Co.</i> ,<br>for the accused.<br><i>R. A. Jahagirdar</i> , Government Pleader,<br>for the Crown. |
|-------------------------------------------------------------|---|-----------------------------------------------------------------------------------------------------------------------------------------------|

|                                                   |   |                                                                                                                                          |
|---------------------------------------------------|---|------------------------------------------------------------------------------------------------------------------------------------------|
| Criminal Revision Application No.<br>174 of 1941. | { | <i>Soloman Judah</i> , with <i>H. D. Thakor</i> ,<br>for the accused.<br><i>R. A. Jahagirdar</i> , Government Pleader,<br>for the Crown. |
|---------------------------------------------------|---|------------------------------------------------------------------------------------------------------------------------------------------|

BEAUMONT C. J. These are three revision applications in which the accused were convicted under r. 6(5) of the Defence of India Rules, 1939, the charge against them being that they were found within a prohibited area. They are all Jewish merchants and they all pleaded guilty. In each case the learned Chief Presidency Magistrate merely recorded a plea of guilty, and did not record the plea in the language used by the accused as he should have done, and in each case he inflicted a sentence of three months' rigorous imprisonment. A fourth case came before this Court in the course of the present week, which has not yet been decided, in which the same sentence was imposed by the learned Chief Presidency Magistrate, although in that case the circumstances were quite different.

These offences under the Defence of India Rules may obviously differ very much in their gravity, and they cannot be dealt with by any rule-of-thumb sentence. If there is any reason for supposing that a man has entered a prohibited area with a view to obtaining information which might be useful to the enemy, he would deserve a severe sentence. Again, if a man has entered a prohibited area knowing full well that it is prohibited, having climbed over a fence or eluded a sentry or done something of that sort, he would deserve a more severe sentence than a man who has entered a prohibited area without appreciating that it is a prohibited area. The prohibited areas in these cases were areas in the docks, and admittedly some of the entrances into the docks were not guarded, and there was no evidence before the learned Magistrate as to whether any notice was given that these areas were prohibited areas. We are told by the learned Government Pleader on the instructions of the Police Sub-Inspector that notices were put up in English, Marathi and Hindustani, stating that the particular area was a prohibited area. The learned Chief Presidency Magistrate does not seem to have made any inquiries into the antecedents of the accused, and in Revision Application No. 174, we stood the matter over in order that the police might make inquiries, because in that case the accused said that he was a merchant from Aden and was looking for a shipping agent with a view to sending goods by sea to Aden. But he did not make that statement when he was arrested by the Deputy Inspector, nor has he mentioned the name of the agent for whom

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he was looking ; nor given any particulars of the goods he wished to send, nor the name of the person to whom he was proposing to send them. Therefore, we thought his statement unreliable, and we wanted to know whether there was anything known against him. If there was reason for supposing that he entered the prohibited area for a definitely unlawful purpose, he would deserve a severer sentence than three months.

—  
 Beaumont C.J.

In the other two cases, Revision Applications Nos. 179 and 180, the accused said that they were carpet merchants, and that the police admit. Their case is that in their enthusiasm to sell carpets they had wandered into the dock area which, they say they did not know, was prohibited, and, of course, it is possible that, even if they could read the notices, they omitted to observe them. We think that their cases should have been dealt with more leniently, because we think probably they were within the prohibited area inadvertently, and even if they knew that it was a prohibited area, there is no doubt on their statement that they were merely trying to dispose of their goods. They were properly convicted, but we think that the sentence should have been only a fine. As they were given sentences of imprisonment, we propose to reduce the sentences to the period already undergone in the cases of the accused in Revision Applications Nos. 179 and 180.

We have felt more doubt in the case of the accused in Revision Application No. 174, because there is no doubt that the accused did make a statement which he could have proved, and he has not done so. At the same time, the police have nothing against him. None of these people had cameras upon them or anything which might suggest that they were seeking to obtain information to which they were not entitled, nor is it suggested that they were in places in which valuable information could be picked up. We think that three months' rigorous imprisonment was rather too severe a sentence in the case of the accused in Revision Application No. 174, though he deserved a more severe sentence than the others for giving what looks like a false excuse. As the accused has already been in jail for more than five weeks, we propose also in his case to reduce the sentence to the period already undergone.

But people must clearly understand that if they wander about prohibited areas, they will be liable to be dealt with severely. We are not laying down any rule that sentences of imprisonment shall not be imposed in such cases. At the same time it must be borne in mind that sentencing first offenders for offences of this type to a term of imprisonment is a very good way of manufacturing criminals for the future.

*Sentences reduced.*

## APPELLATE CIVIL.

*Before Mr. Justice N. J. Wadia and Mr. Justice Wassoodew.*

JOTIRAM EKOBA PATIL

v.

RAMCHANDRA TRIMBAK PATIL.\*

1941

March 4.

*Hindu law — Partition — Paternal grandmother, when entitled to share.*

Under the Mitakshara school of Hindu law a paternal grandmother is not entitled to a share in the family estate upon a partition between her grandson and the collaterals or cousins of his deceased father; but the grandson's share on such partition is subject to her right of maintenance. The grandmother, however, is entitled to a share when partition takes place between the direct descendants *inter se* of her deceased husband provided that the dividing parties are not related to one another as father and son.

SUIT for partition.

A Hindu joint family consisted of one Trimbak and the sons of his uncle Ekoba, viz. Jotiram, Balaram (defendant Nos. 1 and 2) and Bajirao. Bajirao died leaving him surviving his son Pundlik (defendant No. 3). Trimbak died on August 5, 1927, leaving behind him his mother Guntabai and his wife Narmadabai (plaintiff No. 2).

On March 31, 1935, Narmadabai adopted her brother Ramchandra (plaintiff No. 1).

On September 3, 1936, plaintiffs Nos. 1 and 2 filed a suit to recover a half share in the family property by partition of the property.

The defendants contended *inter alia* that they had separated and divided the family estate between themselves in January, 1935, before the adoption took place, that according to the custom of the Tilone Kunbi caste, to which they belonged, an adopted son could be taken only from the same kul or family as that of the adoptor, that plaintiff No. 2 could not take her own brother in adoption, that Trimbak had before his death prohibited his wife plaintiff No. 2 from making an adoption, and that the suit was bad for non-joinder of Guntabai, who was a necessary party.

The Subordinate Judge held that the plaintiff's adoption was proved and valid, that plaintiff No. 2 was competent to take her own brother in adoption, that the defendants failed to prove the custom alleged by them, that Trimbak had not prohibited his wife from adopting, that the partition alleged by the defendants was not proved, that the coparcenary of defendants Nos. 1 to 3 being actually in existence at the time of the adoption, the power to adopt inherent in plaintiff No. 2 had not come to an end and plaintiff No. 1 divested the estate which had vested in the surviving coparceners, defendants Nos. 1 to 3, and that Guntabai was not a necessary party to the suit. Plaintiff No. 1 was accordingly awarded a half share in the family estate. The Subordinate Judge observed on the last point as follows :—

\* First Appeal No. 310 of 1938.  
from the decision of R. G. Karkhanis,  
First Class Subordinate Judge at Jal-

gaon, in Special Regular Suit No. 465  
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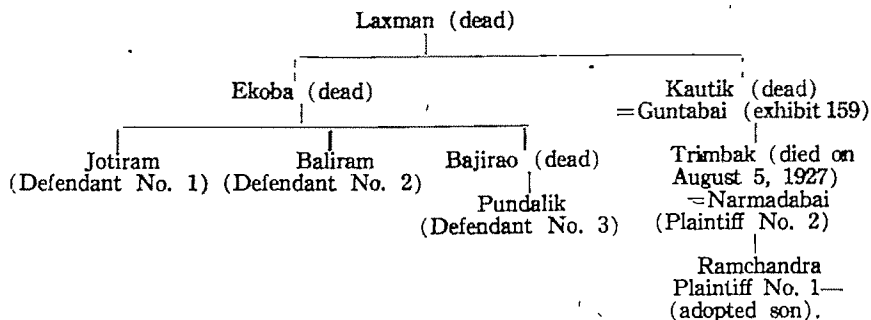
"Trimbak's mother is not entitled to get a share in the partition of the joint family estate between plaintiff No. 1 and defendants Nos. 1 to 3. She is entitled to get maintenance out of the half-share allotted to plaintiff No. 1. She is therefore not a necessary party to the suit."

The defendants appealed to the High Court.

*G. N. Thakor*, with *Y. V. Dixit*, for the appellants.

*H. B. Gumaste* and *V. H. Gumaste*, for the respondents.

WASSOODEW J. This is an appeal from a decree of the First Class Subordinate Judge of Jalgaon in a suit by the adopted son of one Trimbak and by the latter's widow the adoptive mother against Trimbak's cousins and a nephew, the defendants, for partition of the family lands and other property. The precise relationship of Trimbak with the defendants will be apparent from the following genealogical table :—



The principal dispute relates to the legality and validity of the adoption of Ramchandra, plaintiff No. 1, said to have been made on March 31, 1935. The factum of adoption, although not disputed here, was disputed in the trial Court. The evidence on that point is sufficient and reliable and we accept the conclusion of the learned trial Judge that the plaintiff was duly adopted.

Among the numerous other defences raised to the plaintiff's claim were, first, that according to the caste custom amongst the Tilone Kunbis to which sect the parties belong, the only person, who could be legally and properly adopted is the person born in the same gotra or family of the adoptor and inasmuch as plaintiff No. 1 does not belong to the adoptor's family—his family name or gotra being Ahire whilst that of the defendants' is Borase—the adoption is illegal; secondly, that the deceased Trimbak, who succumbed to cholera after a few days' illness, had some hours before his end expressly communicated to his mother Guntabai that he intended to prohibit his wife from making any adoption to him and that in consequence the adoptive mother was incompetent to make the adoption; thirdly, that a few months prior to the alleged adoption all the defendants had separated and divided the ancestral property in their hands and had terminated the coparcenary and that consequently the plaintiff could not upon adoption become a member of any subsisting coparcenary or participate in its property; and, lastly, that the suit must fail because the plaintiff's grandmother Guntabai, who it is said would be entitled to a share on partition between the plaintiff, the adopted grandson, and the other collaterals of his father, was not impleaded as defendant. The

first three objections involve pure questions of fact. The learned Subordinate Judge has disallowed them holding that the special caste custom, the alleged prohibition and the extinction of the coparcenary were not established. On the question of law involved in the last point he found that the plaintiff's grandmother was not entitled to a share on partition and was therefore not a necessary party to the suit. Accordingly the plaintiffs' suit was decreed.

In this appeal by the defendants against that decree it will be convenient to deal with the questions of fact first. [His Lordship dealt with the questions of fact and agreed with the conclusions reached by the Subordinate Judge. The point of law was then dealt with as follows] :—

Then there remains the question as to the maintainability of this action for want of necessary parties. The basis of that argument is that according to the Mitakshara law, which admittedly governs the parties, they being residents of Khandesh, the grandmother Guntabai is entitled to a share upon partition between her adopted grandson and his collaterals and that therefore the failure to implead her was fatal. The question whether Guntabai was a necessary party must depend upon the view whether the assumption underlying the argument is correct. The point that can be formulated upon the facts is as follows. Is a grandmother under the Mitakshara law entitled to a share in the family estate upon partition between her grandson on the one part and his adoptive father's collaterals or cousins on the other? That is a point of first impression so far as this Court is concerned. There is no direct authority bearing upon it of any other High Court in Western India. The question has to be determined by reference to the Mitakshara law. Mr. Thakor for the appellants has not been able to cite any direct text bearing out his contention. His argument is that inasmuch as there is no text directly opposed to it, his point should be conceded upon the general rules as to partition during the lifetime of the father and after his death. There is no specific rule which sets apart a share to a Hindu female in any circumstances other than those contained in the Mitakshara (Ch. I, s. II, pl. 8 and 9) dealing with partition among the sons during the lifetime of the father (Stokes' Translation of Hindu Law, p. 379) :—

"Two sorts of partition at the pleasure of the father have been stated; namely equal and unequal." (See Yajnavalkya 2, V. 115).

The text of Yajnavalkya contains a specific rule in the case of equal partition :—

"If he (father) makes the allotments equal, his wives (पत्न्यः), to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like-portions."

Vijnaneswara in his exposition of that text says :—

"When the father, by his own choice, makes all his sons partakers of equal portions, his wives, (पत्न्यः), to whom peculiar property had not been given by their husband, or by their father-in-law, must be made participant of shares equal to those of sons. But, if separate property have been given to a woman, the author subsequently directs half a share to be allotted to her. 'Or if any had been given, let him assign the half'."

In the text and the commentary the only female who is declared to be entitled

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to a share is the wife (*patni*) of the father. It is not disputed that that term would not include a mother of the father and the text therefore has no application to the present case.

As to division after the father's death—here there is no father alive—the Mitakshara (Ch. I, s. VII, pl. 1) says as follows (see Stokes' Translation of Hindu Law, p. 397) :—

"When a distribution is made during the life of the father, the participation of his wives (*पत्नीनाम्*), equally with his sons, has been directed. ('If he make the allotments equal, his wives must be rendered partakers of like portions')..... Of heirs dividing after the death of the father, let the mother (*माता*) also take an equal share." (See *Yajnavalkya* 2, 123.)

The word used in this connection is '*mata*' which according to the interpretation in a series of decisions has been deemed to include a grandmother and even a step-grandmother (see *Vithal Ramkrishna v. Prahlad Ramkrishna*<sup>1</sup>), for, it has been held that the word *mata* is illustrative of a class and not restricted to the natural mother according to its literal meaning. That rendering of the term is based upon the text of Vyasa, which is translated in Mandlik's Hindu Law at p. 44 as follows:—

"The sonless wives of the father are declared equal sharers; and so are all paternal grandmothers declared equal to the mother."

From the above it is clear that both *Yajnavalkya* and *Vijnaneswara* make a distinction between two sets of partitions, one during the lifetime of the father and the other after his demise. In the former case it is clear upon authority that the wife alone comes in for a share. She comes in as a wife of the father and not the mother of the son. In such a case the grandmother has no place because *patni* can never mean a grandmother. She only comes in when the partition is after the demise of the father. The *raison d'être* underlying the distinction is very difficult to appreciate. But the texts do, as a matter of fact, observe that distinction. Therefore the question arises whether, having regard to the fact that the father is dead and the partition is now sought after his demise, the grandmother can take a share upon partition in the circumstances of this case.

Now the text of Vyasa referred to has been interpreted as restricting the claim of the grandmother and the mother to a share upon a division after the death of the father between the sons and the grandsons *inter se*. The question whether a grandmother was entitled to a share on partition between a father and son arose in *Jamnabai v. Vasudeo Sagarmal*,<sup>2</sup> and it was held that she was not entitled, upon the text of Vyasa, to a share because it was a partition during the lifetime of the father. The law under the Bengal and Mithila school is different for she has been held entitled to a share on such a partition (see *Purna Chandra Chakravanti v. Sarojini Debi*<sup>3</sup>). The cases referred to in argument and which were decided under the Mitakshara law show that on a partition of the property between the sons and grandsons, that is, between a son or sons and the son or sons of a deceased son, the mother

1 (1915) I. L. R. 39 Bom. 373,  
s. c. 17 Bom. L. R. 361.

2 (1929) I. L. R. 54 Bom. 417,

s. c. 32 Bom. L. R. 48.

3 (1904) I. L. R. 31 Cal. 1065.

and that the case could not be brought within s. 373, because the possession, which the accused is said to have obtained over the girl in question in the present case, was not obtained from a third party. The girl, who was seventeen and a half years of age, went with the accused voluntarily. Mr. Mahale has referred to a recent decision of a bench of the Calcutta High Court in *Jateendra Mohan Das v. Emperor*,<sup>1</sup> in which the bench held that ss. 372 and 373 of the Indian Penal Code are correlative of each other, and that the phrase "otherwise obtains possession" in s. 373 corresponds to "otherwise disposes of" in s. 372 and is *ejusdem generis* with "buying" and "hiring". That point was considered by a bench of this Court in *Bhagchand Jasraj v. Emperor*<sup>2</sup> and the Calcutta High Court refused to follow that decision. Having reconsidered the matter in the light of the Calcutta decision, I remain of the opinion which I expressed in *Bhagchand Jasraj v. Emperor*. No doubt, the opening language of ss. 372 and 373 to some extent corresponds. Section 372 commences "Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years," and s. 373 commences "Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years." But to my mind, the fact that the language corresponds to some extent does not justify a conclusion that s. 373 is a mere counterpart of s. 372. I apprehend that, if s. 372 was repealed or amended, that would not in any way affect the construction or effect of s. 373. Section 373 in terms deals with obtaining possession, and not merely with obtaining possession from a third person, and to say that because an offence under s. 372, which is aimed at disposing of a girl, necessarily involves two parties to the transaction, therefore s. 373, which is aimed at obtaining possession, must involve two parties, is, to my mind, a fallacy. Henderson J. in *Jateendra Mohan Das v. Emperor* in giving the judgment of the Court gives an illustration. He says (p. 190):

"If the mother of an illegitimate girl, whom she is unable or unwilling to maintain, made her over to the keeper of a brothel with the intent that she may be used for purposes of prostitution, the mother is guilty under s. 372 and the keeper of the brothel under s. 373."

I entirely agree. But, in my opinion, if the keeper of the brothel meets the girl, and by physical force or by false representation induces her to enter the brothel, and keeps her there, he undoubtedly obtains possession of the girl, and the fact that no third party is involved as the giver of possession is irrelevant. In my judgment, the view taken by the Calcutta High Court imposes an entirely unjustifiable and most undesirable limitation upon the plain words of s. 373.

A further question arises in this case, however, whether what the accused did amounts to obtaining possession of this girl. As pointed out by this Court in *Bhagchand Jasraj v. Emperor*, obtaining possession involves exercising some sort of control over the person of the girl. In that case the question was whether the Judge had correctly summed the matter up to the jury. In the present case we are not concerned with a jury, and we have to see whether what the accused did amounts to obtaining possession. On the finding of the learned Magistrate, the girl went with the accused voluntarily. He

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1 [1937] 2 Cal. 187.

2 (1934) I. L. R. 58 Bom. 498,  
s. c. 36 Bom. L. R. 379.

A. Cr. J. had been living in the same house as the girl, and was a relative, and they went away together by mutual consent. There is nothing whatever to show that the accused exercised any control over the girl, that he locked her in a room, or prevented her from communicating with her friends, or did anything of that sort. As far as I can see, she was perfectly free to leave the accused whenever she wanted to. That being so, I am unable to accept the view of the learned Magistrate that the accused obtained possession of this girl of seventeen and a half years of age, within the meaning of s. 373.

Therefore the conviction must be set aside, and the fine, if paid, be refunded.

SEN J. I agree.

*Conviction set aside.*

### PRIVY COUNCIL

[On appeal from the High Court of Judicature at Madras.]

*Present :*

LORD THANKERTON, SIR GEORGE RANKIN AND LORD JUSTICE CLAUSON.

MERLA RAMANNA

*v.*

CHELIKANI JAGANNADHA RAO.

1941

March 18.

*Hindu law—Joint family—Sham sale deed between coparceners—References in deed of definite share of each coparcener—Whether such references effect severance of status of members of coparcenery.*

Under the Mitakshara system of Hindu law coparceners who intend to remain joint and undivided do not become divided contrary to their intention because in a document for purposes of pretence they refer to their interests as represented by a fractional share.

A member of a Mitakshara family may sometimes be forgiven for speaking of his "one-third share" instead of using the more accurate but more elaborate expression "the share which if a partition were to take place to-day would be one-third." Where, however, a third party has been induced to act upon such a document, very different questions may arise by reason of estoppel or otherwise, but if the case is limited to the parties themselves then, propriety or impropriety of language matters little, since the document does not warrant any inference of a previous or independent agreement to hold in divided shares.

*Appovier v. Rama Subba Aiyar*,<sup>1</sup> referred to.

THE facts are fully stated in the judgment of the Board.

*J. M. Parikh* and *R. A. Parikh*, for the appellants.

*Sir H. Cunliffe K. C.* and *P. V. Subba Rao*, for the respondents.

SIR GEORGE RANKIN. Dharma Rao and Kasibabu were brothers, the former being older than the latter by about nineteen years. The appellant Merla



Ramanna was a creditor of Dharma Rao in respect of a promissory note executed in 1928 for Rs. 10,000 with certain interest. Respondents Nos. 1 and 2 (herein called the respondents) are the sons of Kasibabu who died in 1910. The family is governed by the Mitakshara. Respondents Nos. 3 and 4 do not appear and need not be mentioned.

After Dharma Rao's death in 1929, the appellant sued the respondents in the Court of the Subordinate Judge at Cocanada as being persons in possession of Dharma Rao's estate, and on January 27, 1931, recovered judgment in the usual form limited to assets of Dharma Rao which had come to their hands. Certain immoveables in which Dharma Rao had had an interest were attached before judgment, and on April 22, 1932, the respondents applied to the Subordinate Judge to raise the attachment contending that the properties attached were not liable to be taken in execution under the decree. Their case is that they were coparceners with their uncle in a joint Hindu family governed by the Mitakshara and that on Dharma Rao's death they became entitled by survivorship to the whole interest in the joint family property, the appellant, though a creditor of Dharma Rao, not having taken any steps in his debtor's lifetime to recover his debt.

The appellant, on the contrary, contends that Dharma Rao and Kasibabu had ceased so far as regards the attached properties to be undivided and had become separate in estate by reason of a deed of sale (exhibit B) dated March 22, 1900, whereby Kasibabu purported to sell his one-tenth interest therein to his brother Dharma Rao. To this the first answer of the respondents is that the deed was a sham deed not intended to have any effect upon the rights of the parties and not the expression of any agreement between them. Further and in the alternative the respondents contend that even if the deed of sale was intended to be operative and was entered into *animo contrahendi* it did not have the effect of dividing the brothers' interest in the attached properties or of bringing to an end the right of the survivor to succeed to the whole interest. This contention is based upon the circumstance that in 1900 other branches of the family were joint with the branch represented by Dharma Rao and Kasibabu and it is said that the members of these other branches are not shown to have had notice of the deed of sale. As their Lordships do not find it necessary to examine this contention it need not be stated more particularly. The respondents also contend that if Dharma Rao had acquired Kasibabu's one-tenth interest in addition to his own, he had brought the income into the common stock so as to make the properties joint. This contention was raised by the respondents in their petition and though it does not seem to have been urged at the hearing before the Subordinate Judge, it was maintained before the High Court with success.

Apart from exhibit B, their Lordships are satisfied that there is no ground for maintaining that Dharma Rao and Kasibabu's sons had become divided in respect of the properties now in question. The learned Subordinate Judge found that the respondents had "failed to prove that exhibit B is a sham or a nominal document", but the High Court on appeal thought that "the conclusion is irresistible that exhibit B the sale-deed was a nominal conveyance." The learned Subordinate Judge found in favour of the appellant that exhibit B operated to divide the interests of the two brothers and by his order of

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September 10, 1934, he maintained the attachment. The High Court having found that exhibit B was not intended to be acted on held that it did not operate a division of status as between the brothers. They also held that this would not have resulted from the deed even if it had been a real and not a sham transaction; and that if a division of interest had taken place by virtue of the deed, the manner in which the income had been treated by Dharma Rao restored the properties comprised therein to the condition of joint family property. The High Court by order dated November 16, 1936, accordingly held that the appellant was not entitled to have recourse to the attached properties in execution of his decree, and this is the decision now complained of.

There is a good deal of evidence upon the question whether the deed of sale (exhibit B) was intended by the parties thereto as an agreement between them or was executed merely to bring into existence a document which might, contrary to the truth, appear to have taken away from Kasibabu his interest in the properties comprised therein. Upon a full consideration of this evidence their Lordships are of opinion that the view taken by Mockett and Lakshmana Rao JJ. in the High Court has the greater reason and should prevail. In 1900 Kasibabu had just attained the age of eighteen years and Dharma Rao was thirty-seven. Of a total alleged consideration of Rs. 12,500 only Rs. 650 is said to have been paid in cash to Kasibabu at the time, the rest being accounted for in the deed by recitals about debts of the joint family, of the parties' own branch of the family and of Kasibabu personally, and by a statement that Rs. 1,000 had been paid as earnest money. Though accounts kept by Dharma Rao over many years are in evidence, there is no satisfactory proof of the existence of the alleged debts of their father and none at all that these were in 1900 pressing or that payments were made by Dharma Rao in discharge of them. It is reasonably clear from these accounts that they draw no distinction between properties sold to Dharma Rao by exhibit B and other properties in which Kasibabu retained his original interest as a coparcener. He and his family are shown to have been provided for out of the income of the family as a whole down to 1908 when the four branches become divided in status, and thereafter out of the income of the branch. It is not easy to account for such a transaction as the deed discloses save upon the ground that Kasibabu was thought to be foolish and extravagant and given to bad habits likely to lead to his dissipating his property. There is direct evidence contradicting one of the recitals as to his having taken a loan during his minority, and there is evidence of statements made by Dharma Rao disclaiming that by the deed he had become entitled to his brother's share. In 1912 at the making of the record of rights no such effect appears to have been given to the deed. There was another deed in 1910 whereby Kasibabu purported to divest himself of other properties in favour of a nominee for Dharma Rao, and there is also to be considered the fact that Dharma Rao in 1927, made an ineffective, because unwitnessed, will purporting to leave all his properties to the respondents. In the present case the oral evidence as to which the Courts in India have differed must be judged mainly upon the probabilities arising out of the proved documents and the admitted facts. Their Lordships think it sufficient to say that the careful and detailed examination of the evidence given by Lakshmana Rao J. in his judgment appears

to them to be convincing and that they agree with the High Court in regarding the deed of sale as being merely "nominal" in the sense that it was not intended to have effect upon the right of the parties *inter se*.

Even so, and upon the footing that exhibit B is only a sham, and not a real transaction, the appellant has contended before the Board that it would in law divide the interests of the parties thereto so as to put an end to the *jus accrescendi* or right of survivorship between coparceners. The learned Judges of the High Court do not appear to have contemplated that a document which was not the expression of an agreement at all and not intended to have effect upon the rights of the parties could have the important effect of changing their undivided status. The repeated references in exhibit B to the one-tenth share of each of the two brothers have been emphasised in argument for the appellant, but while they do not seek in any way to qualify what was said in *Appovier v. Rama Subba Aiyar*,<sup>1</sup> their Lordships are unable to hold that coparceners who intend to remain joint and undivided become divided contrary to their intention because for purposes of pretence they refer to their interests as represented by a fractional share. Where a third party has been induced to act upon the footing of such a document as exhibit B, very different questions may arise by reason of estoppel or otherwise, but the question in the present case is limited to the parties themselves and to the immediate effect of the deed. Even a member of a Mitakshara family may sometimes be forgiven for speaking of his "one-third share" instead of using the more accurate but more elaborate expression "the share which if a partition were to take place to-day would be one-third." But in the present case the reference to the shares as "one-tenth" shares is part of the pretence of sale. When once the conclusion is reached that exhibit B is not the expression of any intention or agreement to transfer Kasibabu's interest to Dharma Rao propriety or impropriety of language matters little since the deed does not warrant any inference of a previous or independent agreement to hold in divided shares.

Their Lordships are of opinion that it is not shown as regards the properties now in question that Dharma Rao had before his death ceased to be joint with Kasibabu's sons. They will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs to the first and second respondents.

R. C. C.

*Appeal dismissed.*

Solicitors for appellant : *Lambert & White.*

Solicitors for respondents : *Hy. S. L. Polak & Co.*

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## APPELLATE CIVIL.

Before Mr. Justice Divatia.

1941

June 30.

SHEKH ZAFARBHAI GULJARBHAI .

v.

CHHAGANLAL ADITRAM GANDHI.\*

*Wakf property—Mutawalli—Lease for long term—Sanction of Court—Sanction granted after suit—Sanction by any civil Court.*

A long term lease of the wakf property by its mutawalli is valid, provided permission of the Court is obtained for it. Such permission can be granted even after a suit is brought to set aside the lease, and it can be granted by any civil Court.

*Nimai Chand Addya v. Golam Hossein<sup>1</sup>, Afzal Husain v. Chhedi Lal,<sup>2</sup> In the matter of Woozatunnessa Bibee<sup>3</sup>, Habibar Rahaman v. Saidannessa Bibi<sup>4</sup>, and Burhan Mirdha v. Khodeja Bibi<sup>5</sup>, referred to.*

SUIT to recover possession of land.

The land in dispute was waste land attached to the dargah of Hasan Pir at Gomtipur in Ahmedabad. In 1925 the dargah was managed by one Sayed Hussein Sayad Alli (defendant No. 2) as mutawalli. The land was, on November 11, 1925, granted on lease for a term of fifty-one years by defendant No. 2 to defendant No. 1 (Chhaganlal). Defendant No. 1 built eight rooms and twelve privies on the land at a cost of Rs. 4,000. Defendant No. 2 took the rent in advance under the lease and built a mosque with the money.

On April 24, 1934, Shaikh Rehmanbhai, who was appointed mutawalli of the dargah, filed a suit to recover possession of the land alleging that the lease granted by defendant No. 2 to defendant No. 1 was invalid. The plaintiff having died, the suit was continued by his successor Shaikh Jafarbhai Guljarbhai.

Defendant No. 1 contended *inter alia* that the lease was for the necessity of the mosque, that the permission of the Court was not necessary to the granting of the lease, and that if such permission was necessary the plaintiff should be ordered to obtain it, that in any event the defendant was entitled to recover compensation.

The trial Court held that the plaintiff could dispute the validity of the lease and that he was not bound by it. The suit was accordingly decreed for the following reasons :—

"In arguments defendant No. 1 shifts his plea in the written statement that the plaintiff should be ordered to obtain the leave of the District Court to this that it is open to this Court to grant such a lease and that its grant can validate the lease. In support of this contention reliance is placed on *Nimai Chand Addya v. Golam*

\* Second Appeal No. 96 of 1939, from the decision of P. H. Gunjal, Extra Assistant Judge at Ahmedabad, in Appeal No. 218 of 1937, reversing the decree passed by H. R. Jetley, Third Joint Subordinate Judge at Ahmedabad, in Civil Suit No. 406 of

1934.

1 (1909) I. L. R. 37 Cal. 179.

2 (1934) I. L. R. 57 All. 727.

3 (1908) I. L. R. 36 Cal. 21.

4 (1923) I. L. R. 51 Cal. 331.

5 [1937] 2 Cal. 79, S.B.

*Hossein* (37 Cal. 179). This case lays down that the permission of the kazi requisite under the Mahomedan law can be given by a Subordinate Judge's Court if the property be under its jurisdiction. This is so far as regards the authority to grant permission in the place of the kazi. But the case is of mortgage and as stated therein the Mahomedan law permits the mortgage made by a mutawalli without sanction of the Court if it is granted for emergent necessity and that the leave can be subsequently given. The case no way, in my opinion, helps defendant No. 1 since restriction as regards sale, mortgage and leases is not the result of a general provision of law regarding alienation convening (*sic*) all the above three forms of alienation. There are distinct and separate restrictions as regards sales and mortgages on the one hand and the leases on the other. Therefore the analogy of mortgage cannot help the case of a lease. Thus the 37 Cal. case, based as it is on a provision of Mahomedan law, only refers to the case of mortgage has no application here. The next case relied on for defendant No. 1 is *Bejnath v. Mahmud Ismail*, 46 All. 677. This is not a case under the Mahomedan law but under the Religious Endowments Act and has no application here. The third case relied upon for defendant No. 1 is *Gulam Mahmud v. Akroy Kumar Lal*, 32 I. C. 205. This was a case of a suit to recover the amount paid in advance to a mutawalli for getting a lease. The mutawalli did not obtain the sanction of any Court and so the plaintiff's suit for refund of earnest money was decreed. Thus the actual decision of the case has no bearing on the question in issue ....

On the other hand the case of *Shailundranath Palit v. Hade Kaza Mane*, 59 Cal. 586, lays down that the powers of a mutawalli are more restricted as regards leasing than as regards sale or mortgage. Thus I do not think that permission can be subsequently granted in cases of improperly granted leases, whether or not their making be justified by necessity."

On appeal, the Assistant Judge was of opinion that defendant No. 2 had as mutawalli power to grant lease of wakf property for its benefit for a term exceeding one year under Mahomedan law, that defendant No. 2 had granted the lease for the benefit of the wakf property, and that the lease in suit was valid. He, therefore, dismissed the claim for possession, observing as follows :—

"The case in 37 Cal. 179 lays down that under the Mahomedan law, mortgage of wakf property by a mutawalli in case where necessity is established is valid, even if the permission of the kazi is obtained subsequent to the mortgage. No doubt it is a case of a mortgage, but I am of opinion that from an analogy of a mortgage, it can be said that the same rule is applicable to leases also, inasmuch as a lease, a mortgage and a sale are different forms of an alienation .... In the case in 44 All. 677 it is held that a mutawalli has a power to grant leases for longer period if he thought that such a grant was for the benefit of the trust estate .... It is true that in the case in 32 I. C. 205 the plaintiff prayed for a recovery of a sum of money paid to the mutawalli defendant No. 1 for granting a certain lease which he agreed to execute in favour of the plaintiff, but the mutawalli did not obtain the sanction of the Court. Therein, in the body of the judgment, it is observed that lease of the wakf property made for more than a year is impugned before a Court, it may be held valid on the doctrine of *factum valet* and on the principle that a Court should not disturb the agreement made in the ordinary course of management of an estate. Although these observations are in the nature of *obiter dicta* still they go to support the applicant's contention to some extent. In 52 Cal. 586 it is laid down that a mortgage made by a mutawalli without the previous sanction of the Court is not void, if made for a justifying necessity, and may be retrospectively confirmed by the Court. No doubt this is also a case of a mortgage but from an analogy it can be treated that the same rule is applicable to the lease also. Relying on these rulings, I hold that a mutawalli under the Mahomedan law has got power to grant a lease of the wakf property for a period of more than three years and one year for the benefit of the wakf property."

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A. C. J. The plaintiff appealed to the High Court.

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*I. I. Chundrigar*, with *K. T. Pathak*, for the appellant.

ZAFARBHAI

*G. N. Thakor*, with *J. C. Shah*, for respondent No. 1.

GULJARBHAI

CHHAGANLAL

ADITRAM

DIVATIA J. This is a second appeal in a suit by the plaintiff-appellant to recover possession of a piece of land and damages for occupation at certain rate. The plaintiff is the present mutawalli of the suit property and his case was that the suit land which was wakf property was given on a lease for fifty-one years by his predecessor, defendant No. 2, to defendant No. 1 on November 12, 1925, but that he had no power under the Mahomedan law to grant a lease for a long period. The lease being therefore void, he sued to recover the property from defendant No. 1. Defendant No. 1's case was that the lease was validly passed by defendant No. 2 acting as mutawalli, that the transaction was for necessity as well as for the benefit to the wakf, that a mosque was erected with the money obtained by defendant No. 2 from him, and if permission of the Court was necessary to validate the transaction, such permission should be granted in this suit.

The main question, therefore, was whether the lease for a long period granted by the then mutawalli was valid. The trial Court was of the opinion that it was invalid because under the Mahomedan law he had no power to grant the lease of non-agricultural property for more than one year except with the previous sanction of the Court, and no such sanction had been obtained in the present case. On appeal, the Extra Assistant Judge reversed that decision and held that the mutawalli had the power to grant the lease as it was for the benefit of the wakf property and that such a lease could be validated by retrospective sanction of the District Court, and he thereby gave the sanction for the said lease.

The learned Judge held relying upon several authorities that the case of a lease for a long term was on the same footing as the case of a mortgage or a sale, that under the Mahomedan law it was competent to a mutawalli to mortgage or sell the wakf property with the sanction of the Court, and that even if such sanction was not obtained, the Court has the power to grant retrospective sanction if it was satisfied that the transaction was for the benefit of the institution. The same principle, according to the learned Judge, would apply to the case of a long term lease, and he therefore allowed the appeal. Hence this second appeal by the plaintiff.

The decisions about mortgage transactions lay down that a mortgage by a mutawalli for necessity or benefit is valid even if permission of the Court is obtained subsequent to the mortgage. The principal case on this point is *Nimai Chand Addya v. Gokam Hossein*<sup>1</sup>, and that case has been followed in *Afzal Husain v. Chhedi Lal*<sup>2</sup>. With regard to a long term lease, it has been held in *In the matter of Woozatunnessa Bibee*<sup>3</sup> that the Court has the power to grant permission for such lease. In that case permission was granted to a mutawalli to enter into a lease for a period of thirty years. That decision was followed in *Habibar Rahaman v. Saidannessa Bibi*<sup>4</sup>. It is true that both these cases were of antecedent sanction and not of retrospective

1 (1909) I. L. R. 37 Cal. 179.

2 (1934) I. L. R. 57 All. 727.

3 (1908) I. L. R. 36 Cal. 21.

4 (1923) I. L. R. 51 Cal. 331.

validation. The only question therefore is whether it is open to a Court to grant permission retrospectively in the case of a long term lease. I see no distinction in principle between antecedent and subsequent sanction in the case of a long term lease if a mortgage by a mutawalli can be validated by subsequent sanction as in the cases of *Nimai Chand Addya v. Golam Hossein* and *Afzal Husain v. Chhedi Lal*. The test in both cases is the same, viz., necessity or benefit to the institution.

It is, however, contended that even if the transaction could be subsequently validated by the Court, it is only the District Judge who could do it and not the Assistant Judge, because the power of a kazi who can, under the Mahomedan law, grant such permission, is being exercised now by the District Judge and not by any Judge subordinate to him in the District Court, and that in the present case the permission is given by the Assistant Judge and not by the District Judge. Reliance is placed for that proposition on the decision in *Fakrunnessa Begum v. District Judge of 24-Parganas*<sup>1</sup>. There no doubt it is said that the District Judge has power to grant such sanction. But on the other hand in the leading case of *Nimai Chand Addya v. Golam Hossein* it is observed as follows (p. 187):

".... we can see no reason why an approval by a Subordinate Judge of a transaction by which *wakf* property is mortgaged, provided he has jurisdiction over the *wakf* property, should not be quite as effectual as a sanction by a District Judge."

It has also been recently held by a special bench of the Calcutta High Court in *Burhan Mirza v. Khodeja Bibi*<sup>2</sup> that the civil Courts have taken the place of kazis under the Mahomedan law. I do not think there is, therefore, any substance in the contention that the District Judge alone enjoys the function of a kazi and that sanction must be granted by him.

In the present case defendant No. 1 expressly asked in his written statement for such permission if it was necessary and he repeated the same in his memorandum of appeal to the lower Court. The learned appellate Judge acceded to that prayer as he was of opinion that the transaction was beneficial to the institution, and I do not think that he has erred in doing so.

The decree of the lower Court is, therefore, confirmed and the appeal is dismissed with costs in favour of respondent No. 1.

*Appeal dismissed.*

A. C. J.

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Divalia J.

<sup>1</sup> (1920) I. L. R. 47 Cal. 592.

R. 108.

<sup>2</sup> [1937] 2 Cal. 79, S.B.

## CRIMINAL REFERENCE.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

1941

EMPEROR

*v.*

July 22.

KARSAN JESANG.\*

*Indian Penal Code (Act XLV of 1860), Sec. 211—False charge—Institution of proceedings—Court—Giving of information to police does not amount to, such institution.*

In order to bring a case within the second part of s. 211 of the Indian Penal Code, 1860, criminal proceedings must be instituted in a Court on a false charge. The giving of information to the police of a cognizable offence does not amount to institution of criminal proceedings within the meaning of the second part of the section; and if the case gets no further than a police inquiry, it falls within the first part of the section.

*Queen-Empress v. Bisheshwar*,<sup>1</sup> followed.

*Karim Buksh v. Queen-Empress*,<sup>2</sup> dissented from.

ON May 14, 1940, the accused, Karsan Jesang, charged Chatur Vaja and four others with an offence of dacoity punishable under s. 395 of the Indian Penal Code, 1860, before the Police Sub-Inspector of Mehmedabad. The Sub-Inspector investigated the charge and found that it was false. He thereupon reported the case for B-summary, and it was granted by the Sub-Divisional Magistrate, Kaira.

On December 12, 1940, the Sub-Inspector lodged a complaint against the accused on a charge under s. 211 of the Indian Penal Code, in the Court of the First Class Magistrate at Mehmedabad. The Magistrate convicted the accused of the offence charged, on February 11, 1941, and sentenced him to pay a fine of Rs. 25 under the first part of s. 211.

The District Magistrate of Kaira referred the case to the High Court for an order setting aside the conviction and sentence and directing retrial of the accused before a Court of Session, observing as follows:—

"It has been held by the Calcutta, Madras and Patna High Courts that making of a false charge to the Police of a cognizable offence is the institution of criminal proceedings within the meaning of s. 211, Indian Penal Code, and if the false charge is in respect of an offence punishable with death, transportation for life or imprisonment for seven years or upwards, it falls under the second part of s. 211, Indian Penal Code. The offence charged falsely by the accused in this case is dacoity which is punishable with transportation for life, and in view of the above rulings of the High Courts, it falls under the second part of s. 211 of the Indian Penal Code, which is triable by a Court of Session only. The First Class Magistrate of Mehmedabad has tried the case without jurisdiction, and his proceedings are therefore null and void under s. 530 (p), Criminal Procedure Code. Again, the sentence of fine only awarded by him to the accused is illegal."

The reference was heard.

\* Criminal Reference No. 49 of 1941, made by S. B. Vaidya, District Magistrate, Kaira.

1 (1893) I. L. R. 16 All. 124.

2 (1888) I. L. R. 17 Cal. 574, F.B.



*H. D. Thakor*, (appointed), for the accused.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

A. Cr. J.

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EMPEROR

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BEAUMONT C. J. This is a reference made by the District Magistrate of Kaira asking us to set aside the conviction of the accused under s. 211 of the Indian Penal Code by the First Class Magistrate of Mehmedabad, on the ground that the case was only triable by a Court of Session.

It appears that the accused made a false charge to the police that certain persons had been guilty of dacoity. The police inquired into the matter, and came to the conclusion that the charge was false, and they, therefore, obtained "B" summary, and the present accused was then prosecuted under s. 211. Now, that section is divided into two parts : the first part provides that whoever, with the intent specified, institutes or causes to be instituted any criminal proceeding against a person, or falsely charges any person with having committed an offence, shall be punished, as therein mentioned. That part of the section, it will be noted, refers both to instituting criminal proceedings and to making a false charge. Then the second part provides that if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, the offence shall be punishable more heavily. That part refers only to criminal proceedings instituted on a false charge. Now, under s. 395 of the Indian Penal Code dacoity is punishable with transportation for life, or imprisonment up to ten years. Therefore, it is said that this case falls within the second part of s. 211 of the Indian Penal Code. Under the Second Schedule to the Criminal Procedure Code, on a prosecution under s. 211, if the offence charged be punishable with transportation for life, the case is triable only by a Court of Session ; so that, if the learned District Magistrate is right in thinking that the case falls under the second part of s. 211, it is undoubtedly triable only by the Court of Session, and the First Class Magistrate had no jurisdiction. But, in my opinion, in order to bring the case within the second part of s. 211, criminal proceedings must be instituted in a Court on a false charge. No doubt the criminal law may be set in motion by giving information to the police of a cognizable offence ; but unless proceedings are instituted in a Court of law, it is not in my opinion correct to say that criminal proceedings have been instituted.

There has been a conflict of authority on this point in India. In *Karim Buksh v. Queen-Empress*<sup>1</sup> a full bench held that even if a false charge was made of an offence punishable with death or transportation for life, and the matter got no further than a police inquiry, nevertheless it fell within the second part of s. 211, because inducing the police to institute the inquiry was instituting criminal proceedings. On the other hand, in *Queen-Empress v. Bisheshkar*<sup>2</sup> it was held that where the offence committed did not go further than the making of a false charge to the police, that did not amount to the institution of criminal proceedings, and the case therefore fell within the first part of s. 211. I prefer the view of the Allahabad High Court to that of the High Court of Calcutta.

It would, I think, be very inconvenient, and not in accordance with what

<sup>1</sup> (1888) I. L. R. 17 Cal. 574, F.B.

<sup>2</sup> (1893) I. L. R. 16 All. 124.

A. Cr. J. one would have expected the framers of the Criminal Procedure Code to con-  
 1941 template, that a mere charge, however serious, which gets no further than a  
 — police inquiry, should give rise to a case triable only by a Court of Session. If  
 EMPEROR the matter gets into Court, and a man is put on his trial on a false charge,  
 v. that is a much more serious matter. In my opinion if the case gets no further  
 KARSAN than a police inquiry, it falls within the first part of s. 211 of the Indian Penal  
 JESANG Code, and, therefore, the First Class Magistrate of Mehmedabad had jurisdic-  
 — tion to try this case.  
 Beaumont C.J.

Notice to enhance the sentence was given, but we think it unnecessary to take any action on the notice.

*Order accordingly.*

### PRIVY COUNCIL.

*[On appeal from the High Court of Judicature at Patna.]*

*Present :*

LORD ATKIN, LORD THANKERTON, LORD ROMER, SIR GEORGE RANKIN AND  
 LORD JUSTICE CLAUSON.

1941

JAGAT NARAIN SINGH

April 3.

v.

KHARTAR SAH.

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 90 ; secs. 47, 146—Execution—Property assigned by judgment-debtor—Attachment of property in execution of decree obtained subsequent to assignment—Application by assignee under r. 58—Assignee undertaking under compromise petition to pay decretal amount by instalments—Sale of property in execution for non-payment—Application by assignee under r. 90 to set aside sale—Whether such application competent—Procedure in execution.*

A, being in debt, assigned his immovables to his brother, B, in 1923, by a deed, reserving only a maintenance allowance to himself. In 1928 an execution application was made in respect of a money decree passed in 1926 in favour of C against A. B was added to the application as a "judgment-debtor" although no judgment had ever been obtained by C against him. Part of the estate having been attached in execution of C's decree, B applied for releasing the properties from attachment both under O. XXI, r. 58 and s. 47 of the Civil Procedure Code, 1908, on the ground that he was no party to the decree and that there was no charge on the attached properties for the decretal debt. The trial Judge held that B was a representative of A within the meaning of s. 47 of the Code, and that by virtue of s. 146 the decree could be executed against him as representing A. He eventually dismissed both the applications. However, on the day of the Judge's order a compromise petition was filed in the Court, by which B undertook to pay C the sum due by way of an immediate cash payment and the balance by fixed annual instalments. The instalments not having been paid as agreed, C applied for execution, B again being cited as judgment-debtor. Part of the estate was again attached and then sold. A month after the sale B applied under O. XXI, r. 90, of the Civil Procedure

Code, to have the sale set aside, alleging irregularities as to notice in connection with the sale. The trial Judge held that the sale was without jurisdiction because the compromise deed was unenforceable in execution against B in the absence of any decree against him. The High Court on appeal confirmed the sale and held that the trial Judge's decision in the first execution application that B was a representative of A, the judgment-debtor, concluded the case against B on the principle of *res judicata*. On appeal to the Privy Council :—

*Held*, confirming the sale, that the application of B under O. XXI, r. 90, of the Civil Procedure Code, was misconceived, since an application based on the allegation that the properties had been wrongfully sold in execution must be made under O. XXI, r. 58, of the Code, and not under O. XXI, r. 90, of the Code, which was concerned with irregularities in publishing or conducting the sale.

*Quære*. Whether an application under O. XXI, r. 58, of the Civil Procedure Code, 1908, made one month after the sale would be in time.

THE facts are fully stated in the judgment of the Board.

C. Sidney Smith, for the appellant.

No appearance for the respondents.

SIR GEORGE RANKIN. The appellant is the legal representative of one Madhusudan Singh, deceased. The appeal, which is brought *in forma pauperis*, arises out of proceedings to enforce a money decree dated March 23, 1926, obtained against Madhusudan's brother Shyam Lal by one Soshi Bhusan in the Court of the Subordinate Judge at Jamtara in the Sontal Parganas. The execution case which has given rise to this appeal was brought in the same Court on September 15, 1930, by respondents Nos. 1 and 2 who had in 1929 purchased the rights of Soshi Bhusan in the decree. It is numbered Money Execution Case No. 14 of 1930. It was the second case brought to enforce the judgment of 1926, the first (Money Execution Case No. 12 of 1928) having been brought in the same Court by the original decree-holder Soshi Bhusan on May 22, 1928. The main question raised before the Board is as to the effect to be given in the second case to certain orders passed against Madhusudan in the first.

Shyam Lal was the owner of an impartible estate known as the Jamtara estate and, being involved in debt, he assigned his immovables to Madhusudan by deed dated January 10, 1923, reserving only a maintenance allowance to himself.

The deed recited Shyam Lal's indebtedness and that he was ill and made it clear enough that the purpose of the assignment was to enable the debts to be paid off by proper management of the estate. Shyam Lal having failed to give Madhusudan possession according to the deed, Madhusudan in 1924 sued Shyam Lal in the Court of the Subordinate Judge at Asansol to enforce the deed. This suit was compromised in 1927. By the compromise decree dated March 17, 1927, Madhusudan was declared to be the owner of the estate and a receiver was appointed to manage it, Shyam Lal being declared entitled to a monthly maintenance allowance. Madhusudan got himself recorded as proprietor. A considerable fortification was thus erected against any attack by Shyam Lal's creditors upon the Jamtara properties. Though the exact position of Madhusudan in relation to his brother is not quite clear, their Lordships will not assume that he was a mere agent trustee or benamidar.

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When the first execution application was made on March 22, 1928, the names of Madhusudan and the receiver were added thereto as "judgment-debtors", though it does not appear from anything on the record submitted to the Board that Soshi Bhusan had at any time obtained judgment against Madhusudan. Certain portions of the Jamtara estate having been attached in execution, Madhusudan on September 18, 1928, applied under r. 58 of O. XXI of the Civil Procedure Code that they be released from attachment. Not content, however, with this step he followed it up on October 8, 1928, with an application to the like effect made under s. 47 of the Code. In both proceedings his objections were that he was not a party to the decree and that there was no charge upon the Jamtara estate for the decretal debt of Shyam Lal. The learned Subordinate Judge having correctly observed that the two applications were inconsistent—the first being upon the footing that Madhusudan was a stranger to the suit in which the decree had been passed and the second on the footing that he was a "representative" of the judgment-debtor—dismissed both of them. By his order dated November 29, 1928, he held that Madhusudan was a "representative" of Shyam Lal within the meaning of s. 47 of the Code and that by virtue of s. 146 the decree could be executed against him and against the receiver as representing him. The terms of s. 146 are as follows :—

"Save as otherwise provided by this Code or by any law for the time being in force where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Whether as a result of this decision or in anticipation of it or independently of it, a compromise petition was on the same day (November 29, 1928) filed in Court with the result that on the next day (November 30) the sale which had been fixed for that day was not held. Madhusudan was a party to the compromise as one of "the judgment-debtors". The terms of compromise were that Soshi Bhusan received Rs. 3,000 in cash and agreed to take the balance in annual instalments of Rs. 1,393-12-3. There was a further provision :—

"If any third person as decree-holder executes his decree, then this decree-holder will be competent to execute his decree without waiting for payment of instalment and will be able to arrange for realisation of the entire amount due from the estate. To that the judgment-debtors will not have the right to raise any objection."

On November 30, an order on this petition was made : "Case struck out partly satisfied on the joint petition of the decree-holder and the three judgment-debtors." The attachment of the Jamtara estate properties thus came to an end.

The balance of the debt was not paid as agreed and respondents Nos. 1 and 2 having bought the decree, applied for the execution on September 15, 1930. Madhusudan and the receiver were again cited as judgment-debtors in addition to Shyam Lal. Properties of the Jamtara estate were again attached and were sold on June 6, 1931. Madhusudan took no steps in the meanwhile, but on July 6, 1931, he applied to have the sale set aside under r. 90 of O. XXI of the Code which provides that at the instance of any person whose interests are affected by the sale such an order may be made "on the

ground of a material irregularity or fraud in publishing or conducting" the sale. He set out in his application eleven grounds of which the first nine alleged various irregularities as to notice and otherwise in connection with the sale. As his tenth and eleventh grounds he said that the sale was without jurisdiction and was in any view of the case liable to be set aside. After hearing a number of witnesses, the learned Subordinate Judge by his order of November 12, 1932, held that Madhusudan's case failed on the facts as regards all the irregularities alleged and this finding is not now disputed. He further held, however, that the sale should be set aside on the question of jurisdiction. He rejected the view that Madhusudan was the "representative" of Shyam Lal, and he did not consider that the compromise which had ended the previous execution case could be enforced in execution against Madhusudan without any decree against him having been obtained.

The High Court at Patna by the order of April 14, 1936, which is now under appeal, have reversed this decision. The learned Judges (Wort A. C. J., and Dhavle J.) do not appear to have proceeded upon the ground that a third party objecting to the sale of his property for the judgment debt of another person cannot disregard r. 58 of O. XXI and apply after the sale under r. 90 of that Order treating the case as one of irregularity in publishing or conducting the sale. They held that in the previous case the Subordinate Judge had decided that Madhusudan was the representative of the judgment-debtor, and though one if not both of the learned Judges considered this decision to be wrong, they held that the case before them was concluded by that decision on the principle of *res judicata*.

Their Lordships have not had the advantage of hearing any argument on the part of the respondents to this appeal, no appearance having been made on their behalf. They are somewhat unwilling in the circumstances to go beyond what is required for the proper disposal of the appeal in discussing the technical details of procedure in execution. It appears to them, however, that Madhusudan on his own case ought in the later execution proceeding as in the earlier to have made a claim under r. 58 of O. XXI if he desired to take up the attitude of a third party whose property was being wrongfully taken for another's debt. To treat this objection to the sale as a matter of irregularity in publishing or conducting the sale was not open to him, and the application under r. 90 was altogether misconceived. The only way in which any order in his favour could have been rendered competent, assuming his own case to be well founded, was by treating his application as one under r. 58. While their Lordships appreciate the force of the observation made by Dhavle J. with reference to the first execution case, that "too much importance ought not to be attached to the particular labels attached to his applications", they cannot think it right to hold that the Court should have allowed any such indulgence to Madhusudan having regard in particular to the compromise petition whereby he plainly undertook that the decretal sum should be paid and that the properties now in question should be answerable for it in his hands. It is not clear that on July 6, 1931, a month after the sale, an application under r. 58 would have been in time. Different opinions appear to have been expressed by High Courts in India upon the question. He had, moreover, called a number of witnesses as to

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the publication and conduct of the sale—an inquiry which was futile on the footing that the property was not liable to be sold. He does not appear to have made any application to the High Court for leave to make a case under r. 58. But whether or not by taking appropriate steps he could have succeeded in defeating the promises made by him in the compromise petition, he was not, in their Lordships' opinion, entitled to the assistance of the Court in that behalf, and the order of the High Court confirming the sale must be maintained.

Their Lordships are not to be taken as accepting the view that Madhusudan was a "representative" of the judgment-debtor, or indeed that any person bringing under r. 58 a claim to attached property as property to which he is entitled as against the judgment-debtor can be refused the benefit of the procedure laid down for investigation of claims or the right to question the summary decision by a suit. Nor do their Lordships profess to have ascertained what bearing s. 146 of the Code has upon such a case as the present or how it comes to be considered that the property of a "representative" of a living person against whom a money decree has been passed is answerable for the decretal debt. Further, assuming that Madhusudan in the first execution case was wrongly held to be his brother's "representative" within the meaning of s. 47, their Lordships see difficulty in the view that such a decision on a question of procedure gave the decree-holder a vested right to the misapplication of the Code in all future execution cases between the parties in respect of the same decree. Upon these and other matters their Lordships would have desired to hear argument for the respondents and they make every reserve as to the correctness of the views expressed in the Indian Courts upon these questions and other questions involved therewith.

They will humbly advise His Majesty that this appeal should be dismissed.

R. C. C.

*Appeal dismissed.*

Solicitors for appellant : Hy. S. L. Polak &amp; Co.

## CRIMINAL APPELLATE.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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EMPEROR

v.

July 30.

NINGAPA RAMAPPA KURBAR.\*

*Criminal Procedure Code (Act V. of 1898), Secs. 476, 164—Sanction to prosecute—Statement made under s. 164—Contrary statement made before committing Magistrate—Alternative charge—Magistrate should be satisfied that the latter statement was untrue—Full bench—Practice as to convening of.*

For the purposes of s. 476 of the Criminal Procedure Code, 1898, before the Court can sanction a prosecution of a person for perjury for making a statement under s. 164 of the Code and a contrary statement subsequently before

\* Criminal Appeal No. 224 of 1941,  
from an order passed by M. B. Hona-

var, Additional Sessions Judge at  
Belgaum.

the committing Magistrate, it is absolutely essential that the Court should be satisfied that the latter statement was untrue. There can be no prosecution if the former statement is untrue; and *a fortiori* there can be no prosecution if the Court is not in a position to find out which of the two statements is false.

*Emperor v. Tripura Shankar Sarkar*<sup>1</sup>, followed.

The practice of convening a full bench to reconsider the decision of a previous full bench discussed.

*Emperor v. Purshottam Ishwar*<sup>2</sup>, doubted.

*Emperor v. Mugappa bin Ningappa*<sup>3</sup>, discussed.

*Enatullah v. Kowsher Ali*<sup>4</sup>, referred to.

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#### SANCTION to prosecute.

One Sattyawa was found murdered in her house on the night of April 16, 1940. She was the wife of one Rayappa, but was the mistress of one Khushalsing. Her mother Laxmavva, when informed of the murder, went to her daughter's house, saw her dead body, and immediately went to the house of Khushalsing and told him that her daughter was murdered on his account. That very night Rayappa was found murdered on the outskirts of the village.

Khushalsing was charged with the murder of Rayappa.

During the course of investigation by the police into the case, Laxmavva and two others, Ningappa and Rajesab, were examined. Ningappa made a statement, which was thus recorded under s. 164 of the Criminal Procedure Code (Exh. 13):—

"On last Tuesday at night (16-4-1940) myself, Rajesab Hasansab and Khushalsing together slept on the upper storey of Khushalsing. At about four hours to sunrise the mother of Sattyawa came there and called out Khushalsing and told him to come as there was some work. They then went away together and immediately Khushalsing returned and told us to get up as Rayappa had murdered his wife. We got up and we three went to the house of Sattyawa and found her dead. Her left side of the head was injured with stone and it was broken. Then Laxmavva, the mother of Sattyawa, began to abuse Khushalsing saying that her daughter was killed on his account. Then Khushalsing requested to search for Rayappa. We three then went out in search of Rayappa. Khushali was ahead of us. We went out of the village site and saw a man sitting underneath a nim tree who began to run away as soon as he saw us. Khushali chased him and we too both followed him. Khushali caught hold of him under nalla and we too both caught hold of him. I caught one of his hands and Rajesab caught hold of his other hand, and we both began to drag him to the village. Khushalsing beat Rayappa four or five times on his back with a stone. We told him not to beat him and we could take him to the house of the patil, and see what could take place. He at once caught hold of his testicles and made him to fall down. Rayappa began to cry 'testicles, testicles'. We then advised Khushalsing not to press his testicles and we could take him to the house of the patil. We seeing that Rayappa was dead returned to the village. Khushalsing seeing Rayappa dead tied Rayappa's turban to his neck."

In the course of inquiry before the committing Magistrate, Ningappa was examined as a witness, when he gave a different version altogether and deposed as follows:—

"That day at night I had slept in my own house. I had heard in the village that they both were murdered. I do not know anything about their death.

1 (1910) I. L. R. 37 Cal. 618, S.B.

2 (1920) I. L. R. 45 Bom. 834,

S. C. 23 Bom. L. R. 1, F.B.

3 (1893) I. L. R. 18 Bom. 377, F.B.

4 (1926) I. L. R. 54 Cal. 266, S.B.

A. Cr. J. "My statement has been recorded before the Magistrate under s. 164, Criminal  
 1941 Procedure Code. I have stated before the Magistrate that myself, Rajesab and  
 — accused has slept on the upper storey of the accused that night. I have also stated  
 EMPEROR that Satyawa's mother came to us and awoke us and told us that Satyawa had been  
 & murdered. I have heard my statement recorded under s. 164, Criminal Procedure  
 NINGAPPA Code, as stated therein. It is not true that I had held one of the hands of Rayappa  
 RAMAPPA The statement recorded under s. 164, Criminal Procedure Code, is false. It is not  
 — a true statement."

Khushalsing was committed to the Court of Session to take his trial. At the trial, Ningappa again resiled from his first statement and stated as follows :—

"I knew Rayappa son-in-law of Laxmi. He is dead. He was killed in the early hours of Wednesday. I was at home that night and after daybreak I heard people saying that he was killed. I did not come to know where, how and by whom. I went to see his body at two hours after sunrise . . . . That night, i.e. Tuesday night I had not met Laxmi. I was sleeping in my house that night.

"The contents of Exh. 13 are not true. Exhibit 13 was read over to me and I put my thumb mark on it as correct. I made that false statement because the Police Sub-Inspector and the patil beat me asking me to depose as contained in Exh. 13.. It is not true that the accused squeezed the scrotum of Rayappa in my presence and killed him. It is not true that Raju the accused and I together went in search of Rayappa."

Rajesab also made a similar statement under s. 164 of the Criminal Procedure Code, and similarly retracted it both before the committing Magistrate and at the trial before the Sessions Court.

Laxmavva too made at first a statement under s. 164, from which she resiled before the committing Magistrate and at the trial.

The case against Khushalsing was accordingly withdrawn on December 2, 1940.

The Public Prosecutor of Belgaum then applied to the Court that complaint be ordered to be filed against Laxmavva, Ningappa and Rajesab for perjury.

The Additional Sessions Judge took no proceedings against Laxmavva, and being of opinion that it was expedient in the interests of justice that there should be an enquiry into the perjury committed by Ningappa and Rajesab ordered "that a complaint be made to the Sub-Divisional Magistrate, First Class, Belgaum City, against them," observing as follows :—

"As regards the other two witnesses, according to their statements under s. 164, they were eye-witnesses to the murder of the son-in-law of Laxmavva committed by the accused. In the committal Court and in this Court they resiled from their statements under s. 164. They now urge that their former statements were false and that they made false statements because the police pressed them to do so. It is not my province to inquire at this stage whether the statements made under s. 164 were under pressure. It is true that the existence of s. 164 has been recently commented upon by the highest tribunal of this Province. Even then so long as the section is there and requires a witness to tell the truth, I think that if he makes a false statement even when examined under s. 164 he would be guilty of perjury though he may be treated leniently, as held in *Emperor v. Sultanasha Sidisha* (42 Bom. L. R. 745). The object of enacting s. 164 is to make the witnesses not to resile from the statements they make in the early stages of investigation. If Ningappa and Rajesab had not made the statement that they saw the accused killing the son-in-law of Laxmavva the accused would not have been charged with murder of Laxmavva's son-in-law, and the accused would not have been committed to the Court



of Session. By making the statements complained against the two witnesses have wasted public time and money also. It is necessary that such a thing should be discouraged."

Ningappa and Rajesab applied to the High Court against the order.

*H. B. Gumaste*, for the appellants.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

BEAUMONT C. J. This is an appeal against an order of the Additional Sessions Judge of Belgaum directing under s. 476 of the Criminal Procedure Code, 1898, the prosecution of the applicants for an offence of giving false evidence punishable under s. 193 of the Indian Penal Code.

The case, to my mind, raises an important question as to the principles on which the Court should sanction a prosecution in cases of this kind. Under s. 476 of the Criminal Procedure Code the Court must be satisfied that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in s. 195, which includes offences under s. 193 of the Indian Penal Code; so that we have to be satisfied that it is expedient in the interests of justice that there should be a prosecution.

The facts are that the applicants made a statement before the Magistrate under s. 164 of the Criminal Procedure Code, alleging, in some detail, that they had witnessed the murder of a man named Rayappa. The alleged murderer was subsequently prosecuted, but at the inquiry before the committing Magistrate the applicants resiled from their statements, and said that in point of fact they had seen nothing, and that the statements which they had made under s. 164 were untrue. In the result the prosecution was abandoned in the Sessions Court.

Section 164 of the Criminal Procedure Code provides, so far as material, that any Magistrate as therein defined may record any statement or confession made to him in the course of an investigation under the Chapter or at any time afterwards before the commencement of the inquiry or trial, and it is provided that he may record such statements on oath, and in practice such statements are recorded on oath. The section is extensively used for recording confessions, but it is also in some cases used by the police to pin down a witness to the statement which he has made in the course of the inquiry, the object being to prevent a witness from resiling from his statement. Sometimes, for example, where the witness is a near relative of the accused, there may be some advantage in adopting that course, but, it has to be observed that, although it may be desirable to prevent a witness from resiling from a statement which is true, it is very undesirable to prevent him from resiling from a statement which is untrue.

In the present case it is no doubt true to say that either the statement made before the Magistrate under s. 164, or the statement made in the committing Magistrate's Court, was false, the two statements being contradictory. A full bench of this Court in *Emperor v. Purshottam Ishwar*<sup>1</sup> held that in such a case the statement under s. 164 and the subsequent evidence in Court constituted a series of acts within the meaning of s. 236 of the Criminal Procedure Code, and that consequently it was legitimate to frame a charge in the alter-

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native, a charge of perjury committed either before the Magistrate taking a statement under s. 164 or subsequently in Court, and to record an alternative conviction. The Court in that case consisted of five Judges, one of whom, Mr. Justice Shah, dissented from that proposition. The authority of the case may be open to question, since there had been a previous decision of a full bench of this Court of four Judges in *Queen-Empress v. Mugappa bin Ningappa*, which had reached a different conclusion. Apparently it was considered that five Judges, by a majority of four to one, could overrule a unanimous decision of four Judges, the net result being that the opinion of four Judges prevailed over the opinion of five Judges of co-ordinate jurisdiction. There seems to be very little authority on the powers and constitution of a full bench. There can be no doubt that a full bench can overrule a division bench, and that a full bench must consist of three or more Judges; but it would seem anomalous to hold that a later full bench can overrule an earlier full bench, merely because the later bench consists of more Judges than the earlier. If that were the rule, it would mean that a bench of seven Judges, by a majority of four to three, could overrule a unanimous decision of a bench of six Judges, though all the Judges were of co-ordinate jurisdiction. In *Enattullah v. Kowsher Ali* Sanderson C. J., stating the practice in Calcutta, seems to have been of opinion that a decision of a full bench could only be reversed by the Privy Council or by a bench specially constituted by the Chief Justice. Even if this be the true rule, there is nothing to show that the Chief Justice acted upon it in *Emperor v. Purshottam Ishwar* (supra). I do not recollect myself ever to have constituted a special bench to consider the ruling of a full bench, though I have constituted many full benches to consider rulings of division benches. However, I need not pursue this subject further, since, for the purpose of the present appeal, I am prepared to assume that an alternative charge of perjury lies, and that it was a charge of that nature which the learned Additional Sessions Judge contemplated. The question then is whether it is expedient in the interests of justice that such a charge should be made.

Now, to my mind, in determining that question it is absolutely essential that the Court should make up its mind whether it was the statement before the Magistrate under s. 164, or the statement subsequently made in Court, which was false. I gather from the judgment of the learned Additional Sessions Judge that he is disposed to think that it was the statement made under s. 164 which was false; but there is really no evidence to enable us to determine which of the two statements was false. If the statement in Court was false, then I agree that in the interests of justice there should be a prosecution; but supposing it was the statement under s. 164 which was false, what then? No doubt, a man making a statement on oath before a Magistrate under s. 164 should speak the truth; but if he does not, the least he can do is to tell the truth when subsequently he goes into the witness-box. To prosecute a man who has resiled from a false statement made under s. 164 is to encourage him in the belief that it pays to tell a lie and stick to it. It is far better that a man should escape punishment for having made a false state-

ment under s. 164 than that he should be induced to believe that it is to his interest, however false the statement may have been, to adhere to it, and thereby save himself from prosecution. The danger of such a course leading to the conviction of innocent persons is too great to be risked. The learned Government Pleader contends that if a prosecution is not sanctioned in a case of this kind, the practice of taking statements under s. 164 may as well be abandoned. If that result follows, I am by no means satisfied that it will be a bad thing.

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I observe that the view I take was taken by Sir Lawrence Jenkins, when he was Chief Justice of Calcutta, in *Emperor v. Tripura Shankar Sarkar*<sup>1</sup>. He says (p. 622):

"This, then, is how matters stand. The Court is convinced that of the contradictory statements now under consideration those made in this Court were true, but those before the Magistrate were false; and on a careful consideration of the events leading up to the examination before the committing Magistrate, and of the conditions under which that examination was conducted, we are clearly of opinion that the sanction sought should not be given. Had Tripura repeated here the false story he told before the Magistrate, no such application as the present would have been made: is it to be granted because he had told the truth here? Certainly not."

In my opinion, that reasoning applies, not only when the Court is satisfied that it is the earlier statement, which is false, but also when the Court is not satisfied to the contrary. As I am not satisfied in this case that it was the statement made before the committing Magistrate which was false, I am of opinion that it is not expedient in the interests of justice that there should be a prosecution.

The appeal, therefore, will be allowed.

SEN J. I agree.

*Appeal allowed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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v.

LAXMAN KRISHNA NAIK.\*

1941

August 11.

*Bombay Salt Act (Bom. II of 1890), Secs. 3(o), (38)(1)(a), 47(a) †—Salt—"Possession" or "removal of salt" by servant or agent—"Removal", "Transportation",*

1 (1910) I. L. R. 37 Cal. 618, S.B.

\* Criminal Appeal No. 146 of 1941, by the Government of the Province of Bombay, against an order of acquittal passed by S. M. Patil, Magistrate, First Class, Ankola.

† The material portions of the sections are as follows:—

S. 3(o). "possession" or "removal" of salt or salt-earth by a servant or agent of any person, on that person's account, shall be deemed to be

possession or removal thereof by such person.

S. 38(1). No person shall, within any of the limits described in section 36, transport or possess salt exceeding one maund in weight, ...

S. 47. Whoever in contravention of this Act, or of any rule or order made under this Act, or of any license or permit obtained under this Act,—

(a) manufactures, removes or transports salt; or

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*"Possession" of salt—Liability of servant removing contraband salt on behalf of master.*

Section 47, sub-s. (c), of the Bombay Salt Act, 1890, deals with possession of contraband salt, and makes knowledge or belief that it is contraband salt necessary to constitute an offence. Under sub-s. (a) to the section, however, it is an offence merely to manufacture, remove or transport salt, not merely contraband salt. The words "removal" and "transportation" in the sub-section are used interchangeably. The word "removal" is not confined to salt removed from the salt-works of Government under s. 28 of the Act.

The effect of s. 3(e) of the Act, defining the terms "possession" and "removal", is to provide that where it is proved that the person in possession or removing salt is a servant or agent, then the possession or removal shall be deemed to be that of the master or principal, to the exclusion of liability of the servant or agent.

Hence, where the accused, a cart-driver, is employed by another person to convey contraband salt from a customs-station, he is not liable to be punished either under s. 38(1)(a) or s. 47(a) of the Bombay Salt Act, 1890.

TRANSPORT of contraband salt.

Laxman (accused No. 1) was a cartman. He was engaged by Mhalappa (accused No. 2) to convey in his cart five bags containing over eight maunds of contraband salt from Ankola without pass or permit on April 25, 1940. The salt was loaded in the cart in front of accused No. 2's house, but before the cart could proceed some distance, it was attached and the accused were arrested by Customs authorities.

The two accused were charged with contravening s. 38(1) of the Bombay Salt Act, 1890, by transporting salt and by possessing contraband salt knowing or having reason to believe the same to be contraband salt, the two offences being punishable under cls. (a) and (c) of s. 47 of the Act.

The trying Magistrate convicted and sentenced accused No. 2 of the offences charged, but acquitted accused No. 1, for the following reasons:—

"A cartman hired for transporting goods is no doubt an agent if not a servant. Hence, cl. (e) of s. 3 of the Bombay Salt Act, 1890, means that the possession of salt held by a cartman like accused No. 1 should be *taken* to be not possession by the cartman or agent on his own account but to be possession by the person (accused No. 2) on whose account the agent like a cartman had got possession. This applies to 'removal' also .... Hence under s. 3(e) it must be held that accused No. 1 was not in possession of that salt, as such a possession is simply a custody of the salt, the real person in possession of the salt being the owner or transporter, accused No. 2.

"The question to be decided under s. 47(c) is whether accused No. 1 'knew or had reason to believe' that the salt in question was contraband salt within the meaning of s. 3(m)(B) ... I hold that the prosecution has not proved beyond all reasonable doubt that accused No. 1 did possess the said knowledge or belief ... accused No. 1 therefore had neither the possession of the salt on his own account as defined

(b) excavates, collects or removes natural salt, or salt-earth; and whoever,

(c) except in the exercise of some power or the discharge of some duty conferred or imposed upon him under this Act or any other enactment at the time in force, receives or is in possession of or, without lawful ex-

cuse, retains contraband salt, knowing or having reason to believe the same to be contraband salt; shall for every such offence be punished with fine which may extend to five hundred rupees, or with imprisonment for a term which may extend to six months, or with both.

in s. 3(o) nor had he the necessary knowledge nor belief required by cl. (c) of s. 47. Hence the grounds for holding that accused No. 1 is not guilty under s. 47(c) are true."

The Government of Bombay appealed against the order of acquittal.

R. A. *Jahagirdar*, Government Pleader, for the Government of the Province of Bombay.

S. R. *Joshi*, (appointed), for the accused.

BEAUMONT C. J. This is an appeal by Government against the acquittal of accused No. 1 who was charged with offences under ss. 38 (1) and 47(a) and (c) of the Bombay Salt Act, 1890. The appeal does not relate to the acquittal under s. 47(c), but only relates to the acquittal under ss. 38(1) and 47(a).

The facts are not in dispute. Accused No. 2 hired a cart belonging to accused No. 1 to convey contraband salt from Ankola, which is a customs-station within s. 36(b) of the Bombay Salt Act of 1890, and the cart was attached by the police within ten miles of Ankola, and the two accused were prosecuted. Accused No. 2 was convicted, but we are not concerned with his case; we are only concerned with the acquittal of accused No. 1.

Section 38(1) of the Act provides that no person shall, within the limits described in s. 36, transport or possess salt exceeding one maund in weight, except in the cases mentioned. It is not disputed that the salt was here being transported within the limits described in s. 36, and that the exceptions do not apply. Then s. 47 provides:—

"Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license or permit obtained under this Act,—

"(a) manufactures, removes or transports salt ;"

and then sub-s. (c) is in these terms:—

"(c) except in the exercise of some power or the discharge of some duty conferred or imposed upon him under this Act or any other enactment at the time in force, receives or is in possession of or, without lawful excuse, retains contraband salt, knowing or having reason to believe the same to be contraband salt."

So that, sub-s. (c) deals with possession of contraband salt, and makes knowledge or belief that it is contraband salt necessary to constitute an offence. But under s. 47(a) it is an offence merely to manufacture, remove or transport salt, not merely contraband salt. We have to deal here with a case of removal or transportation of salt, and it is irrelevant that it was contraband.

Section 47 uses two words "*removes or transports salt*", whilst s. 38(1) in the operative part uses only the word "transport", but in exception (a) it excepts salt which is being removed under a permit. I agree with the learned Magistrate that the two words "removal" and "transportation" are used interchangeably. There is no justification for the argument of Government that "removal" refers only to salt removed from the salt-works of Government under s. 28, because the word is used also in s. 11 otherwise than in connection with removal from salt-works. The importance of determining the exact sense in which the words "removal" and "transportation" are used lies in the fact that "removal" is defined in s. 3(o); and if transportation has the same meaning, the definition must extend to that word also. Section 3(o) provides:—

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A. Cr. J. 1941 "‘possession’ or ‘removal’ of salt or salt-earth by a servant or agent of any person, on that person’s account, shall be deemed to be possession or removal thereof by such person."

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It is argued by the learned Government Pleader that all that that section does is to impose vicarious liability upon the master or principal without destroying, or in any way affecting, the direct liability of the servant or agent who is actually in possession of, or removes, salt. But, in my opinion, the learned Magistrate was right in holding that the section goes beyond that. The section does not provide that possession or removal by a servant or agent shall include possession or removal by a master or principal. It says that it shall be deemed to be possession or removal by the master or principal. In my opinion, the effect of that is to provide that where it is proved that the person in possession of or removing salt is a servant or agent, then the possession or removal shall be deemed to be that of the master or principal, to the exclusion of liability of the servant or agent. Here it is not disputed that accused No. 1 was a mere servant, and the charge against him of removing or transporting salt in my opinion must fail.

The decision of the learned Magistrate was right, and the appeal fails.

*Appeal dismissed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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v.

August 13.

GULAMALLI BIN HUSAIN.\*

*Defence of India Rules, r. 90 B †—Defence of India Act (XXXV of 1939), Sec. 3—Criminal Procedure Code (Act V of 1898), Sec. 517—"Order," meaning of—Search of traveller—Money found on his person—Disposal of such money—Conviction of traveller.*

\* Criminal Appeal No. 246 of 1941, from conviction and sentence recorded by Oscar H. Brown, Chief Presidency Magistrate, Bombay.

† The rule ran as follows :—

90B. *Restriction on export of money and gold.*—(1) In this rule "money" means any coin (other than a gold coin) or currency note which is legal tender in British India or elsewhere, and includes bills of exchange; and 'gold' in the form of coin, whether legal tender or not, or bullion or ingot, whether refined or not.

(2) No person shall, except with the permission of the Reserve Bank of India or of a person authorised in this behalf by the said Bank, take

or send out of British India to a place or country outside India and Burma money or gold in excess of such amount as may be specified in this behalf by the said Bank.

(3) Any person who on any occasion is about to leave British India for a place outside India and Burma (which person is hereafter in this rule referred to as 'the traveller') shall, if on that occasion he is ordered so to do by the Officer of Customs,

(a) declare with full details the money and gold he has with him, and

(b) produce for the inspection of the officer the money and gold, and the permission, if any, granted in pur-

§ The Reserve Bank of India has specified such sum to be Rs. 1,000.

The accused, a date merchant and an inhabitant of Kuwait, a port in the Persian Gulf, sold dates in Aden, for which he got a draft on a bank in Bombay for Rs. 8,956. He came to Bombay and cashed the draft. While boarding a steamer bound for the Persian Gulf but which was to stay for a day at Karachi, the accused, who did not know English or any Indian language, was searched by a Preventive Officer and a sum of Rs. 8,900 in currency notes was found on his person. On these facts the accused was charged and convicted under r. 90B(?) of the Defence of India Rules, 1939, for contravening the provisions of r. 90B(3)(a) and the Magistrate on conviction ordered the sum of Rs. 8,900 "to be confiscated and held subject to the orders of the Government of India". On appeal:—

*Held*, (1) that the conviction of the accused was improper, for it was a condition precedent to liability under sub-r. (3)(a) of r. 90B, that the Officer of Customs should "order" a traveller to declare with full details the money and gold which he had with him, and there was no evidence of such a request, much less of an order;

(2) that the Customs Officer was entitled only to seize the currency notes in excess of Rs. 1,000, which amount, under the order made by the Reserve Bank of India under sub-r. (2) of r. 90B, the accused could take or send out of British India;

(3) that as by virtue of s. 3 of the Defence of India Act, 1939, r. 90B(6) prevailed over s. 517 of the Criminal Procedure Code, 1898, the balance of the money, viz., Rs. 7,900, was properly seized by the customs authority and under that sub-rule became subject to the orders of the Government of India; and that that sum never became subject to the jurisdiction of the Court, either of the trying Magistrate or of the High Court on appeal, to make any order as to the disposal of that sum.

THE accused, an inhabitant of Kuwait, a port in the Persian Gulf, and a dealer in dates, sold dates in Aden, for which he obtained a draft for Rs. 8,956 in pursuance of sub-rule (2).

(4) Any Officer of Customs, any person acting under the directions of such officer, may—

(a) examine or search any article which the traveller has with him, for the purpose of ascertaining whether he is conveying or has in his possession any money or gold in contravention of the provisions of this rule;

(b) if he has reasonable ground for suspecting that the traveller has about his person any money or gold which he has not produced for inspection, search the person of the traveller,

(c) seize any money or gold produced for inspection under sub-r. (3) or found upon examination or search under this sub-rule, being money which the traveller has in his possession in contravention of the provisions of this rule;

Provided that no female shall be

searched in pursuance of the provisions of this sub-rule, except by a female.

(5) If, upon his being ordered to make a declaration or to produce any money or gold under the provisions of sub-r. (3) any person knowingly makes a declaration which is false or not true or fails to produce the money or gold, he shall be deemed to have contravened the provisions of this sub-rule.

(6) Any money or gold seized in pursuance of the provisions of this rule shall be disposed of in such manner as the Central Government may by general or special order direct.

(7) If any person contravenes any of the provisions of this rule, he shall be punishable with imprisonment for a term which may extend to five years or with fine or with both.

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on a bank in Bombay. He came to Bombay with the draft and cashed it.

On March 3, 1941, the accused booked his passage on a steamer which was bound for the Persian Gulf but which was to stay at Karachi for a day. He was, while boarding the steamer, searched by a Preventive Officer, and a sum of Rs. 8,900 in currency notes was found on his person.

The charge framed against the accused before the Chief Presidency Magistrate of Bombay was as follows :—

“That you on or about the third day of March 1941 at Bombay being a passenger for Kuwait, a port in the Persian Gulf, did fail to declare with full details the money you had in your possession when asked by Customs Officer under r. 90B(3)(a) of the Defence of India Rules and on being searched under r. 90B(4)(a) of the said rules you were found in possession of Rs. 8,900 in Government currency notes in contravention of the Notification issued by the Reserve Bank of India in exercise of the powers given under sub-r. (2) of r. 90B of the said rules and you thereby committed an offence punishable under r. 90B(7) of the said Defence of India Rules framed under s. 2 of the Defence of India Act XXXV of 1939....”

The Magistrate convicted the accused of the offence charged, sentenced him to undergo simple imprisonment for one day, and imposed a fine of Rs. 250. He also ordered “the sum of Rs. 8,900 to be confiscated and to be held subject to the orders of the Government of India,” for the following reasons :—

“It is true that the boat was to touch Karachi on its way to the Persian Gulf. However this does not exonerate the accused from the offence under the Defence of India Rules. He was clearly taking money out of Bombay and his reason does not appear to be a sufficient ground. A further point has been taken that the accused should have declared this money on his person when asked by the Customs Officer whether he had money on him but he did not understand English or any local vernacular. The Officer is however quite emphatic in saying that the accused understood him perfectly inasmuch as he made a gesture by rubbing the thumb and the first finger of his right hand which the accused immediately understood and took out his purse containing Rs. 13. He however failed to produce Rs. 8,900 which he had concealed.”

The accused appealed to the High Court.

*H. D. Banaji*, with *Pochaji Jamshedji* and *Aibara & Co.*, for the accused.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

BEAUMONT C. J. This is an appeal by the accused against his conviction by the Chief Presidency Magistrate under r. 90B(7) of the Defence of India Rules, 1939, framed under the Defence of India Act, 1939.

The facts giving rise to the prosecution are that the accused landed in Bombay in February, 1941, from Aden, where he had sold a quantity of dates for a sum of Rs. 8,956, for which he had a draft on a Bombay bank, which in due course he cashed. On March 3 he was proposing to leave Bombay by a ship bound for the Persian Gulf, but which was to stay for a day in Karachi, and he had on him Rs. 8,900 in Government currency notes, being part of the money which he had received in respect of the bank draft. The accused's case is that he is an inhabitant of Kuwait, which is either in Persia or in Arabia, the evidence does not show which, and he says that the only language he understands is Persian. When he was going on board the ship, he was searched by the Preventive Officer, and this sum of Rs. 8,900 in currency notes was found on his person, and was seized by the Preventive



Officer. He was prosecuted before the Chief Presidency Magistrate in that he failed to declare with full details his possession of the currency notes when asked by the Customs Officer under r. 90B(3) (a) of the Defence of India Rules.

Now, r. 90B(1) of the Defence of India Rules defines "money" as including currency notes which are legal tender in British India or elsewhere; and sub-r. (2) provides that no person shall, except with the permission of the Reserve Bank of India, take or send out of British India to a place or country outside India and Burma money in excess of such amount as may be specified in that behalf by the said bank. It is admitted that the bank has specified Rs. 1,000 as the amount which may be taken. Then sub-r. (3) provides :

"Any person who on any occasion is about to leave British India for a place outside India and Burma (which person is hereafter in this rule referred to as 'the traveller') shall, if on that occasion he is ordered so to do by an officer of Customs,—

"(a) declare with full details the money and gold he has with him."

That is the sub-rule under which the accused has been convicted, and the first question is whether the conviction is right. There is a further question arising under sub-r. (4), which is not really the subject of the prosecution, and with which I will deal separately.

Now, the offence under sub-r. (3) (a) of r. 90B is that a person has failed to declare with full details the money and gold he has with him, if ordered so to do by an Officer of Customs. Unfortunately the learned Chief Presidency Magistrate in framing the charge did not pay attention to the language of the rule, with the breach of which the accused was being charged. The charge is failure to declare with full details the money the accused had in his possession when *asked* by the Customs Officer. The rule does not say "asked," but "ordered," and "ordered" is a stronger word than "asked". It is a condition precedent to liability under sub-r. (3) (a) that the Officer of Customs should order a traveller to declare with full details the money and gold he has with him. Now, the Customs Officer, Mr. Bhide, in his evidence says that he searched the accused and found a bundle of Government currency notes worth Rs. 8,900. He admits that a person is entitled to carry Rs. 1,000 out of Bombay. Then he says in cross-examination : "I stopped the accused on the gangway. I did not ask the accused to make a declaration." In the face of that evidence I am quite unable to see how the learned Chief Presidency Magistrate was justified in convicting the accused. There is no evidence of a request, much less an order. In his judgment the learned Chief Presidency Magistrate refers to evidence which he has not recorded; but as he was imposing an appealable sentence he was bound to record all the evidence, and we cannot have regard to evidence which is not on record. But what the learned Chief Presidency Magistrate says is :

"The Officer is however quite emphatic in saying that the accused understood him perfectly inasmuch as he made a gesture by rubbing the thumb and the first finger of his right hand which the accused immediately understood and took out his purse containing Rs. 13. He however failed to produce Rs. 8,900 which he had concealed."

There is no evidence before the Court that a man understanding only the Persian language will construe a gesture of rubbing the thumb and the first finger together as constituting an order upon him to declare with full details the money he has with him, and in the absence of evidence to that effect I am cer-

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tainly not prepared to assume that anyone would understand such a gesture in that sense. In my opinion, there was no evidence on which the learned Chief Presidency Magistrate could convict the accused of an offence under r. 90B(3)(a).

The conviction must, therefore, be set aside.

But, then, a further question arises under sub-r. (4), because the learned Chief Presidency Magistrate made an order that the sum of Rs. 8,900 was to be confiscated and held subject to the orders of the Government of India. In my opinion, there was no jurisdiction to make any such order. Under sub-r. (4)(a) any Officer of Customs may examine any article which a traveller has with him, for the purpose of ascertaining whether he is conveying or has in his possession any money or gold in contravention of the provisions of this rule; and, under sub-r. (4)(b), if he has reasonable ground for suspecting that the traveller has about his person any money or gold which he has not produced for inspection, he may search the person of the traveller. I think that the search of the accused, and of his wallet in which he was carrying these notes, was justified under one or the other of those two sub-rules. Then sub-r. (4)(c) provides that any Officer of Customs may seize any money or gold produced for inspection under sub-r. (3) or found upon examination or search under this sub-rule, being money or gold which the traveller has in his possession in contravention of the provisions of this rule. That refers back to sub-r. (2), which makes it an offence to take or send money out of British India. Now, if the rule stood alone, it might be said that the only illegal act in contravention of the rule was taking or sending money out of British India, which the accused was prevented from doing. But then r. 121 provides that any person who attempts to contravene, or does any act preparatory to a contravention of, any of the provisions of the rules, shall be deemed to have contravened that provision. It seems to me that it is correct to say that the accused was properly searched by the Customs Officer, and that he had in his possession money in contravention of the provisions of r. 90B(2) read with r. 121. Therefore, I think that the Customs Officer was entitled to seize the currency notes in excess of Rs. 1,000. It is admitted by the learned Government Pleader that there was no right to seize the Rs. 1,000, and that must be refunded to the accused. The balance of the money, under sub-r. (6) of r. 90B, has to be disposed of in such manner as the Central Government may by general or special order direct; and, in my opinion, money properly seized never becomes subject to the jurisdiction of the Court, and neither the learned Chief Presidency Magistrate nor this Court has jurisdiction to make any order as to the disposal of such money. Section 3 of the Defence of India Act provides that any rule made under s. 2 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act; so that, the rule clearly prevails over s. 517 of the Criminal Procedure Code, under which property produced in the course of a criminal trial may be dealt with by order of the Court. In my opinion, the Court has jurisdiction to determine whether property has been rightly seized under r. 90B(4); but if it comes to the conclusion that property was rightly seized, it has no jurisdiction to make any order as to its disposal. That is entirely a matter for the Central Government.

Therefore, we must set aside the order of the learned Chief Presidency Magistrate confiscating the sum of Rs. 8,900; but we are not in a position ourselves to make any order as to how that money is to be disposed of. That is for the Central Government.

We set aside the conviction, and direct the fine, if paid, to be refunded.

*Conviction set aside.*

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### CRIMINAL REVISION.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

EMPEROR

v.

BHIKHABHAI MOTIRAM ADENWALLA \*

1941

August 13.

*Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 123, sub-s. (5)†—Exception contained in sub-section—Burden of proof.*

In order to bring himself within the exception contained in s. 123 (5) of the Bombay Municipal Boroughs Act, 1925, the burden lies upon the accused to prove that his work was not inconsistent with any provisions of the Act or by-laws. This, however, presupposes that a question has arisen as to whether he has committed a breach of any provision of the Act or by-laws. As soon as the Municipality has notice that the accused is going to rely on s. 123(5), the Municipality must allege what provisions of the Act or by-laws they say the accused has broken which disentitles him to rely on the sub-section. When such an allegation is made, the burden is upon the accused to prove that he has not committed the breach of the Act or by-law alleged. Unless, therefore, the Municipality alleges a breach of some specific provision of the Act or by-law, there is no issue on which any question of burden of proof can arise.

*Emperor v. Dahyabhai Savchand*<sup>1</sup>, explained.

THE accused owned an out-house in the city of Ahmedabad, over which they wanted to build a storey and to make certain internal changes in the out-house itself. On March 2, 1940, they gave a notice to the Ahmedabad Municipality, under s. 123 (1) of the Bombay Municipal Boroughs Act, 1925, of their intention to build and to make alterations.

The Municipality wrote to the accused to make certain changes and corrections in the plan submitted by the accused. The accused complied with the requisition on March 26, 1940.

The accused alleged that they received no further communication from the Municipality. On August 1, 1940, they intimated to the Municipality that as they heard nothing from the Municipality for a period of four months they would proceed with the construction on an assumed permission under

\* Criminal Application for Revision No. 224 of 1941, with Criminal Application for Revision No. 225 of 1941, from an order passed by Raghavendra Rao P. V., Additional Sessions Judge, Ahmedabad, summarily rejecting an application in

revision against the order of conviction made by H. M. Dave, Stipendiary First Class Magistrate, Ahmedabad.

† The sub-section is set out at p. 519, *ante*.

1 (1941) 43 Bom. L. R. 519.

A. Cr. J. s. 123 (5) of the Bombay Municipal Boroughs Act, 1925.

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On August 14, 1940, the Municipality issued an order prohibiting the proposed construction. The Municipality alleged that they had sent a letter to the accused on April 4, 1940, asking the accused to set back the building on the first floor by twenty feet from the privy, under by-law 26 of the Ahmedabad Municipal By-Laws.

The accused contended that they had not received the requisition dated April 4, 1940, and proceeded with the construction proposed by them.

On September 30, 1940, the Municipality prosecuted the accused for building without permission, under s. 123(7) of the Act.

The accused were tried by the Stipendiary First Class Magistrate of Ahmedabad, who convicted them and fined each of them in a sum of Rs. 30.

One of the accused applied in revision to the Additional Sessions Judge of Ahmedabad, who summarily rejected the application, observing as follows :—

“The petitioner relies on s. 123(5) of the Bombay Municipal Boroughs Act and contends that because of this provision he is not guilty of any offence, but for this provision admittedly the conviction would be right. But, as has been held by our High Court in *Emperor v. Dahyabhai Sauchand* (43 Bom. L. R. 519), a person who relies on s. 123(5) must affirmatively establish that the construction he has made is not inconsistent with any other provision of the Municipal Boroughs Act; and it is not for the Municipality to show that there is any such breach. It is admitted on behalf of the petitioner that no evidence has been led to show that the construction he has made is not in conflict with any other provision of the Act nor is any finding given on that point by the learned Magistrate. It is urged that because the Municipality did not charge the petitioner with the breach of any other provision of the Act it must be assumed that there was no such other breach. But in view of the ruling of our High Court that the burden of establishing such a fact lies on the petitioner, this argument cannot stand.”

The accused applied to the High Court in revision.

P. A. Dhruva, for the accused.

No appearance for the complainant.

R. A. Jahagirdar, Government Pleader, for the Crown.

BEAUMONT C. J. These are two revision applications in which the same point arises. The accused were convicted under s. 123 (7) of the Bombay Municipal Boroughs Act, 1925, for having constructed a building without permission.

The facts are that on March 2, 1940, the accused gave a notice under s. 123(1) of the Act as to the work they were proposing to do, and under sub-s. (2) the Chief Officer required them to make certain alterations in their plans, which were duly made, and, according to the accused, they received no further communication from the Chief Officer. Accordingly on August 1 they gave notice that, having received no further communication from the Chief Officer for a period of four months, they were proposing to start work, and they did start work on August 10. On August 14, the Municipality wrote saying that on April 4 they had required the accused to set their work back twenty feet from the privy, which they would be required to do under by-law 26 of the Ahmedabad Municipality.

In revision the learned Additional Sessions Judge dismissed the applications summarily on the authority of a decision of this Court, *Emperor v. Dahya-*

*bhai Savchand*<sup>1</sup>. In that case this Court held that an accused person seeking to bring himself within the provisions of s. 123(5) must prove that he came within that section, because it was an exception which excused him from the liability, which he would be otherwise under, under the rest of the section. Sub-section (5) provides that a work proposed in a notice given under sub-s. (1) may be proceeded with in the manner specified in such notice, provided such manner is not inconsistent with any provision of the Act or any by-law for the time being in force thereunder in the cases therein mentioned, one of which is that the Chief Officer has not within one month taken action as therein specified. In *Emperor v. Dahyabhai Savchand* this Court held that in order to bring himself within that exception, the burden lay upon the accused to prove that his work was not inconsistent with any provisions of the Act or by-laws. But that presupposes that a question has arisen as to whether he has committed a breach of any provision of the Act or by-laws. It is obvious that the accused person cannot go through every section of the Act and every by-law and prove affirmatively that he has not committed any breach of that section or that by-law. In *Emperor v. Dahyabhai Savchand* a question was raised as to whether a certain provision of the Act had been broken, though I am not quite sure from the report when the question was first raised in that case. But it seems to me that the true view is that, as soon as the Municipality has notice that the accused is going to rely on s. 123(5), the Municipality must allege what provisions of the Act or by-laws they say the accused has broken, which disentitles him to rely on s. 123(5). When that allegation is made, the burden is upon the accused to prove that he has not committed the breach of the Act or by-law alleged. But unless the Municipality alleges a breach of some specific provision of the Act or by-law, it seems to me that there is no issue on which any question of burden of proof can arise, and I do not think that the Court intended in *Emperor v. Dahyabhai Savchand* to decide more than as to the burden of proof when an issue arose. I think the learned Additional Sessions Judge was wrong in assuming that he could not go into the question of the right of the accused to rely on sub-s. (5) to s. 123, unless he had affirmative evidence that no single provision of the Act or by-laws had been broken.

The lower appellate Court did not deal with the question whether the notice alleged to have been sent to the accused on April 4, 1940, was received or not, and, therefore, I think we must send the cases back to the lower appellate Court in order that the Court may deal with that point. Assuming that the accused did not receive that notice, then I think the accused were entitled to act under s. 123(5), because they waited ten days before commencing work, and it was not until the expiration of fourteen days that the Municipality first gave notice that there might be a breach of some by-law, and I think that was too late, because by that time the accused had committed the breach with which they are charged. I think, therefore, that unless the lower appellate Court comes to the conclusion that the Jawak sent by the Municipality on April 4 was in fact received by the accused, the conviction will have to be set aside.

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*Case sent back.*

## APPELLATE CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

1941

July 17.

ATMARAM NEMCHAND GUJAR

v.

MALLAPPA APPAYYA KOTIWALE.\*

*Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Indian Limitation Act IX of 1908, arts. 181, 182(5)—Application to record part payment of decretal debt—Whether such application a step-in-aid of execution.*

An application made to the Court to record an adjustment or a part payment of a decretal debt under O. XXI, r. 2, of the Civil Procedure Code, 1908, cannot be regarded as an application within the meaning of art. 181 of the Indian Limitation Act, 1908, and it does not, therefore, amount to a step-in-aid of execution under art. 182(5) of the Act so as to save limitation.

The plaintiff obtained a decree on July 11, 1932. On June 30, 1935, a part payment was made by the defendants of the amount due under the decree. On September 16, 1935, the plaintiff applied to the Court under O. XXI, r. 2(1), of the Civil Procedure Code, 1908, to certify the part payment, and the Court acceded to the application. On November 8, 1935, the plaintiff filed a darkhast against the defendants in execution of his decree. On the question whether the application of September 16, 1935, was a step-in-aid of execution under art. 182(5) of the Indian Limitation Act, 1908 :—

*Held*, that the application could not be regarded as an application within the meaning of art. 181 of the Indian Limitation Act, 1908, and that, therefore, it did not amount to a step-in-aid of execution under art. 182(5) of the Act so as to save limitation.

*Shri Prakash Singh v. Allahabad Bank Ltd.*,<sup>1</sup> and *Amarkrishna Chaudhuri v. Jagatbandhu Biswas*<sup>2</sup>, followed.

*Bacharaj Nyahalchand v. Babaji Tukaram*<sup>3</sup>, overruled.

*Maung Law San v. Maung Po Thein*<sup>4</sup> and *Jatindra Kumar Das v. Gagan Chandra Pal*<sup>5</sup>, dissented from.

## EXECUTION.

One Atmaram (plaintiff) obtained a mortgage decree against Mallappa and others (defendants) on July 11, 1932. On June 30, 1935, some of the defendants made a part payment of the amount due under the decree. The plaintiff on September 16, 1935, applied to the Court to certify the part payment and the Court acceded to the application. On November 8, 1935, the plaintiff filed the present darkhast against the defendants. The defendants contended that the darkhast was barred by limitation as it was presented more than three years after the date of the decree. The plaintiff, however, relied upon his application of September 16, 1935, which he alleged gave him a fresh starting

\* Second Appeal No. 140 of 1939, from the decision of T. B. Shanbhag, Assistant Judge at Belgaum, in Appeal No. 308 of 1937, confirming the decree passed by M. H. Kazi, Subordinate Judge at Hukeri, in Darkhast No. 553 of 1935.

1 (1928) 31 Bom. L. R. 289, P.C.

2 (1931) I. L. R. 59 Cal. 760, F.B.

3 (1913) I. L. R. 38 Bom. 47, s. c. 15 Bom. L. R. 930.

4 (1924) I. L. R. 2 Ran. 393.

5 (1918) I. L. R. 46 Cal. 22.

point of limitation. The trial Judge dismissed the darkhast observing as follows :—

"... the most crucial question that arises here is whether this certification amounts to a step-in-aid of execution of the decree so as to save limitation under article 182(5) of the Indian Limitation Act. I think not... To support his contention that certification is a step-in-aid of execution, he referred me to the authority in *Jatindra Kumar v. Gagan Chandra*, 46 Cal. 22. But this case is overruled by a later authority of the same High Court in *Amarkrishna Choudhuri v. Jagatbandu*, 59 Cal. 760, brought to my notice by the learned pleaders for the judgment-debtors. Regard being had to this case, the certification relied upon by the decree-holder is not, in my judgment, a step-in-aid of execution. That being so, it cannot save the darkhast from the bar of limitation."

On appeal the Assistant Judge confirmed the order of the lower Court and observed as follows in his judgment :—

"Reliance was placed on art. 182, cl. (5), of the Indian Limitation Act. It is urged that the application, dated September 16, 1935, was a step-in-aid of execution. For this, the learned pleader for the appellant relies upon *Bacharaj v. Babaji* (38 Bom. 47). The facts of the case were that on July 3, 1900, Bacharaj obtained a decree against Babaji whereby he was required to pay a sum of Rs. 600 by annual instalments of Rs. 50 and to redeem the property. In case of default of any two instalments by the plaintiff, his right to redeem the mortgage lands was to be foreclosed. Two instalments in full for 1902 and one instalment in part for the year 1903 were paid by the plaintiff to the defendant. No other instalment was paid thereafter. An application was made on July 20, 1905, to the Court for certifying those payments in satisfaction of the decree. That application was signed by the plaintiff as well as by the defendant. On December 14, 1907, an application was made by the defendant for an order of foreclosure in terms of the decree. That application was dismissed in the Court of first instance as well as in the Court of first appeal. On appeal to the High Court it was held that inasmuch as the plaintiff had signed that application it amounted to an acknowledgment, and gave a fresh starting point. From the facts of the case it is clear that inasmuch as there was an acknowledgment by the judgment-debtor, the decision is inapplicable to the facts in this case. In the present case, there has been no acknowledgment by any one of the judgment-debtors. Secondly, the learned pleader for the appellant relies upon *Maung Law San v. Maung Po Thein* (2 Ran. 393). The head-note is to the effect that an application to certify payment is a step-in-aid of execution. But in that case Godfrey J., who decided the case, has observed at p. 395 that an application made by a decree-holder to certify payments, made within three years of the decree, may be made at any time within three years from the date of such payment, and if so made will afford a decree-holder a fresh starting point of limitation within the meaning of art. 185(2) of the Limitation Act. It is clear from that part of the judgment that the application contemplated under O. XXI, r. 2, as giving a fresh starting point for limitation must have been presented within three years from the date of the decree. In the present the application was presented on September 16, 1935, which is obviously more than three years from the date of the suit which was made final on July 11, 1932. The decree could not then have been executed. Under these circumstances, the application, exhibit 19, cannot give a fresh starting point."

The plaintiff appealed to the High Court.

R. A. *Jakagirdar*, for the appellant.

P. B. *Gajendragadkar*, for respondent No. 1.

N. S. *Anikhandi*, for S. R. *Joshi*, for respondents Nos. 2 and 3.

BEAUMONT C. J. This second appeal raises a short point of law, namely, whether an application made to the Court to record a part payment of a decretal debt under O. XXI, r. 2, Civil Procedure Code, 1908, is a step-in-aid

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A. C. J. of execution, which will prevent limitation running under art. 182(5) of the  
1941 Indian Limitation Act, 1908.

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Beaumont C.J.

The facts shortly are that there was a decree in favour of the plaintiff dated July 11, 1932, and on June 30, 1935, a part payment was made by the defendants of the amount due under the decree, and on September 16, 1935, the plaintiff applied to the Court to certify the part payment, and the Court acceded to the application. This darkhast was issued on November 8, 1935, more than three years from the date of the decree. The question is whether the application of September 16, 1935, is a step-in-aid of execution under art. 182(5) of the Indian Limitation Act so as to save limitation.

In *Bacharaj Nyaholchand v. Babaji Tukaram*<sup>1</sup> this Court held that such an application as that of September 16, 1935, was a step-in-aid of execution, and the same view was taken by other High Courts : *Maung Law San v. Maung Po Thein*<sup>2</sup> and *Jatindra Kumar Das v. Gagan Chandra Pal*<sup>3</sup>. In both of those cases the application was made more than three years after the date of the decree, as it was in the present case. The Courts held that, as payment was made within three years of the decree and as the application was made within three years of the payment, the application had the effect of being a step-in-aid of execution. However, in *Shri Prakash Singh v. Allahabad Bank Ltd.*,<sup>4</sup> the Privy Council held that an application to record an adjustment under O. XXI, r. 2, Civil Procedure Code, was not an application within art. 181 of the Indian Limitation Act, on the ground that it was not strictly speaking an application at all ; it was a mere certificate, stating that a certain payment had been made, and a request to the Court to carry out the provisions of O. XXI, r. 2. The Privy Council held that it could not be regarded as an application within the meaning of art. 181 of the Indian Limitation Act. If it is not an application within the meaning of art. 181, I do not see how it can be an application within art. 182(5), the relevant words of which are : "(where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order". So that there must be an application to take a step-in-aid of execution, and having regard to the Privy Council's decision, it seems to me that there was no application. No doubt, the Privy Council were invited to express an opinion as to the correctness of the Indian cases in which it had been held that such an application as is here in question amounted to a step-in-aid of execution under art. 182(5). But their Lordships held that as that article was not before them, it was unnecessary to express an opinion on the point. However, in my view the reasons on which the Privy Council decision was based really cover the point, and it has been so held by a full bench of the Calcutta High Court in *Amar Krishna Chaudhuri v. Jagatbandhu Biswas*<sup>5</sup>. *Bacharaj's* case must be treated as overruled, and this appeal must be dismissed with costs. There will be one set of costs.

SEN J. I agree.

*Appeal dismissed.*

- 1 (1913) I. L. R. 38 Bom. 47,  
s.c. 15 Bom. L. R. 930.
- 2 (1924) I. L. R. 2 Ran. 393.

- 3 (1918) I. L. R. 46 Cal. 22.
- 4 (1928) 31 Bom. L. R. 289, P.C.
- 5 (1931) I. L. R. 59 Cal. 760, F.B.



Before Mr. Justice Divatia.

SHANKAR HARI DESHPANDE

v.

DAMODAR VYANKOJI KULKARNI.\*

1941

July 7.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 15—Decree assigned to two persons jointly—Whether one co-assignee alone can apply to execute decree.*

Where a decree has been assigned to two persons jointly, any one of the co-assignees can validly present an application for execution of the decree under O. XXI, r. 15, of the Civil Procedure Code, 1908.

*Madhav Prabhakar v. Balaji Govind*<sup>1</sup>, followed.

*Narandas Sunderdas v. Tejmal Bhagchand*<sup>2</sup>, distinguished.

*Md. Kazam v. Nadir Ali Shah*<sup>3</sup> and *Mt. Amiran v. Mt. Kamiz Aisha*<sup>4</sup>, referred to.

#### EXECUTION proceedings.

One Meghraj obtained a decree against Damodar and others (defendants Nos. 1-8) on September 1, 1923. In 1926 Meghraj filed a darkhast against all the defendants to execute the decree and prayed for recovery of Rs. 2,000 and odd. Rs. 400 were recovered and thereafter the darkhast was disposed of on April 15, 1926, as the defendants were negotiating for a compromise.

On April 15, 1926, Meghraj assigned the decree jointly to Damodar and Maruti without any mention of their respective shares in it. On July 7, 1926, Shankar and Wasudeo (defendants Nos. 7 and 8) paid Rs. 814 to Maruti.

In 1929 Damodar alone filed darkhast No. 160 of 1929 against defendants Nos. 1 and 5 only, and prayed for execution of the remaining part of the decree after giving credit for Rs. 400 received by Meghraj and Rs. 814 received by Maruti. This darkhast was disposed of on April 15, 1929. In 1932 another darkhast No. 536 of 1932 was filed by Damodar alone against defendant No. 2 only, and it was disposed of on July 1, 1932, without any further execution.

On November 21, 1934, Damodar again alone filed the present darkhast against the heirs of the deceased defendant No. 6 and defendants Nos. 7 and 8. The defendants *inter alia* contended that the execution petition was not in time because the two former execution petitions made by Damodar in 1929 and 1932 were not in accordance with law as one co-assignee alone was not competent to file an execution petition.

The trial Judge held that the darkhast was in time and ordered execution of the decree to proceed. He observed as follows :—

"...The chief point, therefore, to be decided in this respect is accordingly in my opinion whether the former darkhasts at exhibits 35 and 36 were proper step-in-aid executions of the decree as against these contending judgment-debtors. On this I am

\* Second Appeal No. 485 of 1938, from the decision of M. B. Honavar, Assistant Judge at Satara, in Appeal No. 173 of 1936, confirming the decree passed by N. C. Bhambure, Joint Subordinate Judge at Islampur, in Darkhast No. 1187 of 1934.

1 (1926) I. L. R. 51 Bom. 143, s.c. 29 Bom. L. R. 75.

2 (1932) I. L. R. 58 Bom. 226, s.c. 35 Bom. L. R. 1162.

3 [1931] A. I. R. Lah. 5.

4 [1934] A. I. R. Pat. 627.

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—

inclined to think that those darkhasts were proper step-in-aid applications in execution of the decree. Because, firstly, the applications at exhibits 35 and 36 were in accordance with law and properly presented, as provided by O. XXI, rr. 10 to 14 and 15, Civil Procedure Code, and secondly they had prayed the Court to take a proper step-in-aid of execution. It does not appear to be material that those were being prosecuted against judgment-debtors other than the present persons. The decree, exhibit 3, was being passed against all the judgment-debtors under it including the present contending persons, jointly and severally. Similarly the words in the proviso (1) in O. XXI, r. 16, to the effect that the decree shall not be executed until the Court has heard their objections if any to its executions do not in my opinion lessen the character of the application presented by the transferee according to r. 11 of the same Order from its being a proper step-in-aid of execution. I am not inclined to think that the legislature intended such a meaning while framing the proviso referred to above. The marginal notes to r. 16 also are application *for execution* by transferee of decree. The last sentence of the same rule in para. 1, namely 'the decree may be executed... as if the application were made *by such decree-holder*' also supports my own view according to me. All that the proviso in para. 2 of the rule means and intends is that the Court should hear as a condition precedent objections of the transferor or judgment-debtor, if any, to the execution of the decree by the assignee. The proviso puts a condition upon the Court to ascertain if there are any objections to the decree being executed, and that condition the Court has to fulfil. It does not say or mean that the application presented by the assignee or transferee, in the proper form according to rules provided, is not a step-in-aid of execution. The observations and ruling given in 34 Bom. L. R. 189 in the case *Nathubhai v. Pranjivan* hold good in this respect and I rely for my view upon them too. Thus, I think that the former applications at exhibits 35 and 36 were proper step-in-aid applications for execution, and in view of those, this darkhast is by all means filed within the time prescribed by law, under art. 182 of the Limitation Act."

On appeal the Assistant Judge remanded the case for making Maruti, the co-assignee, as a party to the execution proceedings and for a decision as to what, and if so how much, right he had in the decree under execution. On the question whether one of the co-assignees alone could apply for the execution of the whole decree he observed as follows :—

"Order XXI, r. 15, of the Code of Civil Procedure, lays down that where a decree is passed in favour of more than one person any one of the decree-holders can apply on behalf of all to execute the whole decree subject to furnishing security etc. It is true that this rule does not apply to assignees of a decree. But O. XXI, r. 16, of the Code, lays down that where a decree is assigned, the assignee may be permitted to execute the decree and that his application to execute the decree shall be treated as an application by the decree-holder. It would therefore follow that though r. 15 does not apply to assignees, in so many words, the provision in r. 15 will govern an application for execution by one of the many assignees of a decree. Even if it be held that in spite of the provisions in r. 16, r. 15 does not apply to the assignees of a decree, it will have to be held that the principle in r. 15 will apply to assignees of a decree. The Code of Civil Procedure is not claimed to be exhaustive and whenever it does not provide rules of procedure to meet a particular case, it has been held that the Court has authority to exercise its inherent jurisdiction and to apply rules of justice, equity and good conscience. I therefore do not see any reason why the principle laid down in O. XXI, r. 15, of the Code, should not be applied to the assignees of a decree and should be restricted only to the original decree-holders. I therefore hold that an application for execution of a decree by one of the co-assignees of the decree is quite in accordance with law."

On remand it was found that Maruti had one-third share and Damodar had two-thirds share in the decree.

Defendants Nos. 7 and 8 appealed to the High Court.

*S. Y. Abhyankar*, for the appellants.

*P. B. Gajendragadkar*, for the respondent.

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DIVATIA J. This appeal arises in execution of a decree obtained by one Meghraj against the predecessor-in-title of the present appellants. Meghraj filed a darkhast in 1926 to execute the decree against all the defendants and prayed for recovery of Rs. 2,000 and odd. Rs. 400 were recovered and thereafter the darkhast was disposed of as there were negotiations for compromise. On April 15, 1926, Meghraj assigned the decree to two persons Damodar and Maruti. On July 7, 1926, the present appellants, who are two of the judgment-debtors, paid Rs. 814 to one of the assignees, Maruti. In 1929 the other assignee Damodar alone filed darkhast No. 160 of 1929 against defendants Nos. 1 and 5 only. He prayed for execution of the remaining part of the decree after giving credit for Rs. 400 received by Meghraj and Rs. 814 received by Maruti. That darkhast was disposed of on April 15, 1929. A third darkhast was filed in 1932 by Damodar alone against defendant No. 2 only, and it was disposed of also on July 1, 1932, without any further execution. Thereafter the present darkhast was filed on November 21, 1934, by Damodar alone against the heirs of the deceased defendant No. 6 and defendants Nos. 7 and 8. The main contention raised by the judgment-debtors was that the darkhast was time-barred on the ground that the two previous darkhasts by Damodar alone in 1929 and 1932 were not maintainable in law as one co-assignee alone cannot apply for execution, and as they cannot, therefore, be regarded as steps-in-aid of execution, the present darkhast of 1934 being more than three years after the last maintainable darkhast of 1926 was beyond time. The principal question, therefore, is whether those two darkhasts were maintainable in law.

The lower appellate Court had remanded this case for making Maruti, the co-assignee, as a party to these execution proceedings and for a decision as to what, and if so how much, right he had in the decree under execution. It was found that Maruti has one-third share and the present darkhastdar Damodar has two-thirds share in the decree, although in the deed of assignment the right, title and interest of the judgment-creditor have been transferred jointly in favour of the two transferees without any mention of their shares.

It is contended on behalf of the appellants that the two previous darkhasts of 1929 and 1932 ought to have been filed by Damodar as well as Maruti, because both of them were transferees; and there is no provision in the Civil Procedure Code which permits only one of the two assignees to execute a decree. The lower appellate Court has held that the provisions of O. XXI, r. 15, would apply by analogy to the present case, and that, therefore the two previous darkhasts filed by Damodar alone were maintainable according to law.

Order XXI, r. 16, of the Civil Procedure Code, provides :—

“Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it. . . .”

A. C. J. Rule 15, which applies to joint decree-holders, provides :—

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*Divatia J.*

"Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all...."

There is no express provision in the Civil Procedure Code which permits one of several assignees of a decree to execute the whole of the decree. The question then is whether the assignees would stand in the shoes of the decree-holder, and if so, the provisions of r. 15 could be made applicable to them. It may be noted that this is not a case where only a part of the decree is assigned to two assignees, and therefore, the decision of this Court in *Narandas Sunderdas v. Tejmal Bhagchand*<sup>1</sup> would not apply. It is there held that an assignee of a portion of the decretal amount is not entitled to execute the decree. It is true that the lower Courts have now found that Maruti has got one-third and Damodar has got two-thirds interest in the decree. But the deed of assignment is passed to both of them jointly, and not in separate shares, and it was for that reason that Damodar applied to execute the whole decree in the two previous darkhasts.

Mr. Abhyankar on behalf of the appellants relies upon two decisions in *Md. Kazam v. Nadir Ali Shah*<sup>2</sup> and *Mt. Amiran v. Mt. Kaniz Aisha*.<sup>3</sup> In the first of these cases it is held that O. XXI, r. 15, Civil Procedure Code, did not confer an unconditional right on one of the decree-holders to execute the decree, that all the legal representatives of the deceased decree-holder constituted one legal representative and that one of them could not execute the decree nor could give a valid discharge. The Patna case decides that O. XXI, r. 15, refers to a decree which has been passed jointly in favour of more than one plaintiff, and that a transfer by operation of law is not an assignment. In that case the decree was passed in favour of one person only and it was held that O. XXI, r. 15, referred to a decree which had been passed jointly in favour of more than one plaintiff, and it did not apply to the execution of a decree passed in favour of one person though such execution is sought by only one of the legal representatives of the deceased.

On the other hand, we have a decision of our High Court in *Madhav Prabhakar v. Balaji Govind*.<sup>4</sup> It was there held that the presentation of an application for execution of a decree by one of the surviving coparceners of the deceased decree-holder is not invalid in view of the provisions of s. 146 and O. XXI, r. 15, of the Civil Procedure Code. It was held that the darkhast was properly presented although it may be defective and that the executing Court may not proceed with execution on the application of one of the coparceners under the circumstances but at the same time the presentation by one of the surviving coparceners could not be said to be illegal so as to render the proceedings invalid. This decision is based upon the application of the provisions of O. XXI, r. 15, by analogy to the case of more than one person succeeding to the right, title and interest of a deceased judgment-creditor. It is true that the surviving coparceners are not considered to be persons falling

1 (1932) I. L. R. 53 Bom. 226,

s.c. 35 Bom. L. R. 1162.

2 [1931] A. I. R. Lah. 5.

3 [1934] A. I. R. Pat. 627.

4 (1926) I. L. R. 51 Bom. 143,  
s. c. 29 Bom. L. R. 75.

under O. XXI, r. 16, of the Civil Procedure Code. But the reasoning on which the decision is based is clearly to the effect that where the right, title and interest of a judgment-creditor has devolved upon more than one person jointly and severally, any one of such persons can validly present an application for execution. Mr. Abhyankar says that the Court there wrongly applied the provisions of s. 146 because that section contemplates the application being made by any person claiming under the deceased decree-holder. His contention is that the surviving coparceners cannot be said to be persons claiming under the deceased decree-holder. But I am not concerned with that aspect of the decision. The point so far as is material to the present case is that this Court applied the provisions of O. XXI, r. 15, to a case where the right, title and interest of a judgment-creditor devolved upon more than one person, and I think the reasoning in this case could be applied by way of analogy to the facts of the present case. I do not see any distinction in principle between the case of several assignees who have acquired the right, title and interest of the judgment-creditor and the case of persons on whom the interest of the judgment-creditor has devolved by operation of law, whether by way of succession or by survivorship. There is no harm to the judgment-debtor, in my opinion, if a decree is allowed to be executed by one of such persons under the proper safeguards which are mentioned in r. 15. We are not concerned as to whether any relief could be necessarily given to the darkhastdar in such a darkhast. That would depend upon whether the interests of the other assignee are preserved. The only point arising here is whether the two previous darkhasts were maintainable as being in accordance with law and could therefore be regarded as steps-in-aid of execution. I am of opinion that those darkhasts were maintainable and therefore must be regarded as in accordance with law. The present darkhast, therefore, which is filed within three years from the previous darkhast, must be held to be in time.

Another point was raised on behalf of the appellants to the effect that notice under r. 16 was not given in any of the two former darkhasts, but, as I said just now, we are not concerned whether the darkhast could be proceeded with or not on account of the non-compliance of the provisions of r. 16. The question is whether the darkhast was bad in law as a step-in-aid of execution.

The findings returned by the lower Courts now are that the present darkhastdar Damodar has got two-thirds share in the decree and Maruti has got one-third share. I am told that the decree as between Maruti and the judgment-debtor has been satisfied, and under these circumstances the present darkhastdar would be entitled to execute the decree only to the extent of two-thirds of the amount which may be due under the decree at the time when the darkhast was filed. To that extent the order of the lower Court should be varied and with this variation the appeal is dismissed with costs.

A. C. J.

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Divatia J.

*Decree varied.*

## ORIGINAL CIVIL.

*Before Mr. Justice Kania.*

KRISHNAJI BHARMALJI &amp; CO.

v.

ABDULRAZAK AHMEDBHOY.\*

1941

July 7.

*Indian Partnership Act (IX of 1932), Sec. 19(2)(c)—Decree for money—Assignment by one partner for sum less than decretal amount—Whether partner has implied authority from his co-partners to assign decree—Civil Procedure Code (Act V of 1908), O. XXI, r. 16.*

A partner in a firm has no implied authority from his co-partners to assign a money-decree obtained by the firm to a third person for a sum less than the decretal amount.

*Nagappa v. Bhagawanji Rasaji Firm*,<sup>1</sup> referred to.

## PROCEEDINGS in execution.

The firm of Krishnaji Bharmalji & Co was registered as a firm under the Indian Partnership Act, 1932, on March 19, 1934. It consisted of four partners : (1) Krishnaji Bharmalji, (2) Lalchand Bharmalji, (3) Mithalal Krishnaji and (4) Seremal Krishnaji.

On January 24, 1936, the firm of Krishnaji Bharmalji & Co. obtained a money decree for Rs. 4,519-9-0 against one Abdul Razak Ahmedbhoy and Hussan I. A. Lalljee.

On May 7, 1941, one of the partners, Seremal Krishnaji, assigned the decree to one Yacub Husseniibhoy Lalljee for a sum of Rs. 2,000.

On June 16, 1941, the assignee Yacub Husseniibhoy Lalljee applied for a notice under O. XXI, r. 16, of the Civil Procedure Code, 1908, to execute the decree.

The notice was heard.

*M. C. Setalvad*, Advocate General, for the assignee.

*N. P. Engineer*, for defendant No. 1.

*M. C. Chagla*, for defendant No. 2.

KANIA J. This is an application by the assignee of a decree under O. XXI, r. 16, Civil Procedure Code, 1908. The suit was filed by the plaintiffs who were moneylenders against the defendants. They obtained a decree for Rs. 4,519-9-0, interest and costs, on January 24, 1936. It is alleged that the plaintiff firm has assigned this decree by a writing dated May 7, 1941. The consideration therein recited is Rs. 2,000. The defendants' objections are two : (1) that the assignment is executed only by Seremal Krishnaji and under s. 19, sub-s. (2), cl. (c), of the Indian Partnership Act, 1932, one partner in the plaintiff firm had no authority to do so ; and (2) that there was an agreement between the plaintiff firm and the defendants which prevented the enforcement of the claim against defendant No. 1. This second contention need not be gone into at this stage as the application is only under O. XXI, r. 16.

The assignee contends that a partner in a firm has implied authority to

\* O. C. J. Suit No. 431 of 1935.

1 (1936) I. L. R. 59 Mad. 1036.

transfer a debt due to the firm and the present transaction amounts to nothing more than that. In his affidavit Seremal contends that he had express authority to enter into this transaction. That is based on two grounds: (1) that Marwadi moneylenders' firms have such authority; and (2) in this particular case his partners had expressly authorised him. As regards this last contention I must hold against the assignee. With regard to the implied authority of a partner in Marwadi moneylending firms the contention raises a question of custom. There is no affidavit, except the statement of Seremal, in support of it, and a custom of this far-reaching effect cannot be established by the bare word of an interested party only. In his affidavit Seremal has made two statements on oath. The first is that he himself had signed the plaint, and, secondly, that he himself had made the application for execution. He has contended that this was done because each partner in his firm had authority to do all acts. On looking at the two documents it is clear that these statements are untrue. In view of these statements of Seremal I am unable to accept his statement about the existence of a custom either in his firm or the Marwari moneylending firms. I am unable to rely on his statement about his other partners giving him express authority. It may be noted that although this matter has been pending for many days, none of the other partners, whose names are mentioned in the affidavit, has stated that Seremal had express authority to execute the assignment in question. There is no document to show such express authority.

This leaves the question of implied authority. It cannot be disputed that a partner in a trading firm has a right to assign a debt. This is an ordinary function of a partner and a transaction in the ordinary course of business of a partnership firm. But as a matter of policy the legislature has enacted that a partner has no implied authority to compromise or relinquish any claim or a portion of a claim by the firm. The effect of the assignment of May 7, 1941, is that the claim of the plaintiffs against the defendants for Rs. 4,519-9-0 is assigned to the applicant for Rs. 2,000. It is true that the defendants continue to be liable for the full amount of the decree to the assignee under the assignment. The fact, however, remains that a portion of the claim of the plaintiff firm against the defendants, viz. the difference between Rs. 4,519-9-0 with interest and costs and Rs. 2,000, is relinquished by the plaintiff firm. To that extent the plaintiff firm has suffered a loss and it appears to me clear that having regard to the words used in s. 19(2) (c) a partner has no implied authority to do so. *Nagappa v. Bhagawanji Rasaji Firm*<sup>1</sup> deals with this question amongst others. It is there pointed out that an assignment of this nature, which involves the inclusion of a third party, does not alter the nature of the transaction, and it still continues to be a compromise or relinquishment of a portion of the claim by the assignor firm against the debtor.

In my opinion this notice therefore fails and is dismissed with costs. Counsel certified. Two sets of costs allowed.

*Notice dismissed.*

Attorneys for plaintiffs : *Pereira Fazalbhoy & Co.*

Attorneys for defendants : *J. S. Rutnagar & Co.*

<sup>1</sup> (1936) I. L. R. 59 Mad. 1036.

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—

Before Mr. Justice Kania.

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v.

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July 15.

*Transfer of Property Act (IV of 1882), Sec. 69—Deed of mortgage—Power of sale—Effect and construction of clause containing such power—Provision to buy in property by mortgagee at auction sale—Suit by mortgagor to restrain mortgagee from exercising power of sale—Expiry of mortgage—Mortgagor bound to redeem—Injunction.*

The expression "power of sale" is a well-known expression in conveyancing. The words "power of sale," as used in s. 69(c) of the Transfer of Property Act, 1882, refer to a clause to be expressly included in a deed of mortgage. They must therefore be understood to mean what is ordinarily known and understood in conveyancing by that expression.

A power of sale includes all steps which are necessary to be taken in that connection. In order to make the power bad words must be pointed out in s. 69 which render the whole power invalid according to law.

Where a party contends that a clause conferring a power of sale on the mortgagee restricts in any way the liberty of the parties to enter into a contract, the burden is on him to show that the words of the section prevent an agreement between the parties as embodied in the document.

A power to sell necessarily includes a power to postpone the sale. It is a power to sell either now or at a later date.

A power to buy in, or rescind or vary any contract of sale, is not bad as against the provisions of s. 69. The expression "buy in" contained in a power of sale is never intended to give the mortgagee that right. The power is used so that in effect the party at whose instance the auction is held takes the property out of the auction, should the highest bid be inadequate in price.

After a mortgage debt has become due, it is not competent to the mortgagor to file a suit to restrain the mortgagee from exercising the power of sale contained in the mortgage deed, without first offering to redeem and tendering the amount in Court.

*Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar*,<sup>1</sup> *Jerup Teja & Co. v. Peerbhoy*,<sup>2</sup> and *Mohidin Shakkar v. Jehangir Dinshaw*,<sup>3</sup> distinguished.

The relief by way of injunction is always discretionary. The Court will always be slow to grant such a relief to a party who admits that he has committed a breach of the contract and at the same time wants to prevent the opposite party from enforcing his rights under the contract. The more so, in a case where the contract between the parties gives rise to a claim for damages in case the power of sale under the contract is exercised improperly or irregularly.

SUIT for declaration and injunction.

On November 9, 1939, the plaintiff Mulraj Virji effected an equitable mortgage on his property for Rs. 1,25,000 in favour of one Ahmed and Shirinbai. On January 13, 1940, he effected a legal mortgage over the same property in favour of Krishnaji Bharmal and others.

\* O. C. J. Suit No. 620 of 1941.

1 (1877) I. L. R. 2 Bom. 252.

2 (1920) 23 Bom. L. R. 1241.

3 (1940) 43 Bom. L. R. 553.



On April 18, 1940, the plaintiff executed a second mortgage on the same property in favour of Nainmal Pratapmal and others (defendants). The due date of the mortgage was July 18, 1940. The deed of mortgage contained a clause giving the mortgagees a power of sale. [The clause is set out in the judgment.]

The plaintiff failed to pay interest as also the principal amount secured by the mortgage. He failed to redeem the mortgage on the due date.

The defendants elected to exercise the power of sale given to them by the clause in the deed of mortgage, and advertised to sell the property on May 8, 1941.

On May 8, 1941, the plaintiff filed a suit for a declaration that the power of sale in favour of the defendants without the intervention of the Court was invalid and inoperative, and for an injunction restraining the defendants from exercising the power of sale.

The defendants in their written statement denied that the power of sale was invalid and inoperative or that they were not entitled to effect a sale under the power of sale contained in the deed of mortgage.

*M. C. Setalvad*, Advocate General, with *M. M. Desai*, for the plaintiff.

*Sir Jamshedji Kanga*, with *M. L. Maneksha*, for the defendants.

KANIA J. This is a suit by a mortgagor against his mortgagees to prevent them from exercising their power of sale. Although in the plaint several averments are made in respect of the sale intended to be held on May 8, 1941, the relief asked for is not in respect of that particular sale. The plaintiff contends that the power of sale contained in the mortgage deed is invalid and inoperative and it should be declared that the defendants are not entitled to exercise the same. These two prayers are followed by a prayer for injunction. No other relief is sought in the suit.

The mortgage was executed by the plaintiff on April 18, 1940, and the due date was July 18, 1940. From the pleadings it is clear that the due date has expired and the mortgagor (plaintiff) has failed to pay the mortgage debt. There has been no offer to redeem the mortgage.

The first contention raised on behalf of the defendants is that the suit as framed is not maintainable. It was argued that a mortgagor must file a suit for redemption and offer to pay the mortgage debt after the due date has expired if he wants any relief against the mortgagees who are acting under the mortgage deed. The plaintiff relied on three cases, *Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar*,<sup>1</sup> *Jerup Teja & Co. v. Peerbhoy*<sup>2</sup> and *Mohidin Shakkar v. Jehangir Dinsshaw*.<sup>3</sup> The Advocate General for the plaintiff strongly relied on the last case where it was observed that a mortgagor can ask for an injunction in the event of the mortgagee attempting to exercise his power of sale improperly or irregularly. In the first case the suit was filed for redemption and the Court held that even after such a suit was filed the mortgagee could exercise the power of sale contained in the mortgage deed and cannot be restrained from exercising his power of sale merely because of the redemption suit. Pinhey J., in the course of his judgment,

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<sup>1</sup> (1877) I. L. R. 2 Bom. 252.

<sup>2</sup> (1920) 23 Bom. L. R. 1241.

<sup>3</sup> (1940) 43 Bom. L. R. 553.

O. C. J. observed (p. 256) :

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"The mortgagor is entitled to have the sale of the property suspended only if he can shew either that he has paid off the mortgage lien, or that he has made a legal tender of the amount due which has been refused."

In *Jerup Teja & Co. v. Peerbhoy* the due date had not arrived and the mortgagee had threatened to sell the property although the mortgage debt had not become due. That is clearly a different set of facts from what is found here. In *Mahidin Shakkar v. Jehangir Dinshaw B. J. Wadia J.* in the course of his judgment expressly stated (p. 557) :

"No case was cited before me to show that if the right to redeem had not accrued to the mortgagor he could not bring in a suit for an injunction restraining a wrongful sale, but that his only remedy was either to pay or tender the moneys and allow the property to be sold, and then pursue his remedy in damages if any."

The facts there clearly show that the mortgage debt was alleged by the mortgagee to be due, while it was contended by the mortgagor that the event on which the due date was accelerated either had not happened or that the mortgagee had not exercised his option to call in his mortgage amount on the happening of such an event. It was therefore contended by the mortgagor that the mortgage debt had not become due.

The observations in each individual judgment have to be read in the light of facts found in the case, and under the circumstances it does not appear to me that any of the three cases relied upon by the plaintiff sustains the contention that after the mortgage debt has become due the mortgagor is entitled to file a suit to restrain the mortgagee from exercising the power of sale, without offering to redeem and tendering the amount. I have already pointed out that in this case the plaintiff does not suggest that the mortgage debt has not fallen due. The plaint admits that it has fallen due.

The contract between the parties is found in the indenture of mortgage. By that document the plaintiff had stipulated that he would pay the mortgage amount on July 18, 1940, to the mortgagees. The present demand on the part of the plaintiff is to enforce his right under that contract although he has committed a breach of one of the most important terms of the same. The argument of the defendants is that as the plaintiff has committed a breach of the contract he has no right to come to Court and seek to enforce it against the defendants. It is argued that relief by way of injunction is granted on the same principles on which the Court will order specific performance, and in this case if the plaintiff had asked for specific performance of this contract the Court would have refused it because the plaintiff himself had committed a breach thereof. The Court should similarly refuse the relief by way of injunction. In my opinion there is considerable force in this contention. The relief by way of injunction is always discretionary and the Court will be slow to grant such a relief to a party who admits that he has committed a breach of the contract and at the same time wants to prevent the opposite party from enforcing his rights under the contract. Moreover the relief by way of injunction should in this case be very well and properly accompanied by a prayer for redemption. If the plaintiff chooses to refrain from carrying out his obligations and prays only for an injunction, it is difficult for the Court to exercise a discretion in his favour. To permit the

plaintiff to do so would mean that the plaintiff can persist in his breach and prevent the defendants from enforcing their rights under the contract. Moreover in this case the express terms of the contract contained in the mortgage deed show that if the power of sale was exercised improperly or irregularly or that the same was unnecessary, the remedy of the plaintiff in respect of any breach of the proviso was to be in damages only. That is the usual clause in a mortgage deed and is inserted for the benefit of the mortgagor as well as the mortgagees. Without such a clause if an objection is taken to the sale at the time of the auction, the purchaser may be scared away and may not offer a proper price. In order, therefore, that the purchaser may give a proper value this clause is found in mortgage deeds. By that clause it is clear that the parties had stipulated that in the event of an improper, irregular or unnecessary exercise of the power of sale the remedy of the aggrieved party was to be only in damages. Having regard to this clause the Court will be most reluctant to give an injunction to the mortgagor. In my opinion, the suit as framed is not maintainable and the mortgagor should pray for redemption before asking the Court to intervene and grant an injunction restraining the defendants from exercising their power of sale. This leaves the question whether the power of sale is wholly illegal.

On the merits an interesting argument was advanced on behalf of the plaintiff. It was contended that by s. 69 of the Transfer of Property Act the legislature had provided that in certain cases only a mortgage deed might contain a power of sale. Relying on the words of s. 69 it was argued that the power of sale should be without any additions, limitations or ancillary rights. The power of sale in this case is in the following terms :—

"...And it is hereby agreed and declared that notwithstanding anything contained in the Trustees and Mortgagees Powers Act, 1886, it shall be lawful for the mortgagees or any person acting on their behalf at any time or times hereafter as well before as after the due date without any further consent on the part of the mortgagor to sell or to concur in the sale of the mortgaged premises hereby mortgaged and granted or expressed so to be or any part or parts thereof without the intervention of the Court and either together or in parcels or lots and either by public auction or private contract and either with or without any special conditions or stipulations relative to title or evidence of commencement of title or otherwise which may be deemed proper by the mortgagees with power to postpone such sale from time to time and to buy in the said hereditaments and premises or any part thereof at any sale by public auction or to rescind or vary any contract for the sale thereof and to resell the same from time to time being not answerable or responsible for any loss or diminution occasioned thereby and for the purposes aforesaid or any of them to make agreements execute assurances give effectual receipts or discharges for the purchase money and do all other acts and things for completing the sale which the person or persons exercising the power of sale shall think proper AND the aforesaid power shall be deemed to be a power to sell or in selling without intervention of the Court within the meaning of section 69 of the Transfer of Property Act, 1882."

It was contended that this was not authorised by s. 69 of the Transfer of Property Act and therefore the power was invalid. It was argued that this power was one and indivisible and as it was bad the mortgagees had no right to sell the property without the intervention of Court. In this connection it was pointed out that the draftsman of the indenture of mortgage had committed the error of borrowing the form from English forms and precedents.

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It was argued that the law in England was different and therefore this form could not be properly adopted for mortgages in India having regard to the provisions of the Transfer of Property Act.

In my opinion this contention of the plaintiff is unsound. The first statute enacted in England incorporating the rights of the mortgagees was 23 & 24 Vic. c. 145 (Lord Cranworth's Act) of 1860. Even before that in Davidson's Conveyancing Precedents of 1858 (Vol. II, p. 760) a form of mortgage with a power of sale worded exactly as in this case is shown to be the usual form. The Act of 1860 recognised that this power was commonly inserted in mortgages. This is made clear by the preamble to that Act. By the Act it was presumed to exist. Next came the Conveyancing Act of 1881 (44 & 45 Vic. c. 41): Section 19 of that Act recognised this as an implied power of sale in the mortgagee. At present the Law of Property Act of 1925 (15 Geo. V, c. 20), s. 101, governs the rights of the parties in England. By s. 101(1)(i) it is provided that such a power of sale is implied in favour of a mortgagee. The expression "power of sale" thus appears to be a well-known expression in conveyancing. In Davidson's Precedents printed in 1858 the marginal note against a clause worded as here is "power of sale." In India the same expression is known and has been understood in the same way so far back as 1875 in *Pitambar Narayandas v. Vannmali Shamji*<sup>1</sup>.

On behalf of the plaintiff it was argued that this is an incorrect way of approaching the case. The English law should not be looked at and a reference to the precedents there is not relevant. The Court has to consider only s. 69 of the Transfer of Property Act. I concede that in interpreting s. 69 English statutes cannot govern the plain meaning of the words used in it. But I am unable to find anything in s. 69 which in any way is in conflict with or different from the English Act. The words "power of sale" are not defined anywhere in the Act. If it is a technical expression it would not be improper for the Court to find out its meaning as judicially interpreted. *Pitamber v. Vannmali* was decided before the Transfer of Property Act of 1882 was enacted and can therefore be safely relied upon to construe the words "power of sale" in connection with a mortgage. The words used in s. 69 are "...a mortgagee...shall, subject to the provisions of this section, have power to sell" &c. and the insertion of a clause giving such a power when the property is situate in one of the Presidency towns or the towns mentioned in sub-s. (c) is valid. It may be noted that in sub-s. (c) the words used are "Where a 'power of sale' without the intervention of the Court is expressly conferred on the mortgagee..." The words "power of sale." used in sub-s. (c) refer to a clause to be expressly included in the mortgage. They must be understood therefore to mean what is ordinarily known and understood in conveyancing by that expression.

The argument of the plaintiff based on the construction of the words used in this case is also unsound. A power of sale must include all steps which are necessary to be taken in that connection. In order to make the power bad words must be pointed out in the section which render the whole power invalid according to law. It should be remembered that as between adults the law permits the greatest freedom of contract unless it is expressly taken

1 (1875) I. L. R. 2 Bom. 1.

away. Therefore if the plaintiff contends that this particular clause restricts in any way the power of the parties to enter into a contract, the burden is on him to show that the words of the section prevent an agreement between the parties as embodied in the document. I am unable to find any words in s. 69 which prevent the parties from entering into the contract found in this mortgage deed. It was argued that under s. 69 a mortgagee had no power to postpone the sale. I am unable to accept that contention. A power to sell must necessarily include a power to postpone the sale. It is a power to sell either now or at a later date. I do not think that expression is against the words used in s. 69. It was contended that the power to buy in, or rescind or vary any contract for sale was bad and against the words of s. 69. This argument is based on a misapprehension. The words used are not "buy out" but "buy in." No mortgagee has a right to buy the mortgage premises without an express authority from the Court. If he attempted to buy directly or indirectly, on proof that the transaction was of that nature, the Courts have always held that the mortgage subsisted and the transaction of sale was a nullity. I do not think the expression "buy in" has ever been intended to give the mortgagee that right. It should be realised that if at an auction sale there are several intending purchasers and the highest bid is very inadequate, a way has to be found by which the property is not sold to the highest bidder and cause a tremendous loss both to the mortgagor and the mortgagee. The expression "buy in" is therefore used so that in effect the party at whose instance the auction is held takes the property out of the auction. The only way in which the auction can be closed is by such an offer being given and the property not being knocked down to an outsider. The expressions used after the words "buy in" make this position very clear. The mortgagee is given a right to buy in or to rescind i.e. to set aside the contract of buying or vary any contract for sale and to resell the same. Therefore when an auction sale is found not to result in realising the proper value, the mortgagee may either postpone the sale, or if he finds that he is unable to do so because the auction sale had started, he has to resort to the second way to prevent the property being knocked down at an undervalue and to resell the same. I do not think, on a true interpretation, the clause relating to the power of sale gives the mortgagees a right to buy the property for themselves. Unless that construction is put on this clause there is nothing to violate the words "power to sell" used in s. 69. In my opinion, therefore, this clause does not violate s. 69 in any manner and the power is valid.

It was argued that if a portion of the power is bad the whole power is bad because it is one and indivisible. Having regard to the view which I have taken, I do not think it necessary to discuss this aspect of the case.

My findings on the issues are: No. 1 in the negative; No. 2: The power is valid; No. 3 in the affirmative and No. 4 in the negative. The suit is, therefore, dismissed with costs. The interim injunction granted on May 8, 1941, is dissolved. Costs to include costs reserved. The mortgage deed provides that if the mortgagees' rights have to be defended in any manner the mortgagees will be entitled to claim their costs when taxed as between attorney and client. Ordinarily I am reluctant to award costs taxed otherwise than between party and party, but in the present case the mortgagor himself has

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challenged the mortgagees' title and has attacked the right found in the contract. I, therefore, award the defendants costs against the plaintiff when taxed as between attorney and client.

*Suit dismissed.*

Attorneys for plaintiff : *Ambubhai & Diwanji.*

Attorneys for defendants : *Payne & Co.*

*Before Mr. Justice Blackwell.*

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April 18.

RATANSHAW NUSSERWANJI TODIWALLA

v.

GEOFFREY WILLIAM McELHINNY.\*

*Licence—Bombay Abkari Act (Bom. V of 1878), Secs. 4, 14, 35, 35A—Bombay Toddy Tapping Rules, 1928, rr. 2, 9-13—Power to grant licence to tap toddy-producing trees—Power controlled by rules which have the force of law and not by s. 4—Statutory duty to grant licence if rules complied with—"May", meaning of, in r. 2—"Shall", meaning of, in rr. 9 to 13—Specific Relief Act (I of 1877), Sec. 45—High Court—Public servant—Order for enforcement of public duties—Licence for tapping toddy trees—Order to issue licence.*

Section 4 of the Bombay Abkari Act, 1878, relates only to control in reference to establishment, and not to the power to grant licences to tap trees producing toddy.

Section 14 of the Bombay Abkari Act read in conjunction with the Bombay Toddy Tapping Rules, 1928, made under the Act, contemplates that such licences shall be granted in accordance with the rules to enable the duties imposed to be levied.

The implied power conferred upon the Collector by s. 14(I) of the Bombay Abkari Act to grant or refuse a licence is limited by the rules. If the requirements of the rules are complied with, there is a statutory duty imposed upon the Collector to grant a licence, and this duty is not affected by anything contained in s. 4.

Sections 35 and 35A of the Bombay Abkari Act contemplate that the powers of the Abkari officers to issue licences are controlled only by rules having the force of law made under these sections, and not by orders issued by Government under s. 4. Such orders do not override the rules.

The word "may" in r. 2 of the Bombay Toddy Tapping Rules, 1928, is used merely with the object of enumerating the purposes for which tapping licences are issued, namely, for supplying toddy to shops, tree-foot booths, hawkers or for domestic consumption, and to indicate that they may not be issued for any other purpose. The word "may" does not mean that the Collector has a discretion to grant or refuse a licence if applied for in respect of one of the designated purposes.

The use of the word "shall" in rr. 9 to 13 indicates that no question of the exercise of any discretion by the Collector in the granting of a licence arises,

\* O. C. J. (Mis.) Appln. No. 14 of 1941.

provided that the requirements of the rules are complied with, but that a statutory duty to issue a licence is imposed by s. 14(1) of the Act.

*Fakir Mahomed v. Municipal Commissioner of Bombay*<sup>1</sup> and *Haji Ismail v. The Municipal Commissioner of Bombay : Ahmed Moosa v. The Municipal Commissioner of Bombay*<sup>2</sup>, distinguished.

The petitioner owned lands upon which trees producing toddy were grown. Up to July 31, 1939, licences were granted to the petitioner for tapping the trees and supplying toddy to shops for sale. Thereafter owing to the introduction of prohibition no such licences were granted. On November 18, 1940, the petitioner applied, under the provisions of the Bombay Toddy Tapping Rules, 1928, to the Collector of Bombay (respondent No. 1), for the issue of a licence to him to tap and draw toddy from his trees for domestic consumption only. On November 29, 1940, respondent No. 1 replied regretting his inability to grant such a licence. The petitioner thereupon appealed under the said provisions to the Commissioner of Excise (respondent No. 2), but the latter informed him on December 7, 1940, that respondent No. 1 was not bound to issue the licence asked for and that there was no reason to interfere with respondent No. 1's order. The petitioner, thereupon, presented a petition to the High Court, under s. 45 of the Specific Relief Act, 1877, against the respondents praying that they or either of them might be ordered to grant and issue the licence applied for. It was contended on behalf of the respondents that they had acted in the matter under the directions of the Provincial Government, as s. 4 of the Bombay Abkari Act made the Provincial Government the supreme authority in relation to the granting of such licences, and that by virtue of this section respondent No. 1 was bound to obey the orders issued by the Provincial Government with reference to granting of such licences :—

*Held*, that s. 4 of the Bombay Abkari Act related only to control of establishment and had no application to the grant of such licences ;

that respondents, who were charged with the power to issue licences, were controlled by the Bombay Toddy Tapping Rules, 1928, which were made under the Act, and which had the force of law, and that the respondents were bound to consider the petitioner's application for licence in the light of those rules ;

that, even if s. 4 of the Act applied, as there was not in existence at the date of the petitioner's application any notification, rule, or order of the Provincial Government prohibiting the possession of toddy or the tapping or drawing of toddy from toddy trees, respondent No. 1 was not entitled to refuse the petitioner's application and respondent No. 2 to refuse his appeal ;

that as the respondents acted under the mistaken belief that the prohibition policy of the Provincial Government amounted to an order justifying them in the action which they took, the Court could interfere and order them to act as they ought to have acted ; and

that respondent No. 1 should forthwith grant a licence to the petitioner on payment of such fees, if any, and subject to such restrictions and on such conditions and in such form as was contemplated by s. 30 of the Act.

*Alimahomed v. Municipal Commissioner of Bombay*<sup>3</sup>, *The Queen v. Boteler*<sup>4</sup>, and *Rustom J. Irani v. H. Kennedy*<sup>5</sup>, referred to.

APPLICATION under s. 45 of the Specific Relief Act, 1877.

1 (1936) 39 Bom. L. R. 536.

2 (1903) I. L. R. 28 Bom. 253,  
s. c. 5 Bom. L. R. 1001.

3 (1924) 27 Bom. L. R. 581.

4 (1864) 4 B. & S. 959.

5 (1901) I. L. R. 26 Bom. 396,  
s. c. 3 Bom. L. R. 653.

O. C. J.      The petitioner, Ratanshaw Todiwalla, was a landed proprietor owning  
1941      several large pieces of land in Bombay upon which there were toddy-producing  
—      trees. Prior to July 31, 1939, he was in the toddy trade, and he held a licence  
RATANSHAW      for the retail sale of toddy as well as a licence to tap and draw toddy from  
NUSSEER-      trees for supplying to licensed shopkeepers. Those licences were issued by  
WANJI      the Collector of Bombay (respondent No. 1) continuously from the year 1916  
v.      down to July 31, 1939. On August 1, 1939, the licences were cancelled by  
McELHINNY      respondent No. 1 under the policy of prohibition initiated by the Government  
—      of Bombay.

On November 18, 1940, the petitioner applied to respondent No. 1 for a grant to him of the necessary permit or licence to tap or draw toddy from his trees for the purpose of private or domestic consumption only. On November 29, 1940, respondent No. 1 passed an order refusing to grant the tapping licence applied for.

On December 3, 1940, the petitioner appealed against the said order to the Commissioner of Excise (respondent No. 2). Respondent No. 2 replied, on December 7, 1940, that respondent No. 1 was not bound to issue a tapping licence and that he saw no reason to interfere with his order.

On February 5, 1941, the petitioner filed a petition in the High Court, under s. 45 of the Specific Relief Act, 1877, to obtain an order ordering the respondents or either of them "to grant and issue to the petitioner a licence or permit on payment of fees if any and on terms and conditions usual and proper and which the respondents or any of them may lawfully impose or insert in such license ... to enable the petitioner to tap and draw toddy from toddy-producing trees belonging to the petitioner and standing on his land ... for the purpose of private or domestic consumption only, that is of himself and members of his family and for friends and guests."

The petitioner alleged that the respondents were bound, under s. 30 of the Bombay Abkari Act, 1878, to grant a licence, permit or pass, on payment of such fees, if any, and subject to such conditions as might be imposed; that the toddy was required only as a fresh drink free from intoxication by the members of his family and friends and guests; that if he did not tap or draw toddy from his trees in the present season the trees would deteriorate and in course of time cease to be toddy-producing trees, with the result that his valuable lands and properties would be converted into waste and useless land causing him considerable loss and damage; and that the respondents were bound in law to consider each application on its merits and were not entitled to generally refuse to grant any licence in the manner they were doing.

On February 5, 1941, the Court (Blackwell J.) granted a rule nisi calling upon the respondents to show cause why the order sought by the petitioner should not be made.

Respondent No. 1 in his affidavit contended *inter alia* that the petitioner had never held a domestic consumption licence; that neither of the respondents was bound, under s. 30 of the Bombay Abkari Act, 1878, to grant a licence, permit or pass; that respondent No. 1 had a discretion to refuse to grant such a licence; that it was not true that if toddy was not drawn during the season the trees would deteriorate and in course of time they would cease to be toddy-producing trees; that the petitioner's trees were cocoanut-trees and



as such yielded cocoanut-fruits in course of time ; and that respondent No. 1 refused to grant the licence applied for in the exercise of the discretion vested in him in that behalf.

The rule was heard.

*Sir Jamshedji Kanga*, with *R. J. Kolah*, for the petitioner.

*M. C. Setalvad*, Advocate General, with *F. J. Colman*, for the respondents.

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BLACKWELL J. The petitioner is the owner of land in various districts upon which grow toddy-producing trees. Up to July 31, 1939, licences were granted to his agents or managers for tapping the trees and supplying toddy to shops. Thereafter owing to the introduction of prohibition no such licences were granted. By a letter dated November 18, 1940, from his solicitors to the Collector of Bombay, the petitioner applied for the issue of a licence to tap and draw toddy from the trees on his land at Lady Jamsetji Road, Upper Mahim, for private consumption, and not for sale. This application is not in the form prescribed by r. 4 of the rules for the tapping of toddy-producing trees to which I shall presently refer, but the Advocate General informed me that he desired the matter to be argued as if the application were in the form prescribed by the rules. In a letter in reply dated November 29, 1940, the Collector regretted his inability to grant a licence. The petitioner then appealed, as he was entitled to do, to the Commissioner of Excise, Bombay, by a petition dated December 3, 1940. By his letter dated December 7, 1940, the Commissioner informed the petitioner that the Collector was not bound to issue a tapping licence to the petitioner, and that he saw no reason for interfering with the order of the Collector. The petitioner then presented a petition under s. 45 of the Specific Relief Act, 1877, against both the Collector and the Commissioner asking that they and/or either of them might be ordered to grant and issue a licence. Copies of the application made to the Collector and the other documents above referred to are exhibited to the petition. A rule nisi was granted upon this petition. Before it came on for argument respondent No. 2 went on leave. Mr. M. D. Bhansali, who has been appointed to officiate as Commissioner of Excise, has agreed to abide by any order made by the Court.

I propose in the first instance to consider the law as to the application for and the granting of licences for the tapping and drawing of toddy from toddy-producing trees before the introduction of prohibition into certain areas in the Province of Bombay, and thereafter to consider what effect prohibition had upon the law as it previously stood. The law is to be found in the Bombay Abkari Act of 1878 and in the rules made thereunder. As was pointed out by the Court in *Emperor v. Waman Dhanraj*<sup>1</sup>, the Abkari Act is a Licencing Statute, and in *Emperor v. Chinubhai Lalbhai*<sup>2</sup> the Court expressed the opinion that the object of the Act was primarily to secure Abkari revenue, though some of the sections, for example s. 17A and s. 35(2)(g) and (h), showed that the Legislature intended also to confer power to control the trade in drink and drugs, and to obviate abuses which might arise from such trades. I proceed to review the relevant sections of the Act and the rules.

Section 3 is the interpretation clause. By sub-s. (3) "Commissioner" in-

1 (1908) 10 Bom. L. R. 171.

2 (1940) 42 Bom. L. R. 669, s.b.

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- cludes an officer appointed by the Provincial Government to be a Commissioner for the purpose of the Act, and by sub-s. (4) "Collector" includes any person appointed under s. 5 to exercise the powers and perform the duties of a Collector under the Act. By sub-s. (6) "toddy" means juice drawn from a cocoanut, brab, date or any kind of palm-tree, whether in its fermented or unfermented state. By sub-s. (7) "liquor" includes, among other things, toddy and all liquid consisting or containing alcohol. By sub-s. (8) "country-liquor" includes all liquor produced or manufactured in India, and "foreign liquor" includes all liquor imported into India by sea or land, and there is a proviso that the Provincial Government may by notification in the Official Gazette declare that any specified description of country liquor shall for the purposes of this Act be deemed to be foreign liquor. Sub-section (10) defines the meaning of "to import" and "to export", and says that "to transport" means to move to one place from another place within the Province. By sub-s. (15) "excisable article" means, among other things, any alcoholic liquor for human consumption. By sub-s. 15(a) "intoxicant" means any liquor or intoxicating drug. By sub-s. (17) "to tap" means to prepare any part of a tree, or to use any means, for the purpose of causing juice to exude from the tree.

Sections 4 to 8 are preceded by the heading "Establishment and Control." Section 4 is as follows :—

"Subject to the control and direction of the Commissioner and the orders of the Provincial Government, the Collectors are charged with the collection of the Abkari-revenue, and with the carrying out of the provisions of this Act.

For the purposes of this Act, the Collector of Bombay shall be subordinate to such Commissioner as the Provincial Government directs."

The Advocate General contended that this section makes the Provincial Government the supreme authority in relation to the granting of licences for tapping and drawing toddy from toddy-producing trees, and that by virtue of this section the Collector is bound to obey the orders of the Provincial Government with reference to the granting of such licences. Sir Jamshedji Kanga, on the other hand, contended that this section relates only to control in reference to establishment, and not to the power to grant such licences which he submitted is controlled only by the rules made under the Act. He pointed out that under s. 60 there is an appeal to the Commissioner from an order of the Collector, and submitted that in view of this it cannot have been intended by s. 4 that the Collector in exercising his power to grant such licences should be subject to the directions of the Commissioner, inasmuch as in that event the right of appeal would be a farce. He referred to sub-s. (4) of s. 3 under which "Collector" includes any person appointed under s. 5 to exercise the powers and perform the duties of a Collector under the Act, and submitted that the meaning of s. 4 is that the Collectors are not to be regarded as the only persons charged with the collection of Abkari revenue and with the carrying out of the provisions of the Act. As another illustration he referred to a Notification dated February 21, 1939, issued in exercise of the powers conferred by s. 6 of the Act investing the Superintendent of Excise, Bombay, within his jurisdiction with the powers under s. 14(1) (c) and (d) of the Act. I have come to the conclusion that s. 4 relates only

to control in reference to establishment, and not to the power to grant such licences, and that such power is controlled only by the rules made under the Act. I shall give my reasons for this conclusion as I proceed.

Section 5 is as follows :—

“The Provincial Government may, by notification in the Official Gazette, appoint any person other than the Collector of Land-revenue to exercise, in any district or place, all the powers and perform all the duties conferred and imposed by this Act on a Collector, subject to such control, if any, in addition to that of the Commissioner and of the Provincial Government as the Provincial Government may from time to time direct”.

This section in my opinion also relates to control of establishment, and not to the power to grant such licences.

Section 6 is as follows :—

“To aid the Collectors in carrying out the provisions of this Act, the Provincial Government may appoint such subordinate officers, with such designations, and assign to them respectively such powers and duties under this Act, as it deems fit.

The Provincial Government, or, subject to such orders as aforesaid, the Commissioners may invest any servant of the Crown in any department either personally or in right of his office, or any other person, with such powers, and impose upon him such duties, under this Act as they deem fit, and any such officer shall thereupon exercise the said powers and discharge the said duties in addition to the powers and duties incident to his principal office :

Provided that powers under sections 36 and 40, clause (b) shall in no case be conferred on any officer of any department who is not superior in rank to a peon, or constable, and that any assignment of, or investment with, powers or duties made under this section may at any time be cancelled or varied by the authority, which made it.”

This section in my opinion makes it plain that s. 4 relates only to control of establishment. The words “subject to such orders as aforesaid” refer to the word “orders” in s. 4. Section 8 empowers Commissioners to delegate the powers conferred upon them by s. 6. In my opinion ss. 4 to 8 relate only to the appointment of officers and to control in reference to establishment and to nothing else.

Sections 9 to 13 relate to import, export and transport. These sections no doubt show that the Provincial Government is the ultimate authority in regard to such matters, but this is so by virtue of the provisions contained in these sections themselves, and not by virtue of s. 4.

Sections 14 to 15A were before the introduction of the amending Act to which I shall refer later preceded by the words “Cultivation and Manufacture.” Section 14(1) is as follows :—

“Save as hereinafter otherwise provided,

- (a) no intoxicant shall be manufactured ;
- (b) no hemp shall be cultivated or collected ;
- (c) no toddy-producing tree shall be tapped ;
- (d) no toddy shall be drawn from any tree ;
- (e) no foreign liquor shall be bottled ; and
- (f) no person shall use, keep or have in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any intoxicant other than toddy,

except under the authority and subject to the conditions of a licence granted in that behalf by the Collector.”

By virtue of this section there is an implied power conferred upon the Collector to grant licences. I shall consider the effect of this sub-section later.

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Section 14B, before it was amended by Bombay Act VI of 1940, later referred to, was as follows :—

(1) No person not being a licensed manufacturer or vendor of any intoxicant or hemp and no licensed vendor *except* as authorised by his licence shall have in his possession any quantity of any intoxicant or hemp in excess of such limit as the Provincial Government under section 17 may declare to be the limit of retail sale, except under a permit from the Collector :

provided that nothing in sub-section (1) shall extend to any foreign liquor, other than denatured spirit, in the possession of any common carrier or warehouseman as such, or purchased by any person for his *bona fide* private consumption and not for sale ;

(2) Notwithstanding anything contained in sub-section (1) the Provincial Government may by notification in the Official Gazette prohibit the possession by any person or class of persons, either throughout the whole Presidency or in any local area, of any intoxicant, either absolutely or subject to such conditions as it may prescribe."

This section among other things gave the Provincial Government the right by notification in the Official Gazette to prohibit the possession by any person or class of persons of any intoxicant. If this power had been exercised, it might, to the extent to which it had been exercised, have affected the Collector's power to grant such licences. Apart from this the section has no bearing upon the power to grant such licences. I shall refer to this section again later.

At the end of s. 19A, which falls under the heading "Duties", there is a proviso that in the cases therein mentioned "such duty may be levied in consideration of the joint privileges granted as the Collector, acting under the general or special orders of the Provincial Government, deems fit." If s. 4 had the meaning and scope for which the Advocate General contended, it would have been quite unnecessary to insert in this proviso the words "acting under the general or special orders of Government," and it would have been enough to say merely "as the Collector deems fit," seeing that, if the Advocate General is right, he would have been subject to the orders of Government under s. 4. The fact that such words are used in this proviso and in other sections of the Act assists me in my conclusion that s. 4 is intended to deal only with control in reference to establishment.

Section 20 deals with the duty to be levied on the tapping of toddy trees, and says that "every licence for drawing toddy granted under s. 14 shall specify, in addition to any other particulars prescribed by the Provincial Government under s. 30," the particulars therein mentioned. This section indicates that such licences are to be granted under s. 14 of the Act. There is a similar reference to s. 14 in s. 19 (c) in connection with duties imposed on any excisable article manufactured under a licence granted in accordance with the provisions of s. 14. These references to the granting of such licences in sections falling under the heading "Duties" indicate in my opinion that the object of the Act in insisting upon the application for a licence was to ensure the payment of duties, and was not for any other purpose. This object, I think, becomes still more plain when the rules applicable to such licences are considered. Section 14 of the Act read in conjunction with the rules contemplates in my opinion that such licences shall be granted in accordance with the rules to enable the duties imposed to be levied.

Section 25 deals with the privilege of drawing toddy from trees the right to which vests in the Provincial Government, and provides that such privilege may be disposed of annually by auction or otherwise on such terms as the Collector, acting under the general orders of the Provincial Government, deems fit. There would have been no need to insert the words "acting under the general orders of the Provincial Government" if s. 4 was an all embracing section.

Section 30 is as follows :—

"Every licence, permit or pass granted under this Act shall be granted on payment of such fees, if any, and subject to such restrictions, and on such conditions, and shall be in such form and contain such particulars, and may, in case any fee or duty payable by the holder be not duly paid, impose liability for interest thereon at such rate, as the Provincial Government in the case of licenses and the Commissioner in the case of permits and passes, may direct in rules or orders made either generally or in any particular instance in this behalf, such rules or orders being not inconsistent with this Act."

This is not the section under which licences to tap and draw toddy are granted. They are granted under s. 14. The meaning of § 30, in my opinion, is that such licences, if granted, shall be granted on payment of such fees, and subject to such restrictions and conditions and shall be in such form as the Provincial Government may direct in rules and orders which are not to be inconsistent with the Act.

Section 32 authorises the cancellation or suspension of licences, permits or passes in any of the events therein mentioned. The section begins with the words "Subject to such restrictions as the Provincial Government may prescribe, the authority granting any licence, permit or pass under this Act may cancel or suspend it." If s. 4 were an all embracing section there would have been no need to insert the words "Subject to such restrictions as the Provincial Government may prescribe."

Section 35 deals with the power of the Provincial Government to frame rules. This section is preceded by the heading "Powers of Abkari-Officers." The opening words of the section are as follows :—

"The Provincial Government may make rules for the purpose of carrying out the provisions of this Act or any other law for the time being in force relating to Abkari-revenue."

Sub-section (2) says :—"In particular and without prejudice to the generality of the foregoing provision, the Provincial Government may make rules", and the purposes for which rules may be made are set out. One of the purposes is mentioned in (b) as "prescribing the powers and duties of officers of the Abkari Department." Sub-section (3) enacts that "the power to make rules under this section shall be subject to the condition of previous publication," and there is a proviso that any such rules may be made without previous publication if the Provincial Government consider that they should be brought into force at once. I think it is plain from ss. 35 and 35A, to which I shall presently refer, that the powers of Abkari Officers can be controlled only by rules made under these sections, and not by orders issued under s. 4. Rules under s. 35 are, subject to the power given by the proviso, subject to previous publication, and even in the case of the proviso rules must be made, and not merely orders issued. It is significant that the opening words of the

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section refer to rules made for the purpose of carrying out the provisions of the Act. If s. 4 were the controlling section there would be no need for rules, and administrative orders would suffice. I think it is clear that orders cannot be issued under s. 4 overriding the rules. If they could, many sections of the Act would be nullified. The material provisions of s. 35A are as follows :—

“The Commissioner may make rules—

(a) regulating the manufacture, supply or storage of any intoxicant or hemp including ;

(iii) the tapping of toddy-producing trees and the drawing of toddy from such trees ;

(c) prescribing in the case of any intoxicant the way in which the duty on such article shall be levied ;

(d) prescribing the scale of fees or the manner of fixing the fees payable in respect of any privilege, licence, permit or pass or of the storing of any intoxicant or hemp ;

(e) regulating the time, place and manner of payment of any duty or fee ;

(f) prescribing the restrictions under and the conditions on which any licence, permit or pass may be granted,....”

The Tapping Rules, to which I shall presently draw attention, were made in exercise of the powers conferred by sub-cl. (iii) of clause (d) and cl. (e) of this section, and under s. 64 they are to have the force of law. In my opinion the Legislature intended that the officers charged with the power to issue licences should be controlled by rules which were to have the force of law, and did not intend that the provisions of s. 4 were to override the elaborate provisions of the Act made in this behalf.

Section 43 deals with penalties. The material provisions are as follows :—

“Whoever in contravention of this Act or of any rule or order made under this Act or of any license, permit or pass obtained under this Act—

(d) taps any toddy-producing tree, or

(e) draws toddy from any tree,....

shall, on conviction, be punished” as therein mentioned.

Section 60 relates to appeals. The material part is as follows :—

“All orders passed by a Collector or Commissioner shall be appealable to the Commissioner or to the Provincial Government, respectively, at any time within ninety days from the date of the order complained of ;

Provided that no appeal shall lie against an order passed by a Commissioner on appeal.”

The Advocate General contended that by virtue of this section the Commissioner has an absolute unfettered discretion to grant or refuse a licence. I do not take this view of the section. In my opinion the Commissioner in the case of an appeal is substituted for the Collector, and the Commissioner is then charged with the duty of considering the application for the licence in the light of the Act and the rules made thereunder in exactly the same way as the Collector is so charged. To hold otherwise would, in my opinion, involve giving the go-by to the Act and the rules.

The Advocate General drew attention to the use of the word "shall" in s. 62, which excepts certain medicated articles from the provisions of the Act, but empowers the Provincial Government by notification in the Official Gazette to prohibit the sale of any such article within any defined local area or place generally "except under licence from the Collector, which shall be granted on payment of such fees and subject to such conditions as the Provincial Government may deem fit to prescribe." The Advocate General contrasted the wording of this section with that of s. 14, which in his submission gives the Collector an absolute discretion to grant or refuse a licence. I shall return to this argument when I consider the effect of s. 14 and the rules made thereunder.

Section 64 is as follows :—

"All rules made under any power conferred by this Act shall be published in the Official Gazette and on such publication shall have effect as if enacted in this Act."

The rules when made and published thus form part of the Act.

Rules for the tapping of toddy-producing trees and drawing of toddy therefrom were made and published in the *Bombay Government Gazette*, Part I, dated August 16, 1928, p. 1693, and subject to some immaterial amendments are in force to-day.

The material parts of these rules are as follows :—

"In exercise of the powers conferred by sub-clause (iii) of clause (a) and clause (e) of section 35A of the Bombay Abkari Act, 1878 (Bom. V of 1878), and in supersession of this Office Notification No. 81-16/24 of December 9, 1924, the Commissioner of Excise, Bombay, is pleased to make the following rules for the tapping of toddy-producing trees and the drawing of toddy therefrom and for regulating the time, place and manner of payment of the tree-tax thereon, namely :—

1. *Short title, extent and definition.*—

- (1) These rules may be called the Bombay Toddy Tapping Rules, 1928.
- (2) They extend to the whole of the Presidency of Bombay, excluding Sind and Aden.
- (3) In these rules (a) "Act" means the Bombay Abkari Act, 1878, (b) "Commissioner" means the Commissioner of Excise, Bombay, and (c) "Excise Inspector" and "Inspector" include a Sub-Inspector or Assistant Inspector in charge of a taluka or peta.

2. *Tapping licence for what purposes may be issued.* Licences for the tapping of toddy-producing trees may be issued for supplying toddy to shops, tree-foot booths, hawkers or for domestic consumption.

3. *Period of tapping licences.* Tapping licences shall be current for the period of one year from the 1st April to 31st March of each year in the Ratnagiri District and from the 1st August to the 31st July in each year in the rest of the Presidency proper.

4. *Application for a tapping licence.* Any person desirous of obtaining a licence to tap trees in Bombay and any person in the mofussil who has secured a licence for sale of toddy at a shop or booth or for the use of toddy for domestic consumption, shall present, at least 15 days previous to the date on which he intends to tap them, an application in triplicate, in Form A hereto "appended, or in such other form as the Commissioner may from time to time prescribe, to the Excise Inspector of the range in Bombay and to the Mamlatdar or Mahalkari of the taluka or mahal in the mofussil where the trees to be tapped are situated. Trees in different talukas or ranges or required for different shops or booths must not be included in the same application except in the case of Bombay where trees intended to be tapped for supply of toddy to different shops may be included in one application."

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"9. *Verification of particulars of application by Excise Inspector* :—The Excise Inspector to whom the application is presented shall verify the particulars contained in it, correcting them where necessary, and when they are ascertained to be correct, shall hand over one copy of the application to the applicant duly signed by himself and retain the other copy on his own records.

10. *Particulars of application and challan to be checked by Chief Account Officer* :—The applicant shall then present the copy of the application with a challan in triplicate for the amount of tree-tax payable by him in respect of the trees mentioned in the application and tender the amount to the Chief Account Officer of Customs, Salt and Opium, Bombay. The latter shall check the amount of the tree-tax and on receipt of the money sign all three copies of the challan and hand over two of them, together with the application, to the applicant retaining the third copy of the challan on his records.

11. *Entries in the toddy register*.—The applicant shall then produce the two copies of the receipted challan to the Superintendent of Excise, Bombay, who shall enter full particulars of the application "in the register of toddy trees in Form B hereto. He shall enter in the said register in the column provided for the purpose the amount of the first instalment of the tree-tax paid and the date on which it was paid the serial number of the licence as shown in the register being at the same time entered in the application and on the two copies of the challan. One copy of the challan shall then be kept on his records and the other returned to the applicant.

In the case of trees belonging to Government the Superintendent of Excise shall see that the applicant has attached a certificate from the Government Department concerned, to the effect that he has permission to tap the trees. In such cases the column "Proprietor's signature" in the application form need not be filled in. The certificate of the Government Department authorising tapping of trees shall be retained by the Superintendent of Excise.

12. *Numbering toddy trees and issue of licences*.—The Superintendent of Excise, Bombay, shall then forward the application to the Divisional Inspector concerned who shall direct the applicant to proceed at once with the work of marking the trees with numbers in accordance with the provisions of rule 13 and to commence tapping. The Superintendent of Excise, Bombay, shall then prepare and forward to the Divisional Inspector, duly signed by him for delivery to the licensee, the tapping licence for the number of trees licensed to be tapped by him."

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25. *Renewal or transfer of licence at Collector's discretion*.—It is entirely within the discretion of the Collector to renew a licence at the expiration of the term for which it was granted or permit the assignee of the holder of the licence in case of sale or transfer, or the heir or legal representative of the holder of the licence in case of death, to have the benefit of the licence for the unexpired portion of the term for which it was granted."

The Advocate General laid stress upon the use of the word "may" in r. 2, and contended that the use of this word gave to the Collector an absolute discretion to grant or refuse a licence. Sir Jamshedji Kanga on the other hand relied upon r. 25, which in terms authorises the Collector to renew or sanction the transfer of a licence at his discretion, and stressed the use of the word "shall" in many of the rules and in particular in r. 12. The Advocate General contended that these rules were mere machinery, and submitted that they could not over-ride the provisions of s. 4 of the Act. Sir Jamshedji Kanga argued with force that it would be useless to frame elaborate rules under the Act which are to have the force of law, if they were liable to be defeated by orders issued under s. 4. I think that the argument



of Sir Jamshedji Kanga is right. In my opinion the word "may" in r. 2 is used merely with the object of enumerating the purposes for which tapping licences can be issued, namely, for supplying toddy to shops, tree-foot booths, hawkers or for domestic consumption, and to indicate that they may not be issued for any other purposes. I do not think that the word "may" in this connection means that the Collector has a discretion to grant or refuse a licence if applied for in respect of one of the designated purposes. Rule 4 prescribes the form in which an application for a licence is to be made. The use of the word "shall" in r. 9 makes it incumbent upon the Excise Inspector to verify the particulars contained in the application, and to do the other things therein mentioned. The word "shall" is similarly used in rr. 10 and 11. Then comes r. 12, which is imperative in its terms. After the requirements of the earlier rules have been complied with, "The Superintendent of Excise, Bombay, *shall* then forward the application to the Divisional Inspector concerned, who *shall* direct the applicant to proceed at once with the work of marking the trees with numbers in accordance with the provisions of r. 13 and to commence tapping. The Superintendent of Excise, Bombay, *shall* then prepare and forward to the Divisional Inspector, duly signed by him for delivery to the licensee, the tapping licence for the number of trees licensed to be tapped by him." Having regard to the use of the word "shall" in these rules, which are to have the same force as if enacted in the Act, I am of opinion that no question of the exercise of any discretion by the Collector in the granting of a licence arises, provided that the requirements of the rules are complied with, but that a statutory duty to issue a licence is imposed by s. 14(1) of the Act, which I shall proceed to consider, read in conjunction with the rules.

The words "except under the authority and subject to the conditions of a licence granted in that behalf by the Collector" in s. 14(1) are very similar to the words used in s. 411 of the City of Bombay Municipal Act, 1888, namely, "No person shall without... a licence granted by the Commissioner" do various things. In *Fakir Mahomed v. Municipal Commissioner of Bombay*,<sup>1</sup> Kania J. considered s. 411 of that Act. He pointed out that in that Act there was no express provision giving power to the Commissioner to grant a licence, but he held that the power was impliedly vested in the Commissioner, and that the power to refuse a licence must also be vested in him because a power to grant necessarily implies a right to refuse. So also in *Haji Ismail Haji Essac v. The Municipal Commissioner of Bombay*<sup>2</sup> in considering s. 394 of the City of Bombay Municipal Act, 1888, (which is very similar to s. 14 of the Bombay Abkari Act, s. 479 of the Municipal Act being also very similar to s. 30 of the Bombay Abkari Act), the Court held that the power of the Municipal Commissioner to grant a licence includes the power to refuse it. The Advocate General relied upon these decisions, and submitted that under s. 14(1) the Collector has an absolute discretion to grant or refuse a licence, and that so long as the exercise of his discretion was, in the words of Lord Halsbury L. C. in *Sharp v. Wakefield*,<sup>3</sup> not "arbitrary, vague and fanciful, but legal and regular," it would not be called in question.

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1 (1936) 39 Bom. L. R. 536.

s. c. 5 Bom. L. R. 1001.

2 (1903) I, L, R, 28 Bom. 253,

3 [1891] A. C. 173, 179,

O. C. J. 1941 It is, however, to be observed that in neither of these cases were there any rules prescribing the manner in which the power was to be exercised.

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In *Rex v. Metropolitan Police Commissioner, Holloway*, Ex parte,<sup>1</sup> the Court had to consider the effect of ss. 6 and 11 of the Metropolitan Carriage Act, 1869, and of a regulation made by the Secretary of State. Section 6 empowered the Secretary of State to grant licences for hackney and stage carriages. He had an absolute discretion under this section. Section 11 empowered the Commissioner of Police to grant a licence "if the said Secretary of State so directs." A regulation made by the Secretary of State provided that "a licence... may be granted to any person by the Commissioner of Police, subject to the following exceptions," which were set out as (a) and (b). The Court held that the discretion of the Commissioner of Police was not a general discretion to grant or refuse all applications, but was limited to the exceptions contained in cls. (a) and (b) of the regulation. Towards the end of his judgment Cozens-Hardy M. R. said (p. 1138) :—

"But then it has been said that the word used in the Order is not 'shall,' but 'may.' We have had our attention called, and not for the first time, to *Julius v. Lord Bishop of Oxford*,<sup>2</sup> and it seems to me it is impossible to read this Act of Parliament, dealing with an existing well-known numerous class of traders in the city of London, and to say that this is not a case in which there is a duty imposed to grant the licence subject to the express conditions imposed by the Secretary of State in the mandate which has been conferred upon the Commissioner of Police."

I have derived much assistance from the judgments in that case. The Advocate General conceded that if the rules made under the Abkari Act limit the discretion of the Collector and s. 4 is not an over-riding section, this case puts him out of Court. Sir Jamshedji Kanga referred to *Gell v. Taja Noora*,<sup>3</sup> a case in which the discretion of the Commissioner of Police to grant licences for public conveyances under s. 6 of Bombay Act VI of 1863 was limited by a proviso, and the Court held that his discretion was not absolute, and that he was bound to consider each case in the light of the proviso. Sir Jamshedji submitted that in the present case both the Collector and the Commissioner were bound to consider the application in the light of the rules. I think that the implied power conferred upon the Collector by s. 14(1) to grant or refuse a licence is limited by the rules. He would, e.g., have power to refuse a licence if the application were not in the form required by r. 4. But, if the requirements of the rules are complied with, there is, in my opinion, a statutory duty imposed upon the Collector to grant a licence, and this statutory duty is not affected by anything contained in s. 4.

Having considered the meaning of the Act before the introduction of prohibition, I now proceed to consider what effect prohibition had upon the law as it previously stood. On July 14, 1939, the Government of Bombay issued a notification<sup>4</sup> that in pursuance of its policy of prohibition it had passed the orders therein mentioned. Order 1 was as follows :—

1. *Unauthorised possession of intoxicants*.—"On and after 1st August 1939 no

1 [1911] 2 K. B. 1131.

2 (1880) 5 App. Cas. 214.

3 (1903) I. L. R. 27 Bom. 307,

s. c. 5 Bom. L. R. 133.

4 No. 374-39, *Bom. Govt. Gaz.*, Part I, 1939, p. 1971.

person shall have in his possession, or shall import or bring into, the Prohibition Area any country or foreign liquor, toddy, hemp drugs or opium except in accordance with the provisions of these orders",

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and by sub-s. (d) of Order 32 the Commissioner was directed to submit at a very early date the requisite draft notifications, rules, permits, forms, et cetera, for giving effect to the above mentioned orders. On July 17, 1939, the Government of Bombay issued a notification No. 374/39 (c),<sup>1</sup> which is in the following terms :—

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"In exercise of the powers conferred by sub-section (2) of section 14B of the Bombay Abkari Act, 1878 (Bom. V of 1878), the Govern-

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\* The Town and Island of Bombay, Bombay Suburban District and that part of the Thana Mahal which is encircled by the Bassein - Thana Creek.

ment of Bombay is pleased to prohibit, with effect from 1st August 1939, the possession by any person in the area specified in the margin \* called the Bombay Prohibition Area without a permit or a licence issued by an Abkari Officer duly authorised in that behalf—

(a) of any intoxicant specified in the schedule hereto in excess of the quantity specified against the said intoxicant.

(b) of any quantity of any other intoxicants except—

- (i) spirituous toilet preparation,
- (ii) essences,
- (iii) perfumed spirits,
- (iv) toddy possessed for making gul permitted under a special licence granted by the Collector in this behalf.
- (v) intoxicants containing alcohol not exceeding 2 per cent. by volume."

Section 14B of the Act under which this notification was issued was as follows :—

"(1) No person not being a licensed manufacturer or vendor of any intoxicant or hemp and no licensed vendor *except* as authorised by his license shall have in his possession any quantity of any intoxicant or hemp in excess of such limit as the Provincial Government under section 17 may declare to be the limit of retail sale, except under a permit from the Collector :

provided that nothing in sub-section (1) shall extend to any foreign liquor, other than denatured spirit, in the possession of any common carrier or warehouseman as such, or purchased by any person for his *bona fide* private consumption and not for sale ;

(2) Notwithstanding anything contained in sub-section (1) the Provincial Government may by notification in the Official Gazette prohibit the possession by any person or class of persons, either throughout the whole Presidency or in any local area, of any intoxicant, either absolutely or subject to such conditions as it may prescribe".

On April 11, 1940, the question of the validity of this notification came before a full bench in *Emperor v. Chinubhai Lalbhai*.<sup>2</sup> It was held that the power under sub-s. (2) of s. 14B to prohibit the possession by any person or class of persons either throughout the whole Presidency or any local area of any intoxicant does not justify Government in prohibiting possession by the public generally, and the notification was *ultra vires* and of no effect.

On the same day, after this decision had been given, Bombay Act VI of 1940 was passed amending the Abkari Act. The object of the Act as set out in the preamble was to remove doubts as to the validity of certain rules,

<sup>1</sup> Bom. Govt. Gaz., Part IV-A, 1939, p. 1155.

<sup>2</sup> (1940) 42 Bom. L. R. 669, S.B.

O. C. J. orders and notifications made or issued under the Act for the purpose of promoting, enforcing and carrying into effect the policy of prohibition. Section 3 provides that in the preamble of the Abkari Act of 1878, after the word "Bombay" the words "and whereas in order to promote, enforce and carry into effect the policy of Prohibition, it is necessary to prohibit the import, export, transport, manufacture, sale and possession of liquor and of intoxicating drugs in the Province of Bombay or in specified areas thereof" shall be inserted. For the heading to Chapter IV of the Act, which immediately precedes s. 14, "Cultivation and Manufacture" s. 5 substitutes the heading "Cultivation, Manufacture and Possession". Section 6 is as follows :—

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"In section 14B of the said Act,—

(a) the proviso to sub-section (1) shall be deleted; and

(b) in sub-section (2), for the words 'any person or class of persons' the words "any individual or a class or body of individuals or the public generally" shall be substituted."

Section 7 is as follows :—

"The amendments made by this Act in the preamble and the provisions of the said Act shall have effect from the date on which the said preamble and the said provisions were respectively enacted and any rule, order or notification made or issued under the said Act before the commencement of this Act shall be deemed to have been made or issued under the said Act as amended by this Act and no prosecution, suit or other proceeding shall lie against any person for anything in good faith done or intended to be done in pursuance of any such rule, order or notification, as the case may be."

It will be observed that by s. 6, sub-s. (2) of s. 14B was amended by enabling the prohibition to extend to "any individual or a class or body of individuals or the public generally", the effect of which would be, as regards notifications issued under the amending Act, to remove the ground upon which the Notification of July 17, 1939, had been held to be invalid.

In *Emperor v. Dantes*,<sup>1</sup> the accused was alleged to have infringed the provisions of the said notification of July 17, 1939, and the question whether in view of the amending Act that notification was valid and in force came before a full bench. It was held that the only notifications which fell within s. 7 of the amending Act were the notifications effective at the date of the passing of the amending Act, and that the section did not affect the construction of notifications already rescinded, still less of the notification which had been declared invalid, and therefore had never had any effect and was a mere nullity, that s. 7 did not apply to the notification of July, 1939, which was declared to be *ultra vires*, and that even if it did apply, it had not the effect of reviving the notification. The Court was asked to express its views upon the validity of the notification, upon the assumption that it had been revived and was to be treated as passed under the original Act as amended by the amending Act. The Court accordingly expressed its views, stating that these views were not intended to form part of the decision, but were *obiter* only. The Court expressed the view that the notification, upon the assumption just referred to, was invalid and went beyond the powers of the Provincial Legislature. A right to legislate as to possession of intoxicating liquors, given by

item No. 31 in list II of the Seventh Schedule of the Government of India Act, 1935, necessarily involves a right to prohibit possession. The Court thought, therefore, that the Provincial Legislature has power so to limit possession, provided that in doing so it does not encroach upon the powers of the Central Legislature (item 10 in List 1); accordingly the Provincial Legislature has no power to legislate in respect of possession of intoxicants in such a way as to encroach upon the right to import and export across the customs frontier, and the power was a qualified power, subject to the rights of the Central Government.

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That decision having been given, and those views expressed, on July 1, 1940, the Government of Bombay on July 14, 1940, authorised the issue of a Press Note through the Director of Information. It is a remarkable document. In it the Government of Bombay frankly recognized the difficulties involved in attempting to introduce prohibition by mere amendments to what is essentially a licensing and revenue Act. In particular it stated that the Government did not intend, so long as the legal position remained unmodified, to re-issue a notification under s. 14B(2) of the Bombay Abkari Act. How in the face of that Press Note either the Collector or the Commissioner could have thought that there were in existence orders of Government under which they were bound to refuse a licence, I find it difficult to understand. I think that the explanation probably is that they were aware of certain applications later referred to which were refused before the first full bench decision, and thought that they were bound by those refusals to refuse the present application. I think it desirable to set out the material portions of that Press Note. They are as follows :—

"The Government of Bombay considers it desirable to explain, for the information of the public, the present position regarding the prohibition of the possession of intoxicants in Bombay and other "Prohibition" areas in the light of recent legal decisions."

In Criminal Reference No. 75 of 1940 (that is to say, the judgment delivered on July 1), the Bombay High Court held that the notification issued on July 17, 1939, under section 14B(2) of the Bombay Abkari Act, 1878, prohibiting the possession of intoxicants in Bombay City, was not validated by Bombay Act VI of 1940 (the Governor's Act) and was ineffective. The High Court also stated that it was beyond the powers of the Provincial Legislature to enact any law prohibiting possession of intoxicants in such a way as to encroach upon the right to import and export across the Customs frontiers.

Previous to this legal decision the Government of Bombay had in view making certain changes in the policy of prohibition, as the result of the experience gained since it has been in force. These changes were intended to maintain prohibition for country liquor and toddy, but would have altered the regulations in respect of foreign liquor with the object of making them more acceptable to those who had been accustomed to foreign liquor. These contemplated changes have now to be reviewed and made to conform to what is legally possible as the result of the High Court decision.

The Government of Bombay proposes to apply for a certificate to appeal to the Federal Court against the judgment of the High Court. But so long as the view taken by the High Court is not reversed or modified by a higher tribunal, it has to be followed and any notification issued under section 14B(2) of the Bombay Abkari Act prohibiting possession of intoxicants would have to exclude from its purview the possession of any intoxicant following upon, or incidental to, the import

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of such intoxicant across a Customs frontier, or preceding or incidental to the export thereof across such frontier.

"Under such a notification any person who wished to import liquor from any place outside British India through any Customs port or land customs station could do so without the Bombay authorities being able to take any action to prevent the import. The importer could consume it, though he might by the exercise of other powers be prevented from selling it. It would thus be open to anybody who so wished to order his supplies from outside British India.

The questions incidental to export are even more difficult. Any person, notwithstanding the notification, would be able to bring into a prohibited area liquor, unlimited in quantity, on the plea that he was intending to export it later across a Customs frontier, and it would not be possible to prevent his possession of it. It would be impossible, in practice, to prevent effectively much of the liquor thus illicitly transported being consumed in a prohibited area.

Any system of prohibition, which would have to allow in a prohibited area the presence of a privileged class of liquor unlimited in extent would clearly be administratively impracticable, and for this reason Government does not intend, so long as the legal position remained unmodified, to re-issue a notification under section 14B(2) of the Bombay Abkari Act, or to enact a Prohibition Act which would have to be subject to the same disabilities.

It must be added that it is clear, from the experience of the past and from the advice tendered by the law officers, that attempts to adapt the provisions of the Abkari Act to a policy of prohibition are liable to be challenged in the Courts, and with each successful challenge the effective basis of prohibition is shaken and the administrative difficulties of enforcement greatly increased. It is Government's considered view that even if the present legal position came to be modified by a higher tribunal, effective prohibition of intoxicants could only be satisfactorily secured by the passing of a specific and comprehensive Prohibition Act to replace the Abkari Act. Such an Act would need to be elaborate and would be controversial, and would not be likely to secure that general acceptance which is necessary for its success unless it were fashioned by a Legislature. The Government considers that a measure of this character should be left to be enacted by a Legislature.

Meanwhile the immediate problem before the Government is to adapt its procedure both to what is possible under the Abkari Act and to what conforms to recent legal decisions. Under these limitations the Government proposes to do what is possible to reduce to a minimum the consumption of country liquor and toddy in the prohibited areas, while relaxing to a considerable extent the conditions relating to foreign liquor.

The following is the procedure which will now be adopted in the prohibited areas :—

(1) No sale of country liquor or toddy will be permitted in any prohibited area, except, as at present, for authorised sacramental purposes.

(2) Though it will not be possible effectively to prohibit entirely the entry of country liquor or toddy in a prohibited area, its entry will be discouraged, by the imposition of a high excise duty on any transport into a prohibited area etc., from any area outside it, and no country liquor or toddy will be allowed to enter the area unless a receipt for such duty having been paid is produced.

The duty will, if possible, be so fixed as to raise the price of country liquor approximately to that of foreign spirit of similar alcoholic content within the area, and of toddy to that of fermented foreign liquor.

This will necessitate, of course, the retention of a "prohibition" staff on the roads and railways, but if the co-operation of the public in detecting illicit transport and manufacture be obtained, it should be possible to restrict consumption of country liquor to those who can afford to pay really high prices....

"Broadly, the effect of these regulations in Bombay will be that in Bombay, and its suburbs no country liquor or toddy will be on sale anywhere (except for sacra-

mental liquor sold at the four Government Depots) and sale by any private person will be punishable.

A person may bring into Bombay and Salsette country liquor or toddy only provided that he has *previously* paid a special excise duty and obtained a receipt from an Excise Officer for the amount paid. If a person is found bringing in country liquor or toddy without a pass for it he will be liable to prosecution. If he has paid the excise duty, he may possess the duty paid liquor for his own private use. But its sale will be punishable.

The rates of duty will be notified shortly; that for Bombay will probably be Rs. 6 a quart bottle for country liquor of 40° U. P. and Re. 1 for toddy.

There will be no restrictions on the purchase, or possession of foreign liquor by any private individual, but its sale except by licensed vendors will be punishable.

It will be observed from this Press Note that Government stated that there was no intention, so long as the legal position remained unmodified, to re-issue a notification under s. 14B(2) of the Bombay Abkari Act, and none has in fact been issued. Accordingly the power to issue licences under s. 14(1) of the Act and the rules for tapping toddy-producing trees and drawing toddy therefrom at the date of the application made by the petitioner was in my opinion exactly the same as it was before the issue of the notification of July 17, 1939, and the amendments of the Act by Act VI of 1940, no fresh notification having been issued. There is no notification in existence prohibiting the possession of toddy. It is also to be observed that the Press Note states that any person is entitled to possess toddy in a prohibited area provided that he is prepared to pay the excise duty payable on its transport into a prohibited area from any area outside.

A number of applications were made between August 1 and December 14, 1939, by various persons named Boyce, Pardiwalla, Toddiwalla (the present petitioner), Bhandari, Creado, and Kiledar, for permission to tap and draw toddy from their own trees for private consumption, and the papers relating to these applications and the orders passed were referred to. They were all refused before the first full bench decision, above referred to, was given. The orders passed were known to the Commissioner of Excise, and to respondent No. 1.

When the present application dated November 18, 1940, was received by respondent No. 1 he forwarded it with a memorandum dated November 20, 1940, to the Commissioner of Excise, Bombay, "for favour of early orders". The Advocate General submitted that respondent No. 1 was entitled to ask for the orders of the Commissioner and was bound to act on those orders under s. 4 of the Act. I have already given reasons for my opinion that s. 4 has no application to the grant of licences for tapping toddy-producing trees and the drawing of toddy therefrom, and that as there was a right of appeal from the decision of the Collector to the Commissioner, the Collector ought not to have asked the Commissioner for orders, but ought to have dealt with the application himself without consulting the Commissioner. The Commissioner, respondent No. 2, replied by a letter dated November 27, 1940, in these terms:—

"It is entirely at the discretion of the Collector whether to grant or not to grant a tapping license. It is the policy of Government not to grant any tapping licences in the Bombay Prohibition Area. The solicitors may, therefore, be informed that the Collector regrets his inability to grant the applicant a tapping

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Respondent No. 1 admitted in his affidavit that there is no notification, rule or order under the Bombay Abkari Act containing a general prohibition as regards tapping or drawing toddy from toddy-producing trees. He alleged that it was within the discretion of the Collector of Bombay to issue a licence for tapping toddy trees, and that he had refused to grant a licence to the petitioner in the exercise of his discretion. He was cross-examined upon his affidavit and stated that his refusal was pursuant to instructions received from Government and for no other reason. As respondent No. 2 had made no affidavit, the Advocate General, in the course of the cross-examination of respondent No. 1, made the following statement :—

"Eight applications in all, viz., five for domestic consumption and three for the sale of toddy, were received and were refused by the Commissioner of Excise since August 1, 1939, pursuant to instructions received from Government given on considerations based on their policy of Prohibition, the refusal by the Commissioner being due to no other reason than the instructions received by him from Government.

The application in the present case is not included in the five applications just referred to, but I make the same statement in regard to the refusal of the appeal by the Commissioner from the Collector in respect of the present application."

The refusal of the appeal by respondent No. 2 was again sought to be justified by the Advocate General by relying upon s. 4. Even if, contrary to my opinion, s. 4 applied, there would still have had to be in existence an order of the Provincial Government under which the Collector was entitled to refuse the application, and the Commissioner to refuse the appeal. Sir Jamshedji Kanga called for the production of any orders, or resolutions, or notifications, pursuant to which the instructions were given upon which the Collector and Commissioner acted. None were forthcoming. In fact there was not in existence any valid notification prohibiting the possession of toddy, and in my opinion there was no order of the Provincial Government in existence entitling either the Collector to refuse the application or the Commissioner to refuse the appeal. I think that they both acted under the mistaken belief that the prohibition policy of Government amounted to an order justifying them in the action which they took. If they have done this, the Court will interfere and will order them to act as they ought to have acted : see *Alimahomed v. Municipal Commissioner of Bombay*<sup>1</sup>, where the Commissioner refused a licence in the mistaken belief that he was bound to refuse it by a decision of the Appeal Court, and *The Queen v Boteler*<sup>2</sup>, where Justices refused to issue a warrant, taking into account something which they were not entitled to do, and they were ordered by the Court to issue their warrant.

The Advocate General submitted that if I should be of opinion that the Collector and the Commissioner had taken into account matters which they were not entitled to do, I ought to order them to entertain and deal with the application. He relied upon several cases in which such orders were made, of which *Rex v. London County Council : Corrie*, Ex parte<sup>3</sup> may be taken as typical. But these were cases where there had been no hearing at all. In the present case both the Collector and the Commissioner have dealt with the application, the refusal thereof by both of them being for no other reason

1 (1924) 27 Bom. L. R. 581.

3 [1918] 1 K. B. 68.

2 (1864) 4 B. & S. 959.



than the instructions received by them from Government. In this connection the observations of Blackburn J., in *The Queen v. Boteler*<sup>1</sup>, are very pertinent. That learned Judge after pointing out the different circumstances in which the proper order is to order the doing of the act or to order the party to hear and determine said (p. 965):—

"But I think the affidavits shew that, having entered into the inquiry, they determined that it was fit on every legal ground that their warrant should be issued but that they would not issue it because they disliked the Act of Parliament: they have decided all that was in their power to decide, and for a reason which is no reason in law they declined to issue their warrant".

In that case the rule being a rule calling upon the Justices to show cause why they should not issue their warrant, the Court made it absolute with costs. Such an order was made in *Rustom J. Irani v. H. Kennedy*.<sup>2</sup> I think that the present case is one in which I should make a similar order.

The conditions set forth in s. 45 of the Specific Relief Act are, as was held by Russell J. and by the Appeal Court in *Rustom J. Irani v. H. Kennedy*, cumulative. In my opinion all these conditions are satisfied in the present case.

The Advocate General argued that the making of an order which I propose to make would be futile, inasmuch as under s. 32A of the Bombay Abkari Act the authority granting a licence has power to cancel it, and he relied upon a number of authorities such as *Rex v. Mayor of Axbridge*<sup>3</sup> and *Rex v. Army Council : Revenscroft*, Ex parte.<sup>4</sup> But I am entitled to assume that the Collector, if ordered to grant a licence, will not cancel it except for good cause. This appears to me to be a futile argument.

The Advocate General submitted that this petition was not justified as against respondent No. 2. I do not agree with him. Respondent No. 2 entertained the appeal as he was bound to do under s. 60 of the Act, and I think that it was necessary that he as well as the Collector should be bound by any order which the Court might make.

I make the rule absolute with costs. I direct respondent No. 1 forthwith to grant a licence to the petitioner on payment of such fees, if any, and subject to such restrictions, and on such conditions and in such form as is contemplated by s. 30 of the Act.

As respondent No. 2 no longer holds the office of Commissioner of Excise, Bombay, and as I have been today informed by the Advocate General that Mr. M. D. Bhansali no longer holds that office, but that respondent No. 1 holds charge of the office of Commissioner of Excise in addition to performing the duties of Collector, it will no longer be necessary to make any order upon Mr. Bhansali although at the time of the hearing he had agreed to abide by any order of the Court.

I order the costs in this case to be taxed.

*Order granting licence made.*

Attorneys for petitioner : *Gagrat & Co.*

Attorneys for respondents : *Little & Co.*

1 (1864) 4 B. & S. 959.

2 (1901) I. L. R. 26 Bom. 396,

s.c. 3 Bom. L. R. 653.

3 (1777) 2 Cowper 523.

4 [1917] 2 K. B. 504.

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THE CANARA INDUSTRIAL AND BANKING SYNDICATE CO. LTD.

v.

July 17.

NARAYAN VENKATESH SHENOY.\*

*Letters Patent, cl. 12—Bill of exchange—Drawn in Bombay—Acceptance of bill by drawee outside Bombay—Bill dishonoured—Suit in High Court by payee with leave obtained under cl. 12 of Letters Patent—Whether part of cause of action arose in Bombay—Jurisdiction.*

Defendant No. 1 drew in Bombay on defendant No. 2, who was residing at Calicut, five bills of exchange in favour of the Bombay branch of the plaintiff-bank. The bills were endorsed by the plaintiffs in favour of a bank at Calicut for collection. They were presented to defendant No. 2 who accepted them, but on the due date dishonoured them. The plaintiffs filed a suit in the High Court of Bombay with leave under cl. 12 of the Letters Patent to recover the amount due under the bills from both the defendants. Defendant No. 1 did not enter an appearance, but defendant No. 2 defended the suit and contended that the Court had no jurisdiction to try the suit as his liability having arisen only on acceptance of the bills at Calicut, no part of the cause of action arose in Bombay :—

*Held*, that, in order to give rise to the liability of defendant No. 2 as drawee, the plaintiffs had to establish that the bills of exchange were drawn by defendant No. 1 on defendant No. 2 in favour of the plaintiffs, who were the payees in Bombay; and

that, as that material fact took place in Bombay, part of the cause of action arose in Bombay, and with leave obtained under cl. 12 of the Letters Patent, the Court has jurisdiction to try the suit.

*Roghoonath Misser v. Gobindramai*<sup>1</sup>, referred to.

SUIT on bills of exchange.

The plaintiffs, Canara Industrial and Banking Syndicate, was a joint stock banking company incorporated and registered in British India under the Indian Companies Act and having their head office at Udipi in South Canara and a branch office at Bombay.

Defendant No. 1, Narayan, who was residing in Bombay, drew five bills of exchange on defendant No. 2, Govind, who was residing at Calicut, in favour of the plaintiffs. Four of the bills were for Rs. 1,000 each and one was for Rs. 600.

The plaintiffs endorsed the bills in favour of Nadungadi Bank Ltd. of Calicut for collection. The bank presented the bills to defendant No. 2 who duly accepted them. On the due dates the bills were presented to defendant No. 2 but he dishonoured them by non-payment.

The plaintiffs alleged that after certain negotiations between them and the defendants it was agreed that defendant No. 1 should draw eight fresh bills of exchange on defendant No. 2 for the aggregate sum of Rs. 4,875—being the amount due under the first five bills of exchange and interest and other charges up to August 17, 1939—in their favour, and that if the eight bills were accepted by defendant No. 2 the five dishonoured bills should be returned to defendant No. 1.

\* O. C. J. Suit No. 1234 of 1940.

1 (1895) I. L. R. 22 Cal. 451.

Defendant No. 1 drew eight fresh bills of exchange on defendant No. 2 in favour of the plaintiffs who forwarded them to the Nadungadi Bank for collection. They were presented to defendant No. 2 who accepted three bills for Rs. 750, Rs. 250, and Rs. 250, and did not accept the remaining five bills. Out of the three bills accepted by him, he retired only one for Rs. 250 and dishonoured the remaining two.

After giving credit to defendant No. 2 for Rs. 250, the plaintiffs sued to recover Rs. 4,625 from defendant No. 2. As defendant No. 2 was residing outside the jurisdiction of the High Court, the plaintiffs asked for leave under cl. 12 of the Letters Patent; and submitted that with such leave granted the Court had jurisdiction to try the suit. The leave was granted.

Defendant No. 1 did not put in an appearance.

Defendant No. 2 contended *inter alia* that the bills of exchange were not payable in Bombay, that the drawing of the bills was no part of the cause of action against him, that the bills were accepted by him at Calicut as payable to the Nidungadi Bank, and that the Court therefore had no jurisdiction to try the suit. He further contended that the leave granted to the plaintiffs under cl. 12 of the Letters Patent had been granted on the faith of the false allegation made by the plaintiffs that the bills were payable in Bombay, that no material part of the cause of action had arisen in Bombay and therefore the leave granted to the plaintiffs should be revoked, that the plaintiffs treated the bills as satisfied after the eight fresh bills were drawn, that the fresh bills were for Rs. 4,600 and not for Rs. 4,875, that they were not drawn as alleged by the plaintiffs in accordance with an agreement arrived at between the parties, that he did not accept the five fresh bills and did not pay for the two fresh bills accepted by him because the bills were in breach of the agreement arrived at between the parties.

*N. H. Bhagwati*, for the plaintiffs.

*N. K. Ayyangar*, for defendant No. 2

KANIA J. Plaintiffs have filed this suit to recover from the defendants Rs. 4,625 and interest. Between December 14, 1938, and February 16, 1939, defendant No. 1 drew on defendant No. 2 five bills of exchange, in all for Rs. 4,600, in favour of the plaintiffs. The said bills were endorsed over by the plaintiffs in favour of Nudengadi Bank of Calicut for collection and when presented to defendant No. 2 were accepted by him. On the due date, however, he dishonoured the same by non-payment. Thereafter there were certain discussions about the payment which are found in the letters exchanged between the parties. As a result of that correspondence defendant No. 1 drew eight bills of exchange on defendant No. 2 in favour of the plaintiffs. Three of them when presented to defendant No. 2 were accepted by him. He honoured one only by payment but dishonoured the other two. The remaining five bills were dishonoured by non-acceptance. These eight bills were for Rs. 4,875. Defendant No. 2 had honoured by acceptance one bill for Rs. 250 and the suit is filed for the remaining Rs. 4,625.

The suit was filed as a summary suit. Defendant No. 1 did not enter an appearance and has not taken any steps to defend. Defendant No. 2 obtain-

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ed leave to defend. His written statement raises several contentions which are embodied in the issues raised for him. I shall deal with them in the order in which they are found in the issues.

The first contention, found in issues Nos. 1 and 2, is that this Court has no jurisdiction to try the suit. It was contended on behalf of defendant No. 2 that because he had accepted the bills at Calicut no part of the cause of action arose in Bombay and the leave obtained under cl. 12 of the Letters Patent was irregular. It is contended that his liability arose only on acceptance, and therefore, the whole contract in respect of his liability arose at Calicut. In my opinion this argument is unsound. The acceptance of a bill of exchange is made by an acceptor putting his signature on the bill. By reason of the signature the law raises certain implied obligations. In an ordinary case, if a party enters into a contract he has got to set out the terms of the obligations of the parties. The liability of an acceptor is governed by the Negotiable Instruments Act. In order to give rise to that liability the plaintiffs must prove that a negotiable instrument drawn on the drawee in favour of the payee was presented to the drawee and accepted by him as indicated by his signature on the bill. Each one of these steps has to be established by the plaintiffs. They have, therefore, to establish that the bills of exchange sued upon were drawn by the drawer on defendant No. 2, who is named as the drawee, in favour of the plaintiffs, who are the payees. This is necessary because only a drawee can accept a bill of exchange. Therefore the fact that the bills of exchange were drawn on defendant No. 2 is a material fact which has to be proved by the plaintiffs to establish their claim. As that fact took place in Bombay, with leave under cl. 12 of the Letters Patent this Court has jurisdiction.

It is contended on behalf of defendant No. 2 that it is on acceptance only that his liability arose. This contention overlooks the fact that the starting point for the liability is the drawing of the bills of exchange on him and the concluding point is when he accepts the liability by putting his signature on the bills as acceptor. The acceptance is, therefore, the culminating point fixing the liability on him and not the starting point as contended by defendant No. 2.

It was argued that this should be treated as a proposal to make him liable which was conveyed to him at Calicut and accepted by him at Calicut and therefore the whole of the contract of his liability arose at Calicut. In my opinion this argument overlooks the fact that this is not a simple contract governed by the Indian Contract Act, but the rights of the parties are governed by the Negotiable Instruments Act. The form of this proposal, the exact words thereof and the fact that it was drawn on defendant No. 2 are all essential things to be proved. The contents of the proposal are necessary to be proved and as that document was made in Bombay, I am unable to hold that no part of the cause of action arose in Bombay. No direct authority in respect of the jurisdiction of the Court as regards an acceptor has been cited before me. *Sewaram Gokaldas v. Bajrangdat Hardwar*<sup>1</sup>, which was relied upon by defendant No. 2, does not help him. There the disputes

1 (1915) I. L. R. 40 Bom. 473, s.c. 18 Bom. L. R. 57.

were between the drawer and the payee. The question was whether the Court had jurisdiction when it was admitted that the hundi was drawn, delivered and was payable outside Bombay. On the other hand the decision in *Roghoonath Misser v. Gobindharain*<sup>1</sup> shows that any step which the plaintiff has to prove in order to establish his title to sue on a negotiable instrument is a material fact, and if any such event took place within the jurisdiction of the Court, with leave granted under cl. 12 of the Letters Patent, the Court would have jurisdiction to try the suit. Issue No. 1 is, therefore, answered in the affirmative and No. 2 in the negative.

Defendant No. 2 next contended that as he had given eight bills of exchange, whether they were accepted and honoured or not, defendant No. 2's liability under the original five bills came to an end. Section 62 of the Indian Contract Act was relied upon in this connection. The question whether the liability under the original five bills was extinguished is a question of fact. In this case the only evidence about the arrangement under which the eight bills were subsequently drawn is found in the correspondence (exhibit B). In that correspondence the plaintiffs expressly stated that on acceptance and payment of the latter eight bills defendant No. 2's liability would come to an end. On reading the whole correspondence I am unable to find anything to justify a conclusion that the plaintiffs had agreed to extinguish the liability of defendant No. 2 arising by reason of the acceptance of the five bills immediately on defendant No. 1 drawing the subsequent eight bills on defendant No. 2, or when defendant No. 1 agreed to draw those bills. Vague statements or inferences cannot be relied upon to extinguish a right which had accrued under a negotiable instrument, and there is nothing in the whole correspondence to support defendant No. 2's argument. The words actually used in the letters do not show that the plaintiffs had agreed to give up their claim under the acceptance endorsed on the old bills, until they were paid the amounts of the bills. The burden of proof on this question is on defendant No. 2 as he alleges that the obligation under the acceptance signed by him had been extinguished. In my opinion he has entirely failed to discharge that burden. The fact that those bills remained with the plaintiffs, with the acceptance of defendant No. 2 unobliterated, further supports the plaintiffs' contention that the liability was never intended to be or in fact extinguished. The third issue is therefore answered in the negative.

Issues Nos. 4 and 5 are not necessary to be decided. The contention urged is that under the new arrangement defendant No. 1 was to draw bills of exchange for Rs. 4,600 and not for Rs. 4,875. Although the plaintiffs' suit is to recover the difference between Rs. 4,875 and Rs. 250 (i.e. the amount of the bill honoured and paid) the learned counsel for the plaintiffs has intimated to the Court that in this suit he claims only the amount of the original bills, viz., Rs. 4,600, less Rs. 250, with interest from the respective due dates. He does not claim the sum of Rs. 4,625 as formulated in the plaint. It is, therefore, not necessary to decide issues Nos. 4 and 5. Under the Negotiable Instruments Act the plaintiffs are entitled to recover the amount of the bills with interest at six per cent. from their respective due dates.

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O. C. J. Out of the eight new bills drawn by defendant No. 1 on defendant No. 2 one has been honoured and paid and two were accepted but not paid. Having regard to the decree which is being passed on the old bills in this suit, defendant No. 2 does not any more remain liable on his acceptance of the two bills of Rs. 750 and Rs. 250 accepted on August 22, 1939, and dated August 18, 1939, although the bills are at present with the plaintiffs. Defendant No. 2's liability on all those bills is deemed to be unenforceable now.

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On the footing of this judgment the parties are agreed that there will be a decree for the plaintiffs against the defendants (*in invitum* against defendant No. 1) for Rs. 4,350 with interest on Rs. 3,750 at six per cent. per annum from March 1, 1939, up to April 15, 1939, and on Rs. 4,350 from April 15, 1939, till judgment. Defendant No. 1 will pay Rs. 200 for costs of the suit. Defendant No. 2 should pay to the plaintiffs Rs. 800 as costs of the suit and Rs. 135 as costs of the summons for judgment. Interest on judgment against both the defendants at six per cent.

*Suit decreed.*

Attorneys for plaintiffs : *Kanga & Co.*

Attorneys for defendant No. 2 : *Amritlal & Co.*

## APPELLATE CIVIL.

*Before Mr. Justice Broomfield and Mr. Justice Macklin.*

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July 24.

RAMU BALA SANKPAL

v.

JANA DALA PATIL.\*

*Hindu law—Adoption—Unchaste widow—Widow of a regenerate class unchaste at time of adoption—Adopted son of same gotra as adoptive father—Delegation by widow of ceremonies of adoption—Validity of adoption.*

A Hindu widow of a regenerate class made an adoption while she was living in unchastity. The adopted son was of the same gotra as his adoptive father. The performance of the ceremonies of adoption was delegated by the widow to others who performed the ceremonies including the ceremony of *datta homam*. On the question whether the unchastity of the widow rendered the adoption invalid :—

*Held*, that in the circumstances of the case the widow was competent to make the adoption.

*Basvant Mushappa v. Mallappa Kallappa*<sup>1</sup>, followed.

*Sayamalal Dutt v. Saudamini Dasi*<sup>2</sup>, doubted.

\* Second Appeal No. 769 of 1939, with Second Appeal No. 825 of 1939, from the decision of T. B. Shanbhag, Assistant Judge at Satara, in Appeal No. 221 of 1938, reversing the decree passed by T. I. Patel, Joint Subordi-

nate Judge at Karad, in Civil Suit No. 1042 of 1936.

1s. (1920) I. L. R. 45 Bom. 459, s.c. 22 Bom. L. R. 1400.

2 (1870) 5 Beng. L. R. 362,

*Lakshmbai v. Ramchandra*<sup>1</sup>, *Govindprasad v. Rindabai*<sup>2</sup>, and *Bal Gangadhar Tilak v. Shrinivas Pandit*<sup>3</sup>, referred to.

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SUIT to recover possession of property.

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One Bala, a Kshatriya by caste, who owned the suit property, died on October 14, 1904, leaving him surviving his widow Chandra and a son Maruti. Maruti died within two years of his father's death. On February 29, 1908, a child was born to Chandra as a result of unchaste life led by her after her husband's death. This illegitimate child died on March 4, 1908. On September 24, 1909, Chandra sold the suit property to one Bala Vithu Patil (defendant).

On March 26, 1934, Chandra took Ramu (plaintiff) in adoption, who filed the present suit against the defendant to recover the suit property alleging that the sale-deed passed by Chandra was without legal necessity and hence not binding on him. The defendant contended that there was in fact legal necessity and that the adoption of the plaintiff, if proved, was invalid, as his adoptive mother was unchaste and therefore incompetent to adopt according to Hindu law.

The trial Court held the plaintiff's adoption proved and valid in law. It further held that the alienations by Chandra were not for legal necessity and decreed the plaintiff's suit. In his judgment the trial Judge observed as follows :—

"From what has been stated by Mr. Mulla two things are clear : First, that the widow in *Sayamala's* case was pregnant in adultery at the time of adoption, and, secondly, the adoption was held invalid, as the widow on account of her pregnancy in adultery was incapable of performing the religious ceremony. Both these points are not applicable in the present case. Firstly, because inasmuch as even according to defendant Chandra is never alleged to have been pregnant after 1908. The adoption of plaintiff by Chandra is in the year 1934, that is twenty-six years after her pregnancy. She was quite an old lady in 1934 and was not unchaste or pregnant at the time of adoption. Secondly, the religious ceremony in this case is performed by the priest to whom authority was delegated by Chandra. In the case of pollution of a woman the authority can be so delegated. The ruling on this point in *Laxmibai v. Ramchandra*, 22 Bom. 590, is very clear. Even Mr. Mulla has made this point more clear in his commentary below para. 490(3). Thus the legality of ceremonies in *Sayamala's* case is not applicable to the present case as the religious ceremony was performed by priest under an authority given to him by Chandra.

Plaintiff relies on *Pandu Krishna v. Dhondi Krishna Patil*, 22 Bom. L. R. 1400. *Sayamala's* case was referred to, discussed and distinguished by Macleod C. J. in the said case. Macleod C. J. says that the reason why the adoption in that case was declared void was that the widow could not perform the necessary religious ceremonies. The parties in 22 Bom. L. R. 1400 were Shudras hence the argument was not applicable. It is as clear as daylight that what Macleod C. J. decides upon is the applicability of the argument. The parties in 22 Bom. L. R. 1400 were Shudras hence the argument was inapplicable. In this case even though the parties are held to be Kshatriyas the argument will be equally inapplicable first as the ceremonies were performed by delegation, and, secondly, the parties being sagotra the ceremonies are unnecessary.

Thus what came in the way of adoption in *Sayamala's* case was not the want of validity but the illegality of the ceremonies which were performed by the widow

1 (1896) I. L. R. 22 Bom. 590.

2 (1924) I. L. R. 49 Bom. 515,  
s.c. 27 Bom. L. R. 365,

3 (1915) L. R. 42 I. A. 135,  
s.c. 17 Bom. L. R. 527,

A. C. J. herself in that case. The last para. of Macleod C. J.'s judgment in 22 Bom. L. R. 1400 explains the law in the Bombay Presidency. 'In this Presidency the widow has implied authority to adopt from the date of her husband's death unless it can be shown that her husband had either expressly or impliedly revoked such authority. Therefore any conduct of the widow after the husband's death cannot affect the authority which she acquired at the time of his death.'

RAMU BALA SANKPAL v. JANA DALA PATIL — This is the principle on which Macleod C. J. decides. The allegation of the defendant is that Chandra began to lead an unchaste life *after* her husband's death. Hence the implied authority to adopt which she had acquired on her husband's death cannot go away. This proposition is irrespective of the circumstances whether the parties belong to the three regenerate classes or otherwise. Chandra had acquired an implied authority to adopt at the time of her husband's death when she was not at all unchaste and she has exercised it by performing the ceremonies in the proper manner by delegation which she is entitled to do under law as discussed by me above. . . . plaintiff urges that ceremonies were performed by delegation but as the parties are sagotra no religious ceremony would be necessary. He relies on *Bal Gangadhar Tilak v. Shrinivas Pandit*, 17 Bom. L. R. 527. The relevant remarks are at p. 544. It was held therein that the performance of the ceremony of *datta homam* is not essential among Brahmins to the legal validity of the adoption where the adopted son belongs to the same gotra as the adoptive father. He also relies on another case in *Govind Prasad Lalita Prasad Mishra v. Rindabai kom Lalita Prasad*, 49 Bom. 515. It is also held in that case that the ceremony of *datta homam* is essential to an adoption amongst the Brahmins unless the adoptive father and son belong to the same gotra. Thus the rulings in both these cases are very clear and they are applicable in the present case. Certainly in this case plaintiff has satisfactorily proved the fact of the performance of the necessary religious ceremonies by delegation. Hence the question of necessity of performing the religious ceremonies does not arise in this case. Still, however, the parties in this case being sagotra, no *datta homam* ceremony was necessary."

On appeal the Assistant Judge found that the alienations by Chandra were without legal necessity and that she was living in unchastity at the time of the adoption. He held that an unchaste widow in the regenerate classes was not capable of making an adoption and therefore the adoption of the plaintiff by Chandra was not valid in law. In dismissing the suit the learned Judge observed as follows :—

"In *Sayamatal Dutt v. Saudamini Dasi* (5 Beng. L. R. 362) it has been held that a Hindu widow who has become unchaste is incompetent to receive a son in adoption. Sarkar in his *Hindu Law*, 5th edn., at p. 536, after considering the text of Parasara observes that unchastity becomes very grave if followed by conception, and that then a widow's right to a husband's estate must cease. In fact from the time of her fall, she ceases to be the lawful heir to her husband. This is applicable to twice-born castes and not to Shudras. In the light of this, the decision of the Bombay High Court in *Basvant Mushappa v. Mallappa Kallappa Hubli*, 22 Bom. L. R. 1400, relied upon by Mr. Apte for the respondent, is not applicable. In that case it is no doubt held that under the Hindu law in the Presidency of Bombay among Shudras a widow though unchaste can make a valid adoption. Macleod C. J. in his judgment has, at p. 1402, observed in respect of *Sayamatal v. Saudamini*, referred to above, as follows :—

'The defendants relied on the authority of *Sayamatal Dutt v. Saudamini Dasi* in which an adoption was declared void by reason of the unchastity of the giver, but the ground of that decision was that the widow could not perform the necessary religious ceremonies. The parties in this case are Shudras and, therefore, that argument does not apply.'

To my mind, as Bala Lingu and Chandra belonged to a regenerate class of Kshatriyas, the unchastity of Chandra prevented her from adopting to her husband and the decision in *Sayamatal Dutt v. Saudamini Dasi*, 5 Beng. L. R. 362, is applicable.



In the circumstances, I hold that the adoption of the plaintiff by Chandra is not valid in law."

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The plaintiff appealed to the High Court:

A. G. *Desai*, for the appellant.

G. N. *Thakor*, with P. B. *Gajendragadkar*, for the respondent.

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MACKLIN J. These two appeals arise out of two suits brought by an adopted son against certain alienees to have the alienations made by his adoptive mother before his adoption set aside on the ground that they were not made for legal necessity. The defence alleged that there was in fact legal necessity and that the adoption of the plaintiff, if proved, was invalid, because his mother was unchaste, and an unchaste widow according to Hindu law is not competent to adopt. Both the Courts have found want of legal necessity. The trial Court found that the unchastity of the plaintiff's adoptive mother, which admittedly resulted in the birth to her of an illegitimate son more than twenty years before the adoption and some four years after her husband's death, had in fact ceased before the adoption took place. It also found that even on the assumption that she was still unchaste at the time of the adoption, the unchastity would not have the effect of making the adoption invalid, because in the first place she had delegated the ceremonies which otherwise she would have had to perform but which owing to unchastity she was incompetent to perform, and in the second place no ceremonies were necessary apart from the ordinary giving and taking, since the adopted son and his adoptive father belonged to the same gotra. The Assistant Judge who heard the appeal found on the facts that the unchastity continued up to the time of the adoption, at which time he thought on the evidence that the widow was still living with one Naru Bhagoji, the father of the illegitimate son of many years before; and he thought that on a true view of the Hindu law and the authorities cited on the point an unchaste widow in the regenerate classes (to which the parties here belong) would not be capable of adopting. But he left untouched the argument relied upon by the lower Court as to the parties being of the same gotra and of the adoption therefore requiring no ceremonies to be performed by the widow. The order of the trial Court was therefore set aside and the suits were dismissed. In these appeals by the plaintiff we come to the conclusion that the adoption must be upheld.

It seems that on the evidence the learned Assistant Judge was right in his conclusion that the widow was living in unchastity at the time of the adoption. There is not very much by way of authority one way or the other on the question of an unchaste widow's power to adopt. On behalf of the alienees in this case it has been contended, on the general principles of Hindu law as laid down in the texts, that any implied authority to adopt which the widow might be taken to possess can no longer be implied when she behaves in this way, since it is her duty to continue to be as chaste as she was in the lifetime of her husband. But there is the recent current of decisions to the effect that a widow in the Bombay Presidency has an inherent right to adopt unless prohibited by her husband (whatever may be the origin of that right, whether implied authority or something else); and it is therefore urged that

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the inherent right to adopt ought not to be assumed to continue in the case of a woman who has ceased to live in the way that her husband would expect her to live. It is argued that the whole idea of an unchaste widow performing a religious act of this kind in a state of unchastity, even though it be for the benefit of her husband's soul, is repugnant to Hindu ideas; that a woman of this sort is a degraded woman within the meaning of the texts; and that though the authorities say that a woman who becomes unchaste after the death of her husband does not forfeit any property of which she may have become vested on his death, nevertheless there is no authority to be found against her forfeiting her power to adopt in similar circumstances.

It seems however that the authorities, so far as they go, are against her forfeiting her power to adopt. There is a case of 1870 which has been relied upon by the learned Assistant Judge for his view that a widow's unchastity disentitles her from adopting: *Sayamalal Dutt v. Saudamini Dasi*<sup>1</sup>. That was a case of a woman in the regenerate classes making an adoption while living in concubinage and in a state of pregnancy resulting from that concubinage; and the learned Judge who tried the case came to the conclusion that she was incompetent for that reason to receive a son in adoption. But we are not bound by this case; and, with due respect, its authority is perhaps doubtful. It was a decision of a single Judge, and it appears from the judgment that the learned Judge received a good deal of assistance from one of the Court translators in elucidating the Hindu law. Moreover it was a stronger case than the one with which we have to deal at present, since the widow was at that time in a state of pregnancy. But the reasoning upon which that case proceeded, assuming it to be good authority, has been interpreted by a bench of this Court as based upon the widow's incompetency to perform the necessary ceremonies while in a state of unchastity: see *Basvant Mushappa v. Mallappa Kallappa*<sup>2</sup>. In that case it was held that the Bengal case could be distinguished upon the ground that ceremonies which the widow was incompetent to perform were necessary in the one but not in the other, the parties being Shudras. It is argued that this case has not been correctly decided; but it is at any rate binding upon us so far as Shudras are concerned, and the reasoning upon which it proceeded is also binding upon us. It would follow that if the difficulty of the ceremonies necessary in the case of the regenerate classes can be got over, then, so far as this Court is concerned, the adoption would not be regarded as invalidated by the widow's unchastity. That the difficulties arising out of the ceremonies can be got over is clear. Sir Dinshah Mulla, at p. 546 of his 9th edn. of "Hindu Law", says that the ceremony of *datta homam* may be performed by the parties who give and receive a boy in adoption, or the performance of it may be delegated by them to others; and therein he accepts the authority of this Court in *Lakshmibai v. Ramchandra*<sup>3</sup>. It is clear from the evidence in this case that the widow did in fact delegate to others that and other ceremonies. She says in her evidence that she did nothing but sit near the priest and delegated her duties to one Dnyanu. Dnyanu in his evidence says that he supplied the necessary materials to the priest. Apart

1 (1870) 5 Beng. L. R. 362.

s. c. 22 Bom. L. R. 1400.

2 (1920) I. L. R. 45 Bom, 459,

3 (1896) I. L. R. 22 Bom, 590,

from that it is a fact that the parties here are members of the same gotra ; and for members of the same gotra no ceremony beyond giving and taking is necessary even among Brahmins : see *Govindprasad v. Rindabai*<sup>1</sup> and *Bal Gangadhar Tilak v. Shrinivas Pandit*<sup>2</sup>.

The learned Assistant Judge stressed a passage from Sarkar's "Hindu Law" in which it is said that unchastity becomes very grave if followed by conception and that then a widow's right to her husband's estate must cease. The learned Judge takes this to mean that from the time of her fall she ceases to be the lawful heir to her husband if she belongs to a twice born caste, and he goes on to say that in the light of this the decision of the Bombay High Court in *Basvant v. Mallappa* is not applicable to the present case. Whether any inference bearing on the present question can be drawn from the position of a widow as regards inheritance to her husband is, I think, doubtful. Merely because she lost the privilege of inheriting her husband's property, it would not necessarily follow that she lost the duty of adopting to him. But however that may be, the learned author cited in the Court below evidently takes a different view as regards the effect of a widow's unchastity on her power to adopt. In his Tagore Law Lectures of 1888 on the Hindu law of Adoption, 1916 edn., he says that the early cases, in particular *Sayamadal Dutt v. Saudamini Dasi*, were decided at a time when it was thought that unchastity in a widow divested her of the estate inherited by her from her husband, and that it is now settled by the Privy Council that subsequent unchastity is no cause for divesting her of the estate which is already vested in her : see *Moniram Kolita v. Kerry Kolitany*<sup>3</sup> and also *Parvati v. Bhiku*<sup>4</sup>. He concludes with the following sentence :—

"Considering, however, the present state of law as to the effect of a widow's unchastity, there is no cogent reason against an adoption by an unchaste widow, for it would rather be an act of self-sacrifice on her part."

And observations to much the same effect are made by Sir Ernest Trevelyan in his "Hindu Law", 2nd edn., p. 132, where he says :—

"As [however] a widow adopts, not for her own benefit, but for that of her deceased husband, it may seem hard that her want of chastity should deprive his manes of the benefits which, according to Hindu ideas, accrue from an adoption."

We think that there is no reason for holding in this case that the widow was incompetent to adopt the plaintiff. We must therefore set aside the decree of the lower appellate Court and restore that of the trial Court, with costs throughout in each of the appeals.

Decree set aside.

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1 (1924) I. L. R. 49 Bom. 515,

s. c. 27 Bom. L. R. 365.

2 (1915) L. R. 42 I. A. 135,

s. c. 17 Bom. L. R. 527.

3 (1879-80) L. R. 7 I. A. 115, 144.

4 (1867) 4 B.H.C.R. (A.C.J.) 25.

## SPECIAL BENCH—ORIGINAL CIVIL.

Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice Kania,  
and Mr. Justice Somjee.

In re RATANJI RAMAJI.

1941

August 25.

In the petition of RAMAJI ADAJI PAGI.\*

Minor—Joint Hindu family—Minor's share in undivided property—Sale of property by karta of family—Sanction of Court to such sale—Sale binding on minor's share—High Court—Original Side—Jurisdiction to accord sanction—Minor living outside town and island of Bombay but within Bombay Presidency—Such minor to be British subject—Minor to be made respondent to application—Guardian ad litem of the minor—Costs of guardian—Guardians and Wards Act (VIII of 1890), Sec. 3—Amended Letters Patent, 1865, cl. 17—Letters Patent, 1862, cl. 16—Supreme Court Charter, 1823, cl. 37—Practice and procedure.

The High Court of Bombay has, under its general jurisdiction, power to make an order appointing a guardian of the undivided property of a minor who is a member of a joint Hindu family and who resides within the limits of its original jurisdiction, that is to say the town and island of Bombay. Such jurisdiction extends also to a minor in a joint Hindu family, who is a British subject and who resides within the presidency of Bombay. It is derived from the prerogative of the Crown as *parens patriæ* to protect subjects of the Crown who cannot protect themselves.

In re *Manilal Hargovan*<sup>1</sup> and *Mahadeo Krishna Rupji*, In re<sup>2</sup>, followed.  
*Gharib-ul-lah v. Khalak Singh*<sup>3</sup>, explained.

Where the karta of a joint Hindu family applies to the Court for an order sanctioning a sale of joint family property in which the minor coparcener has a share, the Court, before according its sanction to the sale, should make the minor respondent to the petition and he should be represented by a guardian *ad litem*. Such guardian *ad litem* should normally be an officer of the Court, who should satisfy himself as to the interest of the minor. He may require further evidence as to the alleged necessity for the sale, and he may require further evidence as to the price being a good one, and he will also have to consider how the proceeds of sale are to be dealt with. If he requires any funds to enable him to look into the matter properly, the party seeking the order must provide those funds.

THIS was an application under the inherent jurisdiction of the High Court.

The property in question was situated at Navarangpura in City Mahal in the District of Ahmedabad. It belonged to a joint family, of which the petitioner Ramaji Adaji was the karta or manager. The family consisted of two brothers, Ramaji and Ugraji and their sons. Ramaji had five daughters, all of whom were married, and four sons, Somaji, Ratanji, Shankar and Chhagan. Of these the last three were minors. Somaji, who had attained majority, had two sons, Chanaji and Manilal, who were minors. The petitioner's brother Ugraji had four daughters, one of whom was unmarried, and two sons Ishwar and Khushal, both of whom were minors.

\* Miscellaneous No. 118 of 1941.

1 (1900) I. L. R. 25 Bom. 358,  
s. c. 3 Bom. L. R. 411, F.B.

2 [1937] Bom. 432,

s. c. 38 Bom. L. R. 1286.

3 (1903) L. R. 30 I. A. 165,  
s. c. 5 Bom. L. R. 478.

The joint family had no cash, but owned other immoveable properties, the net income of all of which came to Rs. 250 per year. The income was insufficient to meet the expenses of the joint family and the education of minor children.

The debts incurred by the karta of the family amounted to Rs. 10,338 secured by mortgages on different items of the family property. The debts were incurred for legal necessity, viz. to meet the deficiency in the maintenance and marriage expenses of the members of the family.

Among the properties belonging to the family was survey number 201, which is the subject-matter of the present petition. On April 1, 1941, the petitioner agreed to sell the survey number to one Dr. Ratilal for the sum of Rs. 66,393. It admeasured 4 acres and 73 gunthas; and the sale price came to Rs. 3 per square yard. It fetched a net income of Rs. 150 per year. It formed a part of the Ellis Bridge Town Planning Scheme in Ahmedabad. It was alleged that the betterment charges of the plot amounted to Rs. 4,774; that it would have to pay higher assessment every year for its conversion from agricultural to non-agricultural use, and that a sum of Rs. 25,000 would be needed to erect a suitable building on the plot.

The petitioner agreed with the intending purchaser that he would obtain the necessary order of the Court sanctioning the sale and authorising him to execute the conveyance and other necessary documents to complete the sale on behalf of the minors.

Accordingly, on August 14, 1941, the petitioner made an *ex parte* application to the High Court in its inherent jurisdiction praying that the Court may be pleased to sanction the sale of the property, that the petitioner as manager and karta of the undivided Hindu family be appointed guardian of the right, title and interest of the minors in the property and as such guardian be authorised to sell the property for Rs. 66,393, that the petitioner be authorised to execute and register the conveyance and other necessary documents to complete the sale, and that he be authorised to pay the debts of the family.

The petition was in the first instance heard by Kania J.; but it was later placed for disposal before a special bench composed of Beaumont C. J., Kania J. and Somjee J.

The special bench heard the petition on August 22 and 25, 1941.

*Sir Jamshedji Kanga*, with *R. S. Parikh*, for the petitioner. The question that arises for decision is whether the Bombay High Court has under its inherent jurisdiction power to appoint a guardian of the property of a minor who is a member of a joint Hindu family, whose property is an undivided share in the family property, and who resides outside the town and island of Bombay but within the Province of Bombay.

A minor who is a coparcener in a joint Hindu family governed by the Mitakshara law has no separate interest in the undivided family property and no guardian of that property can be appointed under the Guardians and Wards Act, 1890. Under that Act a guardian could only be appointed of a minor's separate property: *Mulla's Hindu Law*, 8th edn., p. 567, s. 519, and *Gharib-ul-lah v. Khalak Singh*<sup>1</sup>.

<sup>1</sup> (1903) L. R. 30 I. A. 165,  
s. c. I. L. R. 25 All. 407,

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The Ahmedabad Court within whose jurisdiction the property is situate and the minor resides has no jurisdiction in the matter, the District Courts being confined to such jurisdiction as is conferred on them by the Guardians and Wards Act : *Besant v. Narayaniak*<sup>1</sup>. No suit can be filed under s. 9 of the Civil Procedure Code, 1908, in the District Court.

The power of the Chartered High Courts in the matter of guardianship has been saved by s. 3 of the Guardians and Wards Act, and the High Court may in the exercise of its inherent jurisdiction appoint a guardian even of an undivided interest of a minor member in a joint Hindu family property : Mulla's Hindu Law, p. 575, s. 537.

The jurisdiction of the High Court in the matter of minors is that conferred by cl. 17 of the amended Letters Patent of 1865. By that clause the Bombay High Court has jurisdiction in the matter of minors over all subjects in the Presidency, the power and authority being that which was vested in the High Court under the Letters Patent of 1862. Clause 16 of the Letters Patent of 1862 which dealt with the matter of minors in turn conferred the same power as that possessed by the Supreme Court established by the Supreme Court Charter of 1823 and gave the jurisdiction over infants whether "within or without the Presidency."

The Charter of 1823 establishing the Supreme Court of Bombay by cl. 37 conferred on that Court jurisdiction over the persons and estates of infants similar to that of the Court of Chancery in England. This clause contains no territorial limits within which the jurisdiction could be exercised. By cl. 5 of the Charter of 1823 the Supreme Court had jurisdiction over all the territories "which are now or hereafter may be subject to the Government of Bombay".

Clauses 23 to 36 of the Charter of 1823 relate to jurisdiction of the Supreme Court in suits and actions and the procedure to be followed in such suits and actions. Clause 37 and the subsequent clauses relate to jurisdiction over infants and lunatics, and matters criminal, probate, admiralty, etc.

The wording of cl. 23 is not clear, but even if it be held that in suits and actions the jurisdiction of the Court was limited to the town and island of Bombay and outside the town and island it extended to British subjects only, that is no warrant to extend that limitation to the jurisdiction under cl. 37 over infants and lunatics. Clause 37 should be read with cl. 5. The Charter of 1823 was issued under powers conferred by 4 Geo. IV, c. 71. By s. 7 of that statute the Supreme Court at Bombay was to have the same powers and authority as that "now subsisting at Fort William in Bengal with full power to exercise jurisdiction both over natives and British subjects within the territories now or hereafter may be subject to the Government of Bombay".

Section 14 of 13 Geo. III, c. 63, under which the Calcutta Charter was granted, does not restrict the jurisdiction of the Supreme Court of Fort William in Bengal beyond the local limits of Calcutta to British subjects only.

In Bombay it is now well established that the High Court in its general jurisdiction under cl. 17 of the Letters Patent of 1865, and apart from the

<sup>1</sup> (1914) L. R. 41 I. A., 314,  
s. c. I. L. R. 38 Mad. 807,`

s. c. 16 Bom. L. R. 625.

Guardians and Wards Act, has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family even where the minor's property is an undivided share in the family property and to sanction the alienation of the property if it is satisfied that the sale is for the benefit of the minor : *Re Jagannath Ramji*<sup>1</sup> ; *In re Manilal Hargovan*<sup>2</sup> ; *Narsi Tokerssey & Co. v. Sachindranath Gajanan*<sup>3</sup> ; and *Mahadev Krishna Rupji*, *In re*<sup>4</sup>.

All these cases relate to minors and property within the town and island of Bombay. The question is whether cl. 17 extends to places and minors within the Province of Bombay but outside the limits of the ordinary original civil jurisdiction of the Bombay High Court. There is nothing in cl. 17 of the Letters Patent of 1865 to limit the jurisdiction to all persons within the town and island of Bombay and to European British subjects outside the town and island but in the Province of Bombay.

In *Taruchandra Ghose*, *In re*<sup>5</sup> the Calcutta High Court acting under its Letters Patent, which is in the same terms as cl. 17 of our Letters Patent, exercised jurisdiction over minors and property outside the limits of its ordinary original civil jurisdiction, but in *In the matter of Phonindrachandra Set*<sup>6</sup> the same Court denied the existence of such jurisdiction over lunatics following an earlier decision in *In the matter of Srish Chunder Singh*<sup>7</sup>.

The cases of *Maharani of Baroda v. Kasturbhai*<sup>8</sup> and *In re Govindan Nair*<sup>9</sup> showed that the powers of the High Court under cl. 5 of the 1823 Charter and its power to issue a writ of *habeas corpus* were not limited to the limits of the ordinary original civil jurisdiction of the High Court and on the analogy of the above jurisdictions the Court had jurisdiction over all infants throughout the Province of Bombay and such jurisdiction outside the town and island of Bombay was not limited to European British subjects only.

The jurisdiction of the High Court over infants was similar to that exercised by the Chancery Court in England. The Chancery Court has exercised jurisdiction over infant British subjects residing anywhere in the world : *Hope v. Hope*<sup>10</sup>. If the Court has jurisdiction the difficulty of enforcing the order is no bar to making one. In *In re Willoughby (an Infant)*<sup>11</sup>, the Chancery Court exercised jurisdiction over and appointed guardian of a minor British subject, domiciled and resident in France, there being no property in England. In the present case the minor and the property are within the Province of Bombay, within the Court's jurisdiction. See *In re the Estate of H. G. Meakin*<sup>12</sup>.

The sale of property is clearly for the benefit of the minor. Orders in five similar cases have been made by this High Court. They were all made *ex parte*.

1 (1893) I. L. R. 19 Bom. 96.

2 (1900) I. L. R. 25 Bom. 353,  
s.c. 3 Bom. L. R. 411, F.B.

3 (1929) I. L. R. 54 Bom. 75,  
s.c. 31 Bom. L. R. 1009.

4 [1937] Bom. 432,  
s.c. 38 Bom. L. R. 1286.

5 (1929) I. L. R. 57 Cal. 533.

6 (1930) I. L. R. 58 Cal. 919.

7 (1893) I. L. R. 21 Cal. 206.

8 (1934) I. L. R. 58 Bom. 729,  
s.c. 36 Bom. L. R. 454, s.B.

9 (1922) I. L. R. 45 Mad. 922.

10 (1854) 4 De G. M. & G. 328.

11 (1885) 30 Ch. D. 324.

12 (1896) I. L. R. 21 Bom. 137.

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*M. C. Setalvad*, Advocate General, *amicus curiæ*. The Court has no power to appoint a guardian of an undivided share of a minor in joint family property. The power contained in cl. 17 of the Letters Patent of 1865 is to appoint a guardian of the "estate of a minor". This will not entitle the Court to appoint a guardian of the undivided interest of a minor in a coparcenary : *Gharib-ul-lah v. Khalak Singh*<sup>1</sup> and *Bindaji v. Mathurabai*<sup>2</sup>. In the latter case *In re Manilal Hargovan*,<sup>3</sup> which held that such a guardian could be appointed, was not referred to.

The cases referred to and the case of *In re Bijaykumar Singh Buder*<sup>4</sup> were cases where the minor and the property were within the original civil jurisdiction of the High Court. On the true construction of cl. 17 of the Letters Patent, the High Court has no jurisdiction if the minor is not within the town and island of Bombay. The power over infants is the same as that vested in the Supreme Court under the Charter of 1823. The jurisdiction of the Court under cl. 23 of that Charter, which closely followed the words of 13 Geo. III, c. 63, s. 14, was limited to British subjects which meant European British subjects and to those in the service of the Crown. The jurisdiction under cl. 24 in respect of "inhabitants of Bombay", i.e. all persons, was confined to suits.

Clause 37 dealing with minors provides for the nature of the jurisdiction and not the persons over whom it could be exercised. To determine who can be governed by cl. 37 one has to go back to cl. 23, which alone defines the general jurisdiction of the Court and the persons amenable to it. It is limited to British subjects as then understood and servants of the Crown.

The use of the words "whether within or without Bombay" in cl. 16 of the Charter of 1862 indicates that the operation of cl. 37 of the 1823 Charter was limited to the island of Bombay.

Clause 37 does not impose a territorial limit or a limit as to the persons subject to the jurisdiction but the earlier clauses do contain such a limitation. The jurisdiction of the Supreme Court is general in the island of Bombay ; outside the island it is a special jurisdiction only over British subjects.

There is no reported decision in Bombay appointing a guardian of a minor living outside the ordinary original civil jurisdiction except the case of *In re the Estate of H. G. Meakin*<sup>5</sup>. That was a case of a European British subject ; and letters of administration were obtained in Bombay and the property was with the Administrator General of Bombay. In Calcutta in the case of *In the matter of Sirish Chunder Singh*,<sup>6</sup> Sale J. disapproved of the exercise of this jurisdiction ; Lord-Williams J. in *Taruchandra Ghosh*, *In re* disapproved the above case. There was there no question of joint family property. In *In the matter of Phanindrachandra Set*,<sup>7</sup> *Taruchandra Ghose*, *In re* was not followed. The only case from Allahabad is that of *In the matter of Govind Prasad*<sup>8</sup>. The Court held it had jurisdiction but refused to exercise it. The report does not show where the property was situate.

1 (1903) L. R. 30 I. A. 165,  
s. c. 5 Bom. L. R. 478.  
2 (1905) I. L. R. 30 Bom. 152,  
s. c. 7 Bom. L. R. 809.  
3 (1900) I. L. R. 25 Bom. 353,  
s. c. 3 Bom. L. R. 411, F.B.

4 (1931) I. L. R. 59 Cal. 570.  
5 (1896) I. L. R. 21 Bom. 137.  
6 (1893) I. L. R. 21 Cal. 206.  
7 (1929) I. L. R. 57 Cal. 533.  
8 (1930) I. L. R. 58 Cal. 919.  
9 (1928) I. L. R. 50 All. 709.



There is no decision from Madras dealing with the point in issue. The decision in *Raja of Vizianagráam v. Secretary of State for India*<sup>2</sup> deals with the meaning of the words "British subject" in the early Acts and Charters and also with the question of jurisdiction of High Courts in the matter of guardianship of the person of minors outside the original jurisdiction of the High Court. The Court held it had jurisdiction. That case is against the view I am submitting and is inconsistent with *In the matter of Phanindrachandra Set*. It is not permissible to enlarge the scope of the operation of the Charter of 1823 by reference to the extended meaning acquired later by the words "British subject". The jurisdiction must be limited to that exercised in 1823.

Reference was also made to *In re the Justices of the Supreme Court of Judicature at Bombay*<sup>3</sup> to show that the Supreme Court had no power to issue a writ of *habeas corpus* except within its local limits and outside its local limits in reference to European British subjects or servants of the Company. The same reasoning would apply to the present case.

In *the matter of Ameer Khan*<sup>4</sup> it was unsuccessfully contended that the writ of *habeas corpus* could not be directed even to a British subject outside the jurisdiction.

In *In re Manilal Hargovan*<sup>5</sup> the jurisdiction was assumed with great hesitation. The main consideration for that decision was a desire not to "imperial title" to property. No such considerations apply here. The local Courts not having jurisdiction in the matter, the remedy is by way of legislation and not by way of the High Court assuming jurisdiction.

Sir Jamshedji Kanga, in reply. The case of *In re the Justices of the Supreme Court of Judicature at Bombay*<sup>6</sup> has been regarded as a decision as to the jurisdiction of the Supreme Court over the Company's Courts in the mofussil and over the officers of the Company's Courts. [The case of *In re Nataraj Iyer*<sup>7</sup> referred to.]

The ratio in *In re Manilal Hargovan* is that one coparcener has a right to sell his share, and that the Court should see that the minor's share is secured for him.

The cases of *Gharib-ul-lah v. Khalak Singh*<sup>8</sup> and *Bindaji v. Mathurabai*<sup>9</sup> were from the districts under the Guardians and Wards Act and therefore they do not affect the power of the High Court under cl. 17 of the 1865 Charter.

The case of *Balaji v. Sadashiv*<sup>10</sup> shows that once the Court sanctions the sale, the minor cannot afterwards challenge it.

BEAUMONT C. J. This is a petition intituled *In the matter of immoveable property situate at Navrangpura and In the matter of Ratanji Ramaji and others, all minors*. It sets out that the petitioner is the karta

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1 [1937] Mad. 383.

2 (1829) 1 Knapp 1,  
s.c. 12 E. R. 222.

3 (1870) 6 Beng. L. R. 392.

4 (1900) I. L. R. 25 Bom. 353,  
s.c. 3 Bom. L. R. 411, F.B.

5 (1829) 1 Knapp 1.

6 (1912) I. L. R. 36 Mad. 72.

7 (1903) L. R. 30 I. A. 165,  
s.c. I. L. R. 25 All. 407,  
s.c. 5 Bom. L. R. 478.8 (1905) I. L. R. 30 Bom. 152,  
s.c. 7 Bom. L. R. 809.

9 (1936) 38 Bom. L. R. 796.

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of a Hindu joint family, and that the coparcenary property is vested in him, his minor sons and grandsons and his brother and minor sons of his brother, all the minor coparceners being mentioned in the title of the petition. Then the petition sets out the property of the family, and alleges that certain debts have been incurred by the petitioner as karta on behalf of the joint family, the debts amounting approximately to Rs. 10,000. Then it is alleged that an offer has been obtained for the purchase of one item of the coparcenary property, being that mentioned in the title, for a sum of Rs. 66,000 odd, which is alleged to be a very good price, and that the purchaser in the contract has stipulated that the petitioner as guardian of the minors should obtain the necessary sanction of the Court for sale of the above land. Accordingly this petition was presented to the Court asking for the sanction of the Court to the sale of the property under the contract, and that the petitioner as manager and karta of the joint Hindu family be appointed guardian of the right, title and interest of the minors in the property, the subject-matter of the contract.

The petition was presented *ex parte* and it has been referred to a special bench, because it raises a question as to the jurisdiction of the Court, and we are much indebted to Sir Jamshedji Kanga, who has appeared for the petitioner, and to the Advocate General, who has been good enough to appear as *amicus curiæ* and argue against the petition, for the assistance they have rendered to the Court.

Substantially three questions arise. First, has the Court under its original jurisdiction power to make an order, such as is asked for, in the case of a minor residing within the limits of the original jurisdiction of this Court, that is to say, the Town and Island of Bombay? Secondly, if it has, does the jurisdiction extend to a minor resident in the Bombay Presidency, outside the Town and Island of Bombay? And, thirdly, if the Court has jurisdiction, ought it to exercise the jurisdiction in the present case? The second question is confined to minors resident in the Bombay Presidency, because that is the position of the minors in the present case, but I must not be taken as indicating any opinion as to what would be the position if the minors were resident outside the Presidency of Bombay.

With regard to the first point, there can be no question that jurisdiction has been exercised in the past by this Court to appoint a guardian of a minor resident within the Town and Island of Bombay entitled to an undivided interest in coparcenary property, and to sanction the sale of such property. The leading case is *In re Manilal Hargovan*<sup>1</sup>, in which the Court, following earlier decisions of this Court, appointed the karta of a Hindu joint family as guardian of the interest of a minor in the joint family property, and sanctioned the sale by the karta of the joint family property. That case was followed by this Court in *Mahadeo Krishna*, *In re*<sup>2</sup>, though in that case no order on merits was made, because the lower Court had declined to exercise jurisdiction, and this Court sent back the case to the lower Court with a direction that the jurisdiction should be exercised, and for determination of the matter on merits. The learned

<sup>1</sup> (1900) I. L. R. 25 Bom. 353,  
S. C. 3 Bom. L. R. 411, F.B.

<sup>2</sup> [1937] Bom. 432,  
S. C. 38 Bom. L. R. 1286.

Advocate General has argued that those cases are really inconsistent with the decision of the Privy Council in *Gharib-ul-lah v. Khalak Singh*.<sup>1</sup> In that case their Lordships were dealing with the appointment of a guardian of the interest of a minor in coparcenary property belonging to a Hindu joint family governed by the Mitakshara law under the Guardians and Wards Act, 1890; and, in the course of the judgment, their Lordships said (p. 170):—

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“It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property.”

Their Lordships in that case were dealing with the statutory jurisdiction arising under the Guardians and Wards Act; but the learned Advocate General argues that the reason given would extend equally to an order made by the Court under its inherent jurisdiction, the reason being that the appointment of a guardian of an undivided share in the immoveable property would be infructuous. For the reasons, which I will give later, I have no doubt that the power which this Court exercises over minors is the power derived from the prerogative of the Crown as *parens patriæ* to protect subjects of the Crown who cannot protect themselves; and, if that be the nature of the Court's jurisdiction, it is clear that it can only be limited as to subjects within the jurisdiction of the Court by the interest of the person to be protected. No doubt, an order, which is likely to be infructuous, would normally not be for the benefit of a minor; but, if the Court thinks that it is for the benefit of the minor, I have no doubt that it has jurisdiction to make such an order. On the authorities, and on principle, I see no reason to doubt that this Court can make an order, such as is asked for in this case, in respect of minors situate within the limits of the ordinary original jurisdiction of this Court.

The second question, whether this jurisdiction extends to minors, who are British subjects, residing outside the limits of such original jurisdiction, depends on the Charters which have conferred jurisdiction upon this Court. Under the Amended Letters Patent of 1865, cl. 17, it is ordained that “the High Court of Judicature at Bombay shall have the like power and authority with respect to the persons and estate of infants, idiots, and lunatics within the Bombay Presidency, as that which was vested in the said High Court immediately before the publication of these presents.” When one turns to the Letters Patent of 1862, which were in force at the time when the Amended Letters Patent were granted, one finds that cl. 16 of those Letters Patent ordained that “the High Court of Judicature at Bombay shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Presidency of Bombay, as that which is now vested in the said Supreme Court at Bombay.” That, no doubt, throws one back to the powers of the Supreme Court, and it is argued that the powers of the Supreme Court were limited to minors resident within the ordinary original jurisdiction. If that were so, I should be of

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opinion that cl. 17 of the Amended Letters Patent of 1865 and cl. 16 of the Letters Patent of 1862 conferred upon the High Court a more extensive jurisdiction than that which the Supreme Court had possessed, because both those clauses refer to minors within the Presidency of Bombay, and the only way in which on that hypothesis effect could be given to those words would be by holding that the Letters Patent conferred upon the High Court powers over infants, idiots, and lunatics within the Presidency of Bombay similar to those exercised by the Supreme Court within the Town and Island of Bombay. But, in my opinion, it is not correct to say that the Supreme Court's powers over minors were limited to minors within the Town and Island of Bombay. The power in relation to minors is granted by cl. 37 of the Supreme Court Charter of 1823, which follows immediately after cl. 36 conferring equitable jurisdiction upon the Supreme Court. By cl. 37 the Supreme Court of Judicature at Bombay was authorized to appoint guardians and keepers for infants and their estates, according to the order and course observed in that portion of Great Britain called England. I need not refer to the rest of the clause which deals with lunatics. Now, it will be observed that that clause imposes no territorial limitation. But it is argued that we ought to refer back to cl. 23, which confers jurisdiction on the Supreme Court in relation to civil suits, and it is said that that jurisdiction does not extend beyond the Town and Island of Bombay. In my opinion, there is no justification for limiting the words of cl. 37 conferring jurisdiction in respect of minors by reference to any other clause. The reference to the jurisdiction exercised in England seems to me to show that the jurisdiction, which it was intended to confer on the Supreme Court, was jurisdiction to exercise the powers of the Crown as *parens patriæ*, those powers being exercised in England at first by the Lord Chancellor, afterwards by the Court of Chancery, and at the present time by the Judges of the Chancery Division. In my view, cl. 37 conferred similar powers upon the Supreme Court; and, if that is so, there was no reason for restricting the powers to part only of the Bombay Presidency, since no other Court in the Presidency possessed such powers and no question of conflicting jurisdiction could arise. The powers now existing under the Amended Letters Patent, in my opinion, extend to persons under disability wherever in the Presidency they may be found, provided they are subjects of the British Crown. On that view of the matter, it is not necessary to consider the interesting and difficult question as to what exactly was meant in cl. 23 of the Charter of 1823 by the expression "British subjects," a question which was discussed at great length and with much learning by a bench of the Madras High Court in *Raja of Vizianagram v. Secretary of State for India*.<sup>1</sup> In my judgment, therefore, the jurisdiction of the Court to sanction a contract for the benefit of a minor extends, at any rate, to a minor resident within the Presidency of Bombay.

I then come to the third question, whether we ought in this case to make such an order as is asked for. I must confess, speaking for myself, that I cannot see the benefit of appointing the karta of the family as guardian of the share of the minors in the property to be sold. It seems to me that an application of this sort is analogous to applications, which are very common

1 [1937] Mad. 333.

in England, where a trustee, having power to sell property in which an infant is interested, comes to the Court to know whether he ought to exercise his power in a particular manner. The object of the application may be to save the trustee from possible actions for breach of trust in the future, or it may be to confirm the title of the purchaser. In cases of that nature it is the practice of the Judges of the Chancery Division by whom such applications are heard to consider very carefully whether the proposed sale, or whatever the transaction may be, is for the benefit of the minor, and, if so, to sanction the same. The result of sanctioning the transaction on behalf of a minor is to remove the disability of minority, and to place the parties in the same position as they would have been in if the minor was of age and approved the transaction. It seems to me that an analogous position arises when the manager of a joint Hindu family comes to the Court and asks it to sanction a sale as being for the benefit of a minor. The manager is not, of course, a trustee; but he has power to sell property, in which the minor is interested, for legal necessity or the benefit of the estate, without the consent of coparceners. Very frequently a purchaser insists on having the sanction of adult coparceners, so as to preclude them from challenging the sale in the future. A minor coparcener cannot consent because of his minority, and the object (as in the English cases) of coming to the Court and asking for its sanction on behalf of a minor is to remove the disability of minority and to protect the purchaser from attack by the minor after attaining majority, and how the position is improved by appointing the karta guardian of the minor's property, I do not follow. However, the appointment of a guardian of the share of a minor in the particular property to be sold cannot generally do any harm. As I have no doubt the Court has jurisdiction, and the contract in this case requires the appointment of the karta as guardian, I think we may make the appointment.

I am told that applications of this sort are not uncommon, and that they are normally made *ex parte*, as is this application. I have no doubt that learned Judges in Chambers have always taken great care in seeing that the contract is one beneficial to the minor, because this Court both in *In re Manilal Hargovan* (supra) and *In re Mahadeo Krishna* (supra) sounded a note of warning against making orders of this sort without due care. But, in my judgment, orders of this nature ought not to be made *ex parte*. We are, as I have said, exercising jurisdiction which is exercised in England by the Judges of the Chancery Division, and I am very certain that no Judge of the Chancery Division would make an order, dealing with property in which a minor was interested, behind the back of the minor. In my opinion, we ought to follow the practice prevailing in England, and in a case of this sort the minors should be made respondents to the petition, and should be represented by a guardian *ad litem*. Normally I think the guardian *ad litem* should be an officer of the Court, because it would be difficult in most cases to find an independent member of the family to consider the interest of the minor. The guardian *ad litem* must satisfy himself as to the interest of the minor. He may, of course, require further evidence as to the alleged necessity for the sale, and he may require further evidence as to the price being a good one, and he will also have to consider how the

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proceeds of sale are to be dealt with. If he requires any funds to enable him to look into the matter properly, the parties seeking the order must provide those funds. The object of asking for orders of this sort is to enable the joint family to get a better price for its property, and they cannot complain, if they have to pay for the privilege.

In the present case the petition should be amended by making the minors respondents, and they should appear by a guardian *ad litem*. We appoint Mr. Kirtikar to act as guardian *ad litem*. Having regard to the discussion in this Court and to the very clear evidence, that this is a beneficial sale, and having regard to the undertaking given by the karta, through Sir Jamshedji Kanga, that the minors' share in the proceeds of sale not applied in payment of debts will be sent to the Accountant General, for the account of the minors, probably the guardian *ad litem* will not require to go into the matter any further. But in that case he ought either to appear by counsel and express approval of the sale, or to make an affidavit to that effect. If he does not approve, his opinion will, naturally, be considered by the Court. I notice in the contract that part of the purchase money is to remain on mortgage. I see no objection to that. It is only Rs. 26,000, and, of course, the share of the minors in that amount cannot be sent to the Accountant General until it is received.

Subject to those matters we can make an order.

KANIA J. The matters involved in this petition may be considered under four heads :

(1) Whether the High Court has original jurisdiction to appoint a guardian of the property of a minor, who is resident outside its original civil jurisdiction and whose property is also outside the same but within the Bombay Presidency.

(2) Whether a guardian of a minor member of a joint and undivided Hindu family may be appointed under the original civil jurisdiction of the High Court.

(3) Whether, assuming that the High Court has jurisdiction, an alternative relief could be granted by the Court, having jurisdiction over the place where the minor resides or has property.

(4) Assuming that the Court has jurisdiction, should it exercise it and grant sanction for the sale?

In dealing with the first point, the question of jurisdiction has to be considered under the Guardians and Wards Act, 1890, or the general jurisdiction of the High Court founded on the Charter establishing the same. It is clear that the application being for the appointment of a guardian of a minor's interest in immoveable property, when there is a joint Hindu family, no application could be made under the Guardians and Wards Act. All argument is set at rest on that point by the Judicial Committee of the Privy Council in *Gharib-ul-lah v. Khalak Singh*<sup>1</sup>. The jurisdiction of the High Court under the Charter is expressly saved by the last portion of s. 3 of the Guardians and Wards Act. In order, therefore, to determine whether

the High Court has jurisdiction under the first heading, it is necessary to refer to its Charter.

The Supreme Court was first established in India at Fort William in or about 1772 in pursuance of 13 Geo. III, c. 63. It was established in Bombay in pursuance of 4 Geo. IV, c. 71, and the Charter establishing the Supreme Court was granted in 1823. It is relevant to refer to this Charter, because the later Charters refer to the jurisdiction of the Supreme Court originally established. In the order of dates, the High Courts Act was passed in 1861, and ss. 8 and 9 give authority to the Sovereign to establish a High Court under the Royal Charter. In pursuance of that, the Charter of 1862 was granted. Clause 16 of that Charter relates to the jurisdiction over minors. Then came the Charter of 1865, under which the High Court is functioning at present, and cl. 17 relates to minors. It provides that the High Court shall have the like power and authority with respect to the persons and estate of infants, as that which was vested in the High Court before the publication of those presents. It is to be noticed that in this clause there is a clear reference both to "persons" and "estate." Clause 16 of the Charter of 1862 similarly refers both to "persons" and "estates" of infants, idiots and lunatics, and mentions that the High Court established shall have the like power and authority as that which was vested in the Supreme Court at Bombay. Clause 37 of the Charter of 1823, which has been quoted in the judgment of the learned Chief Justice, does not specify any limitation on jurisdiction on the ground of residence or property of the infants or lunatics. By cl. 36 the High Court was invested with the powers exercised by the Court of Chancery in England. If these clauses were read by themselves, there appears no doubt that the High Court had jurisdiction which was vested in the Crown as *parens patriæ* that is over every person who was a minor and who owed allegiance to the Crown. In that view, wherever the minor be, or wherever his estate be, the High Court has jurisdiction over him. We are indebted to the learned Advocate General for putting before us the different aspects of the Charter. It was pointed out by him that cl. 23 contained a marginal note "The Jurisdiction of the Court defined." He pointed out that the jurisdiction of the Court was defined by cl. 23, while the subsequent clauses only stated the different natures, as contrasted with the extent of the jurisdiction of the Court. This argument overlooks the point that marginal notes do not control the interpretation of statutes and do not form part of the statutes. This was pointed out in *Thakurain Balraj Kunwar v. Rae Jagatpal Singh*.<sup>2</sup> Moreover, it should be noticed that the jurisdiction of the Court defined in cl. 23 does not in any way control the general words in cl. 37. Indeed, cl. 23 relates to suits and matters of civil nature, while cl. 37 is founded on the principle that the Sovereign stands *in loco parentis* to all minors.

If, therefore, the question has to be considered on the construction of the High Courts Act and the different Charters, it appears that the High Court has jurisdiction over minors wherever they be, provided they owe allegiance to the Sovereign. On this point numerous authorities were cited. I shall briefly consider them.

1 (1904) L. R. 31 I. A. 132, s. c. 11 Bom. L. R. 516.

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S. B. I shall first deal with the English cases. In *Hope v. Hope*<sup>1</sup> it was held that the Court had jurisdiction to appoint a guardian of a British child who was born outside; and in *In re Willoughby (an Infant)*<sup>2</sup> it was held that the Court had jurisdiction to appoint a guardian of a child who was English by nationality, although French by domicile. So far as Indian cases are concerned, in Bombay there is no authority. In *Re Jagannath Ranji*<sup>3</sup> Mr. Justice Starling considered that the Court of Chancery in England had jurisdiction to appoint guardians of infants, whether such infants had property or not. In *In re the Estate of H. G. Meakin*<sup>4</sup> the question of the appointment of a guardian arose where the minors were at Poona, and one of them was in England. The parties were British subjects, but letters of administration to the estate of the deceased parent were granted in Bombay and the property was with the Administrator General in Bombay. It may, therefore, be considered that in that case the property of the minor was within the jurisdiction, and the larger question did not arise. Our attention is drawn to three decisions of the Calcutta High Court. In *In the matter of Srish Chunder Singh*<sup>5</sup> the Court refused to appoint a guardian of the person and property of an infant who was not an European British subject and who was living outside the limits of the ordinary original civil jurisdiction of the Court, there being testamentary guardians in existence and there being no application to remove them. It was held that there was no precedent and there being no difficulty in administration the summary procedure cannot be availed of. The words of the Charter are not construed. The jurisdiction under the Guardians and Wards Act was considered, and it was pointed out that as there were testamentary guardians, the Court would not appoint a guardian under that jurisdiction. In *Taruchandra Ghosh*, *In re*<sup>6</sup> an *ex parte* order was made appointing a guardian where the minor and his property were outside the limits of the ordinary original jurisdiction of the Court; but it must be pointed out that the case was governed by the Dayabhaga law, and the estate of the minor was a divided share received on partition. This aspect of the case has to be borne in mind in considering the second head to be dealt with here. In *In the matter of Phanindrachandra Set*<sup>7</sup> the decision in *Taruchandra Ghosh*, *In re* (supra) was not followed and impliedly disapproved, although in terms it was distinguished. It was a case of a lunatic. It was considered that s. 14 of 13 Geo. III, c. 63, limited the jurisdiction to persons within the area of Fort William, and for that purpose the learned Judge quoted a portion of that particular section. It may be noticed that the whole of the section does not appear to have been fully looked at and the words of the clauses relating to minors and conferring the Chancery jurisdiction are not scrutinised. In *In the matter of Govind Prasad*<sup>8</sup> it was held that the Court had jurisdiction in such a case, but for reasons considered in the judgment it did not consider it expedient to exercise it. In Madras there are two interesting decisions, which discuss the clauses of the Charter in detail.

1 (1854) De Gex M. & G. 328, 344.

2 (1885) 30 Ch. D. 324.

3 (1893) I. L. R. 19 Bom. 96.

4 (1896) I. L. R. 21 Bom. 137.

5 (1893) I. L. R. 21 Cal. 206.

6 (1929) I. L. R. 57 Cal. 533.

7 (1930) I. L. R. 58 Cal. 919.

8 (1928) I. L. R. 50 All. 709.



They are *Raja of Vizianagram v. Secretary of State for India*<sup>1</sup> and *In re Govindan Nair*.<sup>2</sup> In the last case the question was in respect of the power of the Court to issue writs of *habeas corpus* outside Presidency Towns. In the course of his judgment Schwabe C. J. relied on the jurisdiction of the King's Bench Division in England to determine the limits of the High Court's jurisdiction. He observed (p. 926) :—

"This Court has, however, succeeded under the High Courts of Judicature in India Act, 24 and 25 Vic., C. 104, and the Letters Patent issued thereunder to all the powers of the Supreme Court of Madras."

It was held that the Court had jurisdiction to issue writs of *habeas corpus* outside Presidency Towns. In a later Privy Council case it has been held that this jurisdiction has been limited by s. 491 of the Criminal Procedure Code, but that does not affect the interpretation of the clauses of the Charter. In *Raja of Vizianagram's* case, in a carefully considered judgment, there is an elaborate discussion about the construction of the different clauses of the Charter relating to infants. The Court held that the jurisdiction of the Supreme Court over infants, which the High Court inherited, was not limited to the City of Madras, and, outside the city limits, to European subjects only, but it extended to the native Indians outside the City of Madras. The Court then proceeded to further consider whether the expression "British subjects" found in the original Charter had an enlarged meaning by reason of the Crown taking over the possessions of the East India Company so as to include Indian subjects also. In the opinion of the Court the meaning of that phrase was widened to that extent. That case is therefore a direct authority in support of the applicant's contentions. In *Maharani of Baroda v. Kasturbhai*<sup>3</sup> the Bombay High Court had occasion to consider the power of the Court to direct its Sheriff to execute its warrant outside the jurisdiction. That is not a case dealing with cl. 37, although certain observations in that case support the conclusion that the Court had in certain matters jurisdiction under the Charter beyond the limits of its original civil jurisdiction. The Advocate General further drew our attention to *In re the Justices of the Supreme Court of Judicature at Bombay*.<sup>4</sup> In that case the question was to execute a writ of *habeas corpus* issued by the High Court in respect of two persons, one being the gaoler at Thana and the other a resident of Poona. There is no judgment, but the arguments are set out *in extenso*. The order of the Privy Council tendering advice to the Crown is only printed. The conflict there was between the order of the High Court and the execution thereof by the Courts of the Company as it then existed. It does not deal with the jurisdiction of the High Court over minors beyond the limits of its original civil jurisdiction.

In this state of case-law, it appears that there is nothing in the words of cl. 37 to exclude infants, who are outside the limits of the ordinary original civil jurisdiction of the Court, but who are stated in this case to be within the Bombay Presidency from its operation. The weight of judicial decisions is in favour of that view.

1 [1937] Mad. 383.

2 (1922) I. L. R. 45 Mad. 922.

3 (1934) I. L. R. 58 Bom. 729,

s.c. 36 Bom. L. R. 454, F.B.

4 (1829) 1 Knapp 1.

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Coming to the second head, under which can be considered the appointment of a guardian of a minor member of a joint and undivided Hindu family, the question is somewhat intricate. It has been pointed out by the Privy Council in *Gharib-ul-lah v. Khalak Singh*<sup>1</sup> that as there is no separate property of a minor in a coparcenary, there is no jurisdiction of the Court to appoint a guardian of such property under the Guardians and Wards Act. That decision does not touch the question of the general jurisdiction of the High Court founded on the Charter establishing the same. The jurisdiction of the mofussil Courts is confined to what is conferred on them by the different Acts of the Legislature. Apart from the Guardians and Wards Act the Courts in the districts have no jurisdiction in respect of the minor's property or person on the civil side. Therefore, the Court at Ahmedabad in this case has no jurisdiction to appoint a guardian of the undivided interest of the minors' property.

The question of the jurisdiction of the High Court on its original side in respect of infants in Bombay came to be considered fully in *In re Manilal Hargovan*<sup>2</sup>. The Court appointed a guardian of the property of the minor on the ground that by long practice it was permitted and to question the jurisdiction might upset many titles to properties. It accorded its sanction to the sale of the whole property on the terms and conditions therein mentioned. In that case the Court was asked to make the appointment of a guardian of the interest of a minor when he was a member of a joint and undivided Hindu family. In the course of argument Sir Lawrence Jenkins inquired why the karta wanted to be appointed a guardian, since as manager of the family he had a right to deal with the family property. The report shows that counsel urged that the person who desired to purchase thought that he would get a better title if a guardian of the minor's share was appointed and the Court's sanction given to the sale, and that the minor could not thereafter question the sale as he might do if it were made by the manager in that capacity alone. Sir Lawrence Jenkins pointed out that that was the difficulty in the way of granting the application, as that would take away the minor's right thereafter to question the sale, if he thought proper to do so. Counsel, who appeared in support of the petition, stated (p. 355):

"That is a right that need not be considered in this case. We are willing to protect his rights in every way."

The facts further show that on behalf of the petitioner it was pointed out that in the Bombay Presidency the adult members of a joint Hindu family had a right to sell their individual shares, and the petitioner offered that in respect of the minor's share without any reduction the whole of it might be safeguarded by being deposited with the Accountant General. Sir Lawrence Jenkins in his judgment emphasized this aspect and pointed out that the result of granting the order was not in any way to prejudice the minor, because the minor could have no higher right than to have a half share in the property which was to be sold, and the result of refusing the order would be to give him less price than was realised. The whole of the debt, which was there stated to exist, was offered to be paid out of the adults' share, and it was pointed out

<sup>1</sup> (1903) L. R. 30 I. A. 165,  
S. C. 5 Bom. L. R. 478.

<sup>2</sup> (1900) I. L. R. 25 Bom. 353,  
S. C. 3 Bom. L. R. 411, F.B.

that by refusing the order the Court would permit the manager to retain in his hands, although perhaps a smaller amount, not only his share of the sale proceeds but also the minor's share thereof. Under those circumstances, the Court made the order keeping intact the whole amount which came to the minor's share.

That decision has been the foundation of similar applications thereafter made. I have emphasized this, because the later decisions have gone far beyond this decision in fact and in substance. That decision did not decide in terms what was the effect of the order on the interest of the minor because it was pointed out that in no view of the law, on the facts of that case, the minor's interest could be considered adversely affected by the order to be made. Later applications were mostly made because when the "Karta" wanted to sell the property, the purchaser insisted that the Court's sanction should be obtained and made that a term of the agreement of sale. The later line of applications should, therefore, be considered from that aspect. In *Narsi Tokersey & Co. v. Sachindranath Gajanan*<sup>1</sup> the question whether a guardian of an undivided interest of a minor in a joint Hindu family residing in Bombay should be appointed was considered and it was affirmed, following *In re Manilal Hargovan*, that such appointment could be made on the original side of the High Court, under its general jurisdiction. This was after the Privy Council decision in *Gharib-ul-lah's* case. The later decisions of this Court, including *Mahadeo Krishna Rupji*, *In re*<sup>2</sup> affirm that jurisdiction of the Court to appoint a guardian of a minor so placed. In *In re Bijaykumar Singh Buder*<sup>3</sup> this view of the Bombay High Court was adopted, and a guardian of a minor member of a coparcenary was appointed. Therefore, on the ground that for a long time the High Court has appointed a guardian of the undivided share of a minor member of a joint Hindu family, the Court should not now depart from the practice and refuse to appoint a guardian. Under the circumstances, I agree that in respect of the undivided share of a minor the High Court has inherent or general jurisdiction to appoint a guardian.

Coming to the third head as to whether any alternative relief is available, it has been pointed out that in the mofussil no suit to appoint a guardian is permissible under the Guardians and Wards Act. *Basant v. Narayaniah*<sup>4</sup> decided that. The jurisdiction of the mofussil Courts in respect of minors' property and person is limited by the Guardians and Wards Act, and, therefore, so far as the mofussil Courts are concerned, there is no alternative remedy. It was urged by the learned Advocate General that this may be a ground for bringing in fresh legislation, but is not a ground for this Court extending its jurisdiction. In my opinion we are not however extending the Court's jurisdiction. This point is considered only to meet the argument that an alternative relief exists in the mofussil Court and the applicant should be asked to apply to that Court rather than invoke the inherent jurisdiction of the High Court.

This brings me to the last head viz., whether it is expedient to exercise the

1 (1929) I. L. R. 54 Bom. 75,  
s. c. 31 Bom. L. R. 1009.

2 [1937] Bom. 432,  
s. c. 38 Bom. L. R. 1286.

3 (1931) I. L. R. 59 Cal. 570.

4 (1914) L. R. 41 I. A. 314,  
s. c. 16 Bom. L. R. 625.

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jurisdiction which exists in this Court. Different arguments have been advanced at different times in support of such applications. It is contended that this is a term of the contract, which gives the joint family a better price or that the purchaser claims that he must have a good title, and, therefore, the Court should sanction the sale. It is sometimes alleged that the purchaser is entitled to see that evidence is preserved, and if he takes the property without obtaining the sanction of the Court, after twenty or thirty years when the question arises, he may find it difficult to prove his title. There is a considerable force in these contentions. But each of them may be capable of being satisfied by an order obtained under such applications and in other ways also. The purchaser's right to have a good title is undoubted. The application, which is made here, calls for a greater degree of proof to be led before the Court than what may be sufficient from the purchaser's point of view. The authorities on Hindu law show that a purchaser buying property from a manager of a joint family is not obliged to prove as a fact that there was legal necessity or benefit to the estate. It is sufficient for him to show that he had made at the time of purchase bona fide inquiries, and as a reasonable man was satisfied about the necessity or benefit. When the matter is brought before the Court, on such application it has to be recognized that the Court is called upon to make an effective order so as to bind the minor, and the Court will require a higher degree of proof than merely establishing a prima facie case which would satisfy on reasonable inquiries a bona fide purchaser. In making a contract with a term of this kind the parties have, therefore, to recognize that they are taking upon themselves a greater liability of proof before a Court. It is true that a purchaser several times is faced with the question after a number of years. But I may point out that the difficulty could be met by obtaining affidavits from the parties and preserving extracts from books of account or certified copies thereof. All these may be well preserved as documents of title. As I have pointed out, the degree of proof, which the Court will require when making an order which is binding on minors, is bound to be far higher than mere satisfaction to a bona fide purchaser on his making reasonable inquiries. These observations are meant only to caution parties before they make this a term of the contract. They may, if they are so minded, achieve the result by preserving proofs in respect of the bona fides of the purchase transaction. I may point out also that in considering applications of this kind the Court has to inquire into the debts which are stated to exist. Normally a purchaser may consider that an antecedent debt has to be paid, and if there is reasonable proof of its bona fides and necessity, the requirements of law may be satisfied. When the question comes to be considered by the Court, the Court may have to go into greater details and to find out that the debts were binding. The fact that they were antecedent debts may not be sufficient for the Court passing the order, realising that the order is binding on the interest of the minor. These points have to be considered carefully in applications which are made to Court. Under the procedure which is now suggested in the judgment of the learned Chief Justice all minor's interests have to be scrutinized very carefully, and different aspects will have to be borne in mind in disposing of these applications.

These points had not arisen in *In re Manilal Hargovan*, because there the whole of the minor's interest, without any deduction, was sought to be safeguarded by being deposited with the Accountant General. As I have pointed out, the applications, which are based on that, but which go much beyond the scope of that case, have to be considered from different aspects, because they involve larger questions which are not dealt with in that decision.

In the present case the transaction is shown on the affidavits to be clearly beneficial to the family. It is in the nature of a windfall. The interest of the minors is shown to be safeguarded, and in the order which will ultimately be made in Chambers on this petition the necessary safeguards will have to be retained.

Having regard to these facts, I agree that in this case, with the safeguards suggested in the judgment of the learned Chief Justice, the order may be made.

SOMJEE J. I agree, and I have nothing to add.

PER CURIAM. We refer the matter back to the Chamber Judge for necessary orders.

Costs of this hearing to be dealt with by the Chamber Judge.

*Order accordingly.*

Attorneys for petitioner : *Kamdar & Co.*

## ORIGINAL CIVIL

*Before Mr. Justice Kania.*

*In re* FRAMROZ DADABHOY MADON.\*

1941

*Native Share & Stock Brokers' Association—Right of membership—Death of member—Probate duty on right of membership whether leviable—Personal right—Rules of Native Share and Stock Brokers' Association, 1939, rr. 36 (h)† and 38.‡*

July 11.

In view of the decisions in *Official Assignee, Bombay v. Shroff*<sup>1</sup> and *Tribhondandas v. Bhikhubhai*<sup>2</sup> and rr. 36 (h) and 38 of the Native Share and Stock

\* O. C. J. Probate No. 194 of 1941.

† Rule 36(h) of the Native Share and Stock Brokers' Association, 1939, runs as under.—

36(h). On the death of a member his right of membership shall cease and vest in the Association.

‡ Rule 38 runs as follows :—

"38. A Card or right of Membership which under any rule for the time being in force is forfeited to or vests in the Association, shall belong absolutely to the Association free of all rights, claims or interest of such Member or any person claiming through such Member and the Board shall be entitled to deal with or dispose of the said Card as the said Board may think fit. If the said

Board sell such Card, the sale proceeds thereof shall, in the first place be applied in satisfying the liability of the Member, whose Card is sold, to other Members in respect of any contract made subject to the Rules of the Association and balance thereof shall be paid into the funds of the Association :

Provided always that the Association may in their absolute discretion by a Resolution passed at a general meeting of the Members direct such balance to be disposed of or applied in such other manner as they think fit."

1 (1932) 34 Bom. L. R. 1178, P.C.

2 (1937) 39 Bom. L. R. 666.

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Brokers' Association, 1939, the right of membership of the Association is not property which passes on succession or can be dealt with by will, but is a personal right which comes to an end on the death of the holder of the membership card and is, therefore, not property on which probate duty can be levied.

CHAMBER matter. Probate duty.

One Dadabhai Sorabji Madon, who was a member of the Native Share and Stock Brokers' Association, died in Bombay on May 18, 1940. He left a will dated January 8, 1924, and a codicil dated September 30, 1935.

By his will he directed that his membership card should be given to his son, Framroz. In the schedule of his assets attached to the petition for probate made to the High Court by his attorneys, who were his executors, no value of the card was shewn. In reply to the requisition sent by the High Court to the attorneys why the value of the membership card was not shewn, they stated that under the rules of the Native Share and Stock Brokers' Association a member's card or right of membership vested in the Association on his death and belonged absolutely to the Association free from all rights, claims or interests of such member or any person claiming through such member and the Board was entitled to deal with or dispose of the card as it thought fit. The matter was referred to the secretary of the Native Share and Stock Brokers' Association, and he confirmed what the attorneys had stated and further replied that the heirs of the deceased recommended the deceased's son Framroz for membership and the Board had accepted his nomination. He also stated that the value of the card was about Rs. 19,000.

The Master and Assistant Prothonotary submitted to the Testamentary Judge for orders whether the membership card held by the deceased formed part of his estate and whether probate duty should be levied on its value viz. Rs. 19,000. The son of the deceased was carrying on the business of his father and had there been no card left by the deceased he would have had to purchase it for Rs. 19,000.

The solicitors to Government were asked to appear before his Lordship to argue the question whether the value of a deceased share-broker's card was exempt from probate duty.

The matter was disposed of in chambers.

*N. H. Sethna*, solicitor, of *Merwanji, Kola & Co.*, for the petitioners (executors).

*M. C. Setalvad*, Advocate General, for the Crown.

KANIA J. This petition is submitted to the Court to decide whether probate duty is payable in respect of a membership card of the Native Share & Stock Brokers' Association.

The nature of the right of a member in a card came to be considered by the Judicial Committee of the Privy Council in *Official Assignee, Bombay v. Shroff*.<sup>1</sup> Their Lordships held that it was a personal right which did not pass to the Official Assignee on insolvency of the member. That was under the old rules of the Association.

The question of interest of the widow and children in such a card came to be considered by me in suit No. 386 of 1936. The matter went in appeal

and the Appeal Court confirmed the decision in suit : *Tribhowandas v. Bhikhubhai*.<sup>1</sup> In that suit it was held that the widow was entitled to the sale proceeds of the card held by her deceased husband in her own right and the sale proceeds did not form part of the estate of the deceased, whether he left a will disposing of the property or not. That conclusion was arrived at on the footing that the membership card was not property which passed on death, but that on construction of the rules the widow was given certain rights by the rules themselves.

Since then the Association has further altered the rules and the position today is more emphasized. Rule 12 provides as follows :

"(a) the legal representatives of a deceased Member or the persons mentioned in Appendix C may, with the sanction of the Board, nominate one of themselves or any other person otherwise eligible ... as a candidate for admission in the place of the deceased member."

The rule goes on to provide :

"(b) In considering the application of a candidate .... the Board shall, .... be guided by the rules set out in Appendix C ..."

The wording is clearly permissive and this nomination, under r. 16, has to be considered by a ballot. The result is that it is only a recommendation and does not create any right. Rule 36 makes the right of nomination personal and non-transferable. Rule 36(h) in terms states that on the death of a member his right of membership shall cease and vest in the Association. Rule 38 deals with the question of a membership card which under any rule for the time being in force is forfeited or is vested in the Association. In that rule it is provided that after paying the debts of the members, the balance of the sale proceeds shall be paid into the funds of the Association and shall be at the disposal of the Association.

As in this matter the Crown was interested, I directed a notice to be given to Crown and the learned Advocate General has put before the Court certain portions of r. 36. The provisions are found in sub-rr. (i) and (j). Sub-rule (i) provides that when a member dies his debts and other obligations and claims of any member shall be paid and satisfied by his legal representatives before the transfer of his right of nomination. It is singular that the legal representatives are given no right of transfer except by this indirect reference in this sub-rule. Sub-rule (j) is very peculiar. It provides for a contingency of legal representatives of such a member being unable to satisfy the debts or claims of members. The rule provides that in such an event the right of membership shall be disposed of by the Board and the proceeds applied in the order mentioned in that sub-rule, viz., (1) payment of debts to members ; (2) payment of debts or claims in respect of transactions effected subject to the rules of the Association and to the extent the same are admitted by the Board ; and (3) payment of the balance, if any, to the legal representatives mentioned in Appendix C upon the execution by them of such release or indemnity as the Board may require. This is certainly difficult to be harmonised with rr. 36 (h) and 38. The only way in which it can be so done is to consider this as a provision made for a particular contingency and the last clause deals with

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1 (1937) 39 Bom. L. R. 666.

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the payment of the balance to the legal representative because the Association has taken a step on the footing that the deceased was a defaulter.

I am not concerned with any particular or peculiar aspect of the case here. I am only asked to decide whether the right of membership, unconnected with any particular circumstances, is property which passes on the death of a member to his heirs and in respect of which probate duty is payable. Having regard to the previous decisions and the clear and unambiguous words of rr. 36 (h) and 38 it seems to me that the right of membership is not property which passes on succession or can be dealt with by will as the property of the deceased. In my opinion this is a personal right which comes to an end on death of the holder and is not property on which probate duty can be levied.

*Order accordingly.*

Attorneys for petitioners (executors): *Merwanji, Kola & Co.*  
Attorneys for the Crown: *Little & Co.*

## CRIMINAL APPELLATE.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

EMPEROR

*v.*

1941  
August 28.

SADEPPA GIREPPA MUTGI.\*

*Indian Evidence Act (I of 1872), Sec. 138—Cross-examination of witness—Tendering witness for cross-examination—Whether eye-witnesses can be so tendered—Practice and procedure.*

The practice of tendering witnesses for cross-examination in Sessions Court is inconsistent with s. 138 of the Indian Evidence Act, 1872. It may, however, be adopted only in cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point and do not want to waste the time of the Court by examining-in-chief a witness who was examined in the lower Court, they may tender him for cross-examination. But before doing that the witness ought to be asked by the prosecution, with the consent of the pleader for the accused and the leave of the Judge, whether his evidence in the lower Court is true. If he gives a general answer as to the truth of his evidence\* in the lower Court, he can be cross-examined on that. But he must in some way be examined-in-chief before he can be cross-examined. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eye-witness.

*Veera Koravan*, In re,<sup>1</sup> relied on.

\* Criminal Appeal No. 258 of 1941, with Criminal Appeal No. 259 of 1941 and Jury Reference No. 80 of 1941, from convictions and sentences pass-

ed by A. G. Wells, Sessions Judge of Belgaum.

1 (1929) I. L. R. 53 Mad. 69.



## MURDER trial.

The murdered man Annappa lived in the village of Nargankop. He was, rightly or wrongly, regarded by the villagers as a dangerous criminal and a menace to the public peace. Chapter proceedings were taken against him and he was also prosecuted for abducting one Jankibai. In September, 1940, he was acquitted in both the cases. Six of the accused were witnesses for the prosecution in those cases.

Annappa, after his acquittal, moved to the neighbouring village of Devshigihalli, which was barely half a mile distant from Nargankop. At Devshigihalli one Nagappa and his wife lived with one Chandrappa. His mistress Rudrawa shifted to a house belonging to one Shivbasapa.

On October 18, 1940, Jankibai, the woman alleged to have been abducted by Nagappa, complained to the Patil of her village that her sugarcane crop had been cut, and later implicated Annappa into the crime. On the same day accused No. 3 made a similar complaint against the same man.

On October 21, 1940, the complainant Payappa had to go to another village Gaddikop to bring some cattle and he asked Chandrappa to go with him. Annappa was also going with two Kakeri men, i.e. witnesses Bhimappa and Shambhu, to collect a debt due to them from a certain person. They all decided to go together.

When they had gone a little way past the village of Nargankop but still within its limits, they espied some persons coming towards them armed with sticks, hatchets, etc. Annappa promptly divined that they were out for his blood and said, "Let's run for it." They did so. The Kakeri witnesses ran off at once in another direction, and Payappa and Chandrappa ran along with Annappa. They were overtaken by the pursuing party and Annappa was beaten. Annappa received twenty-two injuries, as the result of which he died. No attempt was made by the assailants to injure the companions of the deceased, though they were prevented from assisting him. These companions ran at once to the nearest village Dastikop, from which Payappa told Chandrappa to go back and inform Annappa's wife of what had happened. The last they saw of Annappa was that he was being carried off with the aid of sticks in the direction of Nargankop. The body of Annappa was found thrown in the sugarcane crop of one Shivalingayya in Nargankop. Payappa next went to Kittur, where he gave his first information of what had happened to the Head Constable. The Head Constable took down Payappa's statement naming the eight accused as offenders, and recorded the substance of it in the station diary, but omitted to record the information in the first information register, as he was not sure of the nature of the offence. Meanwhile, Chandrappa saw Annappa's wife Sheshava, who had already been told of what had happened by Paresha. Sheshava sent Paresha with Rs. 4 to despatch a telegram to the District Superintendent of Police informing him of what had happened. This was done.

The accused, eight in number, were in due course tried for the offence of the murder of Annappa with an alternative charge of being members of an unlawful assembly the common object of which was to assault Annappa.

At the trial, the prosecution examined Payappa as well as Chandrappa as eye-witnesses. They also examined the two Kakeri witnesses, Bhimappa and

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A. Cr. J. Sambanna, who were present at the time of the offence. Bhimappa was  
 1941 examined-in-chief up to a point, when he deposed : " We passed by Navin-  
 — kop, when I saw a hundred people coming running from Navinkop side."  
 EMPEROR The prosecution then asked the Court for permission to cross-examine the  
 v. witness, which was given. The other Kakeri witness Sambanna was not  
 SADEPPA examined-in-chief at all, but was offered for cross-examination. The defence  
 GIREPPA accordingly cross-examined the witness.  
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— The accused were tried by a jury for the offences punishable under ss. 147 and 148 of the Indian Penal Code. The jurors delivered an unanimous verdict of not guilty, a verdict which the trial Judge characterised as perverse and which was not accepted by him. The jurors were then asked to give their opinion as assessors on the charge of murder. Their unanimous opinion was that all the accused were guilty of an offence punishable under s. 304 of the Code. The trial Judge agreed with the opinion and sentenced all the accused to transportation for life.

The accused appealed to the High Court against their conviction and sentence. The trial Judge made a reference to the High Court disagreeing with the verdict of the jury on charges under ss. 147 and 148 of the Indian Penal Code.

*Purshottam Tricumdas*, with *B. D. Belvi*, for the accused.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

BEAUMONT C. J. These are appeals by the eight accused against their conviction by the Sessions Judge of Belgaum of the offence of murder. They were sentenced to transportation for life. There is also a reference by the learned Judge against the verdict of the jury acquitting the accused on the charge of rioting, the learned Judge considering the verdict perverse. It is obvious that there is no substance in the reference, because the charge of rioting and the charge of murder depend on the same evidence, and, therefore, the really serious question is whether the accused were guilty of murder.

The jury, as I have said, returned a verdict of not guilty on the charge of rioting, which must mean that they disbelieved the prosecution evidence. Three of the jury happened to be clerks in the District Court or the First Class Subordinate Judge's Court, and as soon as they gave their verdict the learned Judge stated that he considered the verdict perverse, and declined to accept it. Then they were asked to give their opinions as assessors on the more serious charge, and they agreed in holding accused No. 1 guilty under s. 304 of the Indian Penal Code, and the others not guilty, and they stated that they believed Payappa and Basaya but not the other witnesses. It is quite obvious that in point of fact they could not have believed Payappa, because if they had, they would have been bound to convict the accused of rioting, and further there is no justification on the evidence of Payappa for distinguishing between accused No. 1 and the other accused. Moreover, one of the other witnesses, Chandrappa, tells practically the same story as Payappa, and it would be absurd to believe Payappa and disbelieve Chandrappa. I think this opinion of the assessors, that Payappa and Basaya were to be believed, was a sop to the learned Judge, who had commented

favourably on their evidence. The real question in the case is whether the evidence of Payappa and Chandrappa is to be believed.

The deceased man, Annappa, was a bad character. He was known as the dacoit, and he had recently been prosecuted for two offences, and had been acquitted, and had left the village of Margankop, where he had previously lived, and gone to Shigihalli close by. The suggestion of the prosecution is that the accused, most of whom had given evidence against Annappa in these prosecutions, being tired of Annappa, and despairing of getting him convicted according to law, took the law into their own hands, and beat him to death. There is no doubt that he was beaten to death on October 21, 1940, somewhere about eleven or twelve o'clock in the morning, somewhere in the neighbourhood of the village of Margankop. The deceased on that day was going to a place beyond Margankop to collect a debt of two Kakeri witnesses, who were with him, and that party of three joined Payappa and Chandrappa, both of whom were friends of Annappa, shortly before they reached the village of Margankop.

The evidence of Payappa and Chandrappa and the two Kakeri witnesses is that, about a furlong or a furlong and a half beyond Margankop, they saw people from the village coming towards them. Payappa and Chandrappa say that they saw the eight accused, and the Kakeri witnesses say that they saw about a hundred—that is many people. But, at any rate, they all agree that they saw a party coming out from Margankop, and that Annappa realized that they were coming to beat him, and suggested that they should run, and they started to run. The Kakeri witnesses ran by another way, but the others were rapidly caught up, and Annappa was beaten to death. Now, I see no reason to doubt that this party of five did proceed past Margankop, and that there was an assault upon the deceased; but the eye-witnesses differ on a very material question. Payappa and Chandrappa say that it was the eight accused alone who came out from Margankop, and that they were armed with sticks and axes, and that Annappa said that they had better run, so they all started to run, and the Kakeri people took a different route and escaped altogether. Then Payappa's story is that the pursuers caught up the party of Annappa, that accused Nos. 5 and 7 held Payappa, and that the other accused surrounded Annappa, who stood with an axe raised. Then Payappa says :

"Then accused No. 3 stood in front of him and asked him why he had damaged his sugarcane crop and ordered him to throw down his axe. Then Annappa threw down his axe and asked him not to beat him and promised to behave properly in future. He fell at his feet; but accused No. 3 struck him with a stick."

Then we have the class of evidence, usual in this type of cases, attributing to each of the accused specific blows on Annappa. Then Payappa says :

"Then the accused put a stick under Annappa's legs, lifted him up, Annappa looked as if he were dead and they carried him off in the direction of the village of Margankop."

Then he says that he and Chandrappa went in the direction of Dastikop, which is a mile or so away from the scene of offence, and from there Payappa sent Chandrappa to Shigihalli to tell Annappa's wife what had happened,

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A. Cr. J. 1941 and then Payappa himself went to the police station at Kittur, which is about nine miles from Dastikop, and lodged the first information. Chandrappa agrees with that story.

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The first of the Kakeri witnesses, Bhimapa, (exhibit 16), agrees with Payappa up to the point where they passed Margankop, and then he says : "I saw a hundred people coming running from Margankop side." At that point the learned Judge apparently allowed him to be cross-examined, because it was suggested that in the lower Court he had said "seven people" ; but, when the Kanarese word was looked at, it was 'bahala', which, the learned Judge says, means 'many' ; so that really there is no conflict between his evidence in the Sessions Court and in the Committing Magistrate's Court. Obviously, when he says 'a hundred people' he means 'many'. Nobody suggests that he counted them. So his story is that many people came out from Margankop. Then he says :

"Before Annappa was beaten we two Kakeri men ran away."

The other Kakeri witness is Shambu, (exhibit 34), and a very irregular course was adopted with regard to him. He was tendered for cross-examination. The practice of tendering witnesses for cross-examination, which is no doubt often adopted, is inconsistent with s. 138 of the Indian Evidence Act, which says that witnesses shall be first examined-in-chief, and then, if the adverse party so desires, cross-examined, and, if the party calling him so desires, re-examined. It is obvious that if a witness is examined by the defence without having given any evidence-in-chief, he is not being cross-examined, by whatever name the process may be described. The practice of tendering for cross-examination should only be adopted in cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower Court, but at the same time do not want to deprive the accused of the right of cross-examining such witness, they tender him for cross-examination. But I think, strictly speaking, the witness ought to be asked by the prosecution, with the consent, of course, of the pleader for the accused, and the leave of the Judge, whether his evidence in the lower Court is true. If he gives a general answer as to the truth of his evidence in the lower Court, he can be cross-examined on that. But he must in some way be examined-in-chief before he can be cross-examined. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eye-witness. That has recently been laid down by the Madras High Court in *Vera Koravan, In re*<sup>1</sup>. Here there were four eye-witnesses, two of whom had told one story, and the third a different story, and it is obvious that the evidence of the fourth eye-witness would be of extreme importance, and if such witness had not been examined by either of the parties, the learned Judge should himself have called him as a Court witness. However, from the questions asked in what is called cross-examination, it does appear that the witness agreed with his fellow-witness of Kakeri. He says :

"Your suggestion that many people came out from the village is correct. They

were about 100. Seeing them we were afraid and ran away. I did not see the actual assault on Annappa." A. Cr. J. 1941

Now, it seems to me that the real question is which of those stories is to be believed. If in fact a large crowd came out from Margankop, contrary to the story of Payappa, it is very unlikely that Payappa would see exactly what happened, and who succeeded in striking Annappa; and if in fact it was a large crowd which came out, I think, we must hold that Payappa's evidence against the accused is not acceptable. The learned Judge notices that Payappa is a man of bad character, who had been convicted of dacoity, and also that he was a friend of Annappa, as was Chandrappa. But the learned Judge says that, having said so much against Payappa, he has said all that could be said against him. But I do not take that view. It seems to me that the real difficulty in accepting the story told by Payappa in the witness-box is that on the face of it the story is ridiculous. I accept the story down to the point at which the party was seen coming out from Margankop, and I have no doubt that the assault on the deceased was deliberate. It is clear, I think, that the people of Margankop had got to know that Annappa was going on this expedition, and were minded to waylay him. Even if only these eight accused came out directly after Annappa had passed, it shows that the assault was planned. But if it was planned, why did they let Annappa get a start of a furlong or so from the village? And if Annappa, a man of thirty, well nourished as the medical evidence shows, started to run for his life with a start of a couple of hundred yards, how came it that he was caught within another furlong or so? because the place, which Payappa puts as the place of assault, is not more than a furlong from the place where the party was, when they saw the people coming out from Margankop. The accused vary in age from twenty-two to fifty-five, three of them being over forty, and if they had had to run after a man of thirty, who was running for his life, and to whom they had given a liberal start, I think it very unlikely that they would have caught him. Some of the younger accused might have caught him, but it is inconceivable to my mind that they would have caught him within a couple of hundred yards. He probably would have run a long distance, and his pursuers would have become separated, and Annappa might well have been able to attack them singly. The fact that he was caught and surrounded in such a very short time suggests, to my mind, that the villagers had made their plans, and had cut off both his retreat by the way he had come, and his further progress; they had got other villagers in front of him. No doubt the Kakeri witnesses do not say this, but they managed to get away before the assault started, and did not see how Annappa was surrounded and caught.

[After commenting on the evidence adduced in the case, His Lordship concluded:] Having regard to the improbabilities, to which I have referred, in Payappa's story, and to the much greater probability in the Kakeri witnesses' story, that this was an attack by a large number of villagers, I am not disposed to accept Payappa's story. Chandrappa stands on the same footing; he was also a friend of Annappa. As to Basaya's evidence that he saw the body being removed by some eight persons, it does not follow that because one hundred or more people took part in the assault, therefore, the body

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A. Cr. J. of the person assaulted must have been carried away by all these people.  
 1941 The crowd may have dispersed before the body of Anappa was removed.  
 — It is not necessary to reject Basaya's evidence, because one rejects the story  
 EMPEROR of Payappa, and his evidence does not necessarily corroborate Payappa's story,  
 v. though, no doubt, it is rather more consistent with Payappa's story than with  
 SADEPPA the story of the Kakeri witnesses. But I do not see any sufficient reason  
 GIREPPA for rejecting the story of the Kakeri witnesses that a large crowd assaulted  
 MUTGI Annappa. All the probabilities point that way. I have no doubt that the  
 Beaumont C.J. villagers surrounded Annappa, and some of them beat him to death, and  
 — very probably the accused were in the crowd; but I do not think that in  
 this case we can safely act on the evidence of Payappa and Chandrappa.  
 We must, therefore, allow the appeals, and direct the accused to be discharged.

We make no order on the reference.

SEN J. I agree.

*Appeals allowed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen*

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v.

MAHAMED KASSAM PANWALLA.\*

*Bombay Shops and Establishments Act (Bom. XXIV of 1939), Secs. 5, 6, 14, 30,  
 4(1)(a)†—"Employer" in s. 30, meaning of—One-man shop governed by Act*

\* Criminal Appeal No. 229 of 1941, by the Government of Bombay, from an order of acquittal passed by M. A. F. Coelho, Presidency Magistrate, Second Court Bombay.

† The sections run thus :

5. (1) Save as provided by or under any other enactment for the time being in force, no shop shall on any day—

(a) be opened earlier than such hour as may be fixed by the Provincial Government by a general or special order in this behalf, and

(b) be closed later than 9 p.m. or such other earlier hour as may be fixed by the Provincial Government by a general or special order in this behalf :

Provided that any customer who was being served or was waiting to be served at such closing hour in any shop may be served in such shop during the quarter of an hour imme-

diately following such hour.

(2) An order under sub-section (1) shall be passed by the Provincial Government after making an enquiry in the prescribed manner.

6. Save as otherwise provided in this Act or by or under any other enactment, no person shall after the closing hour fixed under section 5 carry on in or adjacent to a street or a public place the sale of any goods :

Provided that nothing in this section shall apply to the sale of newspapers.

14. After the hour fixed for closing of shops under section 5, no goods of the kind sold in such shops shall be sold in any restaurant, eating house, theatre or any other place of public amusement or entertainment except for consumption on the premises.

30. (1) Any employer who contravenes the provisions of sections 5

—*Rules made under Act, r. 12(10).*†

Section 5 of the Bombay Shops and Establishments Act, 1939, is intended to include a one-man-shop.

Accordingly, where the owner of a one-man-shop keeps the shop open for business after 9 p.m., he renders himself liable to punishment under s. 30 read with s. 5 of the Act.

The word "employer" as used in s. 30 of the Act means a person having charge of or owning the business of a shop.

The effect of s. 6 of the Act, or one effect at any rate, is to protect an employer, who has been compelled to close his shop at 9 p.m., from competition by sales in a public place after that hour; another object may be to prevent a man who has been compelled to close his shop from reopening his business in the street or other public place.

Section 14 of the Act clearly protects the shop which has been compelled to close at 9 o'clock from competition after that hour by a place of public amusement.

The owner of a shop cannot be said to be a person occupying a position of management as contemplated by s. 4(1)(a) of the Act. One of the incidents of ownership is no doubt the right to manage; but it is difficult to say that the owner is a person occupying a position of management.

THE accused was a pan-shop-keeper. He conducted his business singly and on his own account. He did not employ any servant. He was charged with keeping his shop open after 9 p.m. contrary to the provisions of s. 5 of the Bombay Shops and Establishments Act, 1939. He was found to have sold a pan for one pice to one of his customers at 10-20 p.m. on February 15, 1941. He was therefore charged with having committed an offence punishable under s. 30 read with s. 5 of the Act. He was also charged under r. 12 (5) made under the Act for failing to exhibit in the shop an extract from the Act, and under r. 12 (10) for failure to maintain a visit book.

The trying Magistrate was of opinion that the accused was not an employer as understood by the Bombay Shops and Establishments Act, and acquitted him, observing as follows :—

"Turning to the provisions of the Act, I am referred... firstly to the definition of the word 'employer' and 'establishment to which this Act applies' in s. 2, sub-ss. (5) and (6), of the Act. The word 'employer' according to the definition means a person having charge of or owning the business of an establishment to which this Act applies and includes the manager, agent, or any other person acting in the

and 7 to 21 (both inclusive) shall, on conviction, be punishable with fine which may extend to Rs. 25 for the first offence and to Rs. 250 for every subsequent offence after his conviction for the first offence.

(2) Whoever contravenes the provisions of section 6 shall, on conviction, be punishable with fine which may extend to Rs. 10 for the first offence and to Rs. 100 for any subsequent offence after his conviction for the first offence.

4. (1) Nothing in this Act shall

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apply to—

(a) persons occupying positions of management or employed in a confidential capacity;

‡ The rule runs thus :

(10) Every employer shall maintain a visit book in which an Inspector visiting the establishment may record his remarks regarding any defects that may come to light at the time of his inspection and shall produce it whenever required to do so by any Inspector. (*Bom. Gov. Gaz.*, 1940, Part IV-B, p. 1009-A.)

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—

general management or control of such shop, restaurant, theatre or establishment. 'An establishment to which this Act applies' according to the definition means a shop, commercial establishment, restaurant, eating-house, theatre, or any other place of public amusement or entertainment. Putting these two definitions together, it is urged. .... that a person owning the business of a shop is an employer, whether he employs anybody or not. Now, in a legislative enactment the meaning of a word may be enlarged so as to include by analogy something which the word does not ordinarily imply. The analogy, at times may be strained, but there should be some degree or comparison or resemblance, I should think, between the newly acquired meaning and the original sense and it is quite inconceivable to my mind how the meaning of an English word could be stretched so as to include a sense which is directly contradictory to or is a complete negation of its dictionary meaning. It would then cease to be English and so long as the language of the Act is English we have to read it as English. The word 'employer' therefore in my opinion cannot be stretched to include one who does not employ, much less could it be defined to mean one who does not employ. I think the definition of the word 'employer' as given in the Act is designed to include a wider class of persons than the employer himself so that there may be no evasion of liability in case of a breach of regulations and it does not appear to me that the definition is intended to give a fantastic meaning to the word employer. It should be noted that the words 'if any' are not there at the end of the definition of the word 'employer' and the existence of employees in the shop or other establishment mentioned therein is implicit in the definition itself. In fact a one-man establishment is a contradiction in terms. The legislature therefore could not have intended to use the word 'employer' in the sense in which the Inspector wishes me to interpret it. Secondly, a word or a term may by long usage acquire a technical sense but even the technical sense cannot be directly contradictory to its original meaning. The word 'employer' has not acquired the technical sense that it includes a person who does not employ . . .

Section 5 provides that save as otherwise provided by or under any other enactment for the time being in force, no shop shall on any day (a) be opened earlier than such hour as may be fixed by the Provincial Government by a general or special order in this behalf and (b) close later than 9 p.m., or such other earlier hour as may be fixed by the Provincial Government by a general or special order in this behalf. Now, if we come to the penal section, which is s. 30, the words used there are 'any employer who contravenes the provisions of s. 5 shall be punished.' I have already dealt with the meaning of the word 'employer' so that reading ss. 30 and 5 together it is clear that it is only those shopkeepers who employ labour are sought to be penalised. This is further clear from the language of s. 30 itself which says that any employer who contravenes the provisions of ss. 5 and 7 to 21 shall be punished. Sections 7 to 21 deal with employment conditions. And s. 5 should therefore be read *ejusdem generis* with ss. 7 to 21. If it were intended to penalise shopkeepers as such, there would have been a separate penal section in the Act dealing with shopkeepers in respect of the closing of the shops.

Now, the Inspector points out that s. 6 which prohibits hawking after the closing hours in any street or public place shows that the shops referred to in s. 5 are shops of all kinds. According to him s. 6 is necessary to protect the interests of shopkeepers who are compelled to close their shops under s. 5 as otherwise hawkers would outbid them by hawking their wares after the closing hours. But they could easily outbid them by plying their trade before the opening hours as there is nothing in the section to prevent them hawking before the opening hour. Take for example the case of a vegetable shopkeeper. The hawkers could easily gain an advantage at his expense by selling vegetable before he opens his shop. So the idea of preventing unfair competition does not, in my opinion, necessarily come in s. 6. The hawkers are prohibited from selling under s. 6, because, as I understand it, the shopkeepers may exploit their employees by making them sell outside when they cannot sell inside. . . .

.... Now according to the Inspector this section also shows that all shops should be closed at the closing hour and to protect their interests and to prevent restaurant



keepers from plying the shopkeepers' trade, this section has been enacted. Again may I ask, of what use is that protection so long as the restaurant keepers are not precluded from selling these articles before the opening hour? To my mind, the question of prevention of unfair competition does not arise here also. The section is apparently meant to prevent the influx of intending purchasers and the consequent overcrowding of people in restaurants and places of entertainment as it would undoubtedly spoil the amusement of the people who go there mostly in the evenings. There would have been a hue and cry from the public on account of the nuisance of the hawkers at night and the overcrowding of restaurants in the evening where they go for their pleasure and entertainment and therefore the provisions of ss. 14 and 6 were probably thought necessary.

The defence counsel Mr. Pinto has drawn my attention to s. 4, sub-s. (1)(a), which runs as follows: 'Nothing in this Act shall apply (a) to persons occupying positions of management or employed in a confidential capacity.' This phrase is not defined anywhere. But in my opinion this sub-section means that in the case of superior grades of employees whose position is comparable to that of employers there is no fear of exploitation and therefore they can carry on their work, whether that work is that of supervising, managing or conducting the shop or business, free from the restrictions of this Act. The Inspector has contended that if too wide an interpretation is given to this sub-section, it might reduce the whole Act to a nullity because if persons occupying positions of management are deemed to be exempt from all provisions of the Act including those which require that workmen could be employed only for certain number of hours the whole Act would become inoperative. That contention is unsustainable because s. 4 (1)(a) refers to the work done by the persons mentioned therein themselves and not to the work they could get others to do. So far as their work or their own duties are concerned, nothing in this Act applies to them, that is to say, they can work as many hours as they like and keep their shops open as long as they like in their personal capacity. The owner of a shop could put himself in the position of management and nothing in this Act would apply to him either. That is what s. 4 (1)(a) means."

The Government of Bombay appealed against the order of acquittal.

*R. A. Jahagirdar*, Government Pleader, for the Government of Bombay.

*J. I. A. Pinto* and *H. J. Britto*, for the accused.

BEAUMONT C. J. This is an appeal by Government against the acquittal of the accused, who was charged with infringement of the provisions of s. 5(1)(b) of the Bombay Shops and Establishments Act of 1939 and r. 12(10), (5) of the rules made under the Act.

The accused is the keeper of a panshop, which he conducts himself and in which he employs no one. On February 15, 1941, he sold a pan worth one pice at about 10-20 p.m., and thereby he is alleged to have infringed s. 5 of the Act.

The preamble of the Act recites that it is expedient to make provision for the regulation of hours of work in shops, commercial establishments, restaurants, eating houses, theatres and other establishments and for certain other purposes thereafter specified. Then there are certain definitions, and to those which are material I will return. Then s. 5(1)(b) provides:

"Save as provided by or under any other enactment for the time being in force, no shop shall on any day be closed later than 9 p.m. or such other earlier hour as may be fixed by the Provincial Government by a general or special order in this behalf."

Now, the main contention of the accused is that this being a one-man shop, managed by the owner with no employees, the Act does not apply.

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A. Cr. J. Taking s. 5 by itself, there is nothing whatever to suggest that it does not  
 1941 apply to a one-man shop. The prohibition includes any shop; the direc-  
 — tion being that no shop shall be closed later than 9 p.m. But when one turns  
 EMPEROR to the penal section, which is s. 30, it provides that any employer who contra-  
 v. venes the provisions of s. 5 shall be punishable. So one has to see whether  
 MAHAMED the accused is an employer, and prima facie, since he does not employ any-  
 PANWALLA body, he is not an employer. But it is open to the Legislature to make its  
 — own dictionary for the purpose of any particular Act; and the term "em-  
 Beaumont C.J. ployer" is defined in s. 2(5) of the Act as meaning a person having charge  
 of or owning the business of "an establishment to which this Act applies",  
 and includes the manager, agent or any other person acting in the general  
 management or control of such shop, restaurant, theatre or establishment.  
 Then the expression "establishment to which this Act applies" is defined  
 in sub-cl. (6) as meaning, amongst other things, a shop. So that reading  
 those two sub-clauses together, for the purposes of the present application,  
 "employer" means a person having charge of or owning the business of a  
 shop.

The learned Magistrate was of opinion that it is implicit in the word  
 "employer" that somebody should be employed. But with all respect to  
 the learned Magistrate, that is disregarding the definition contained  
 in the Act. Undoubtedly the word "employer", according to its  
 ordinary meaning in the English language, signifies a person who  
 employs somebody else. But it is competent for the Legislature to enact  
 that in a particular Act the word shall include the owner of a business,  
 whether or no anybody is employed therein; and that seems to me the effect  
 of the present definition. If one were to read into the definition the provi-  
 sion that an employer must employ somebody, then I think undoubtedly s. 5  
 would not apply to a one-man-shop; but I have no doubt from the terms of  
 the whole Act, that the section was intended to include such a shop. Section  
 6 provides that no person shall after the closing hour fixed under s. 5 carry  
 on in or adjacent to a street or a public place the sale of any goods. The  
 effect of that section, or one effect at any rate, is to protect an employer,  
 who has been compelled to close his shop at 9 p.m., from competition by  
 sales in a public place after that hour. That may not be the only object of  
 the section; another object may be to prevent a man who has been compelled  
 to close his shop from reopening his business in the street or other public  
 place. But, at any rate, protection of the shop, which is compelled to close  
 at 9 p.m., from outside competition is one of the effects of s. 6, and the same  
 may be said of s. 14, which provides that after the hour fixed for closing  
 of shops under s. 5, no goods of the kind sold in such shops shall be sold  
 in any restaurant, eating house, theatre or any other place of public amuse-  
 ment or entertainment except for consumption on the premises. That section  
 clearly protects the shop which has been compelled to close at 9 o'clock from  
 competition after that hour by a place of public amusement. If s. 5 does  
 not apply to a one-man shop, one would certainly expect to find some provi-  
 sion protecting the employer who is compelled to close his shop at 9 o'clock,  
 from competition by the one-man shop after that hour; and there is no such  
 provision in the Act. It seems to me, therefore, that there is no justification

for restricting the meaning which the Legislature has seen fit to give to the word "employer" for the purposes of this Act, although the meaning may not be the one normally attached to the word in the English language.

The learned Magistrate, I think, fell into an error not uncommon in construing Acts of the Legislature. He made up his mind, apart from the Act, what was the intention of the Legislature in passing the Act, and construed the Act so as to give effect to his preconceived idea as to the Legislature's intention. He made up his mind that the object of the Legislature was to protect employees, and nothing else, and construed the Act so as to make every part of it fit in with that object. With all respect to the learned Magistrate, that is not the way to construe the Act. One has to take the language as one finds it, although, of course, one has to look at the Act as a whole and construe it so as to give effect to what appears from the language of the whole Act to be the intention of the Legislature. The language of the preamble and of s. 5, and the definition of "employer" do not suggest that the sole intention was to benefit employees.

The only other section relied on by the accused is s. 4(1) (a), which provides that nothing in the Act shall apply to persons occupying positions of management or employed in a confidential capacity. It is suggested that that sub-section saves the accused, who was managing his shop, from liability. The sub-section is not, I think, easy to construe. Under the penal section an employer is liable for breaches of the Act, and an employer is defined expressly as including a manager, and, therefore, a manager can be prosecuted for an infringement of the Act. But then s. 4(1) (a) says that nothing in the Act shall apply to persons occupying a position of management. It may be that the sub-section was intended to mean that persons occupying positions of management or employed in a confidential capacity should not be regarded as employees under the Act. Whether or not that is the meaning, it is not necessary to decide in this case. I am clearly of opinion that the owner of a shop cannot be said to be a person occupying a position of management. He is the owner. One of the incidents of ownership is no doubt the right to manage, but one cannot say that an owner is a person occupying a position of management. I think, therefore, that the accused is liable to be convicted under s. 5.

With regard to the rules, it is, of course, clear that a good many of the sections of the Act, for example ss. 7, 8 and 9, have no application to shops in which no one is employed, and r. 12, some of the provisions of which the accused is said to have infringed, is, I think, mainly enacted for the benefit of employees. Rule 12(5) provides that every employer shall exhibit in his establishment a notice containing such extracts of the Act and these rules, in English and in the regional language of the majority of the persons employed by him, as the local authority or Government may direct. This sub-rule does not apply, in my opinion, if there are no employees. Sub-rule (10) provides that every employer shall maintain a visit book in which an Inspector visiting the establishment may record his remarks regarding any defects that may come to light at the time of his inspection and shall produce it whenever required to do so by any Inspector. The accused has, I think, committed a technical breach of this sub-rule, though the maintenance

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Beaumont C.J.

A. Cr. J. of a visit book is not of much consequence, I should think, in the case of a  
 1941 shop where no persons are employed.  
 —————  
 EMPEROR We convict the accused under s. 5(1) (b) read with s. 30 of the Act, and  
 v. under r. 12(10) read with r. 15 of the rules made under the Act. We think  
 MAHAMED it is not a case for a heavy sentence. We sentence the accused for infringe-  
 PANWALLA ment of s. 5(1) (b) to pay a fine of Rs. 4-15-0 and for infringement of  
 —————  
 r. 12(10) to a fine of Re. 0-1-0, making altogether Rs. 5.  
*Beaumont C.J.*

*Appeal allowed.*

### CRIMINAL REVISION.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen*

1941  
 —————  
*September 3.*  
 —————

EMPEROR

v.

DHULA JETHA.\*

*City of Bombay Police Act (Bom. IV of 1902), Secs. 9(1)(a), 33(1)—Prevention of Cruelty to Animals Act (XI of 1890), Sec. 3—Agent of Society for Prevention of Cruelty to Animals, Bombay—Appointment by Commissioner of Police, Bombay, as additional Police Officer—Power of such agent to arrest.*

The complainant, an agent of the Society for Prevention of Cruelty to Animals, Bombay, was appointed as an additional Police Officer for the purposes of the Prevention of Cruelty to Animals Act, 1890, by the Commissioner of Police, Bombay, under s. 9(1)(a) of the City of Bombay Police Act, 1902, as it stood in 1934. Subsequently in 1935, the power of appointing additional Police Officers became vested in the Government of Bombay. In 1938, the Government again delegated the power to the Commissioner of Police, Bombay. In 1940, the complainant arrested the accused, a hack victoria driver, for causing unnecessary pain or suffering to his horse by overloading the carriage. It was contended that the appointment of the complainant as additional Police Officer had lapsed because at one period since his appointment the Commissioner of Police ceased to have power to appoint additional Police Officers:—

*Held*, overruling the contention, that the appointment of the complainant as an additional Police Officer for the purposes of the Prevention of Cruelty to Animals Act, 1890, was for life or until the same was revoked by competent authority, and as it had not been revoked, the complainant could arrest without warrant under s. 33(1) of the City of Bombay Police Act, 1902.

THE accused, a hack victoria driver, was coming out of the compound of the Central Railway Station in Bombay, on the morning of October 22, 1940. There were at the time six passengers with six beddings and six bags in the carriage which the horse was struggling to draw. The accused was arrested by the complainant for causing unnecessary pain or suffering to the horse, an offence under s. 3(a) of the Prevention of Cruelty to Animals Act, 1890.

\* Criminal Application for Revision No. 236 of 1941, from conviction and sentence recorded by V. K.

Muranjan, Presidency Magistrate, Second Additional Court, Mazagaon, Bombay.

The complainant was an agent of the Society for Prevention of Cruelty to Animals, Bombay. He was, on March 9, 1934, appointed an additional Police Officer by the Commissioner of Police, Bombay, under an order which ran thus :—

“Vithoo Kanoji Rane [complainant] has been appointed by the Commissioner of Police for the City of Bombay as an additional Police for the B. S. P. C. A., Bombay, and is vested with the powers, functions and privileges of a Police Officer under the City of Bombay Police Act, 1902, for the purposes of ss. 3, 4, 5 and 6 of Act XI of 1890.”

In 1934, the Commissioner of Police, Bombay, was vested with the power of appointing additional Police Officers, under s. 9(1)(a) of the City of Bombay Police Act, 1902, which ran :—

“The Commissioner of Police may in his discretion appoint . . . additional Police Officers . . . to enforce any of the provisions of this or any other Act in respect of any particular class or classes of offences . . .”

In 1935, the power of appointment was taken away from the Commissioner of Police and vested in the Government of Bombay, by re-enactment of s. 9(1)(a), which provided :—

“The Provincial Government may appoint . . . additional Police Officers . . . to enforce any of the provisions of this or any other Act in respect of any particular class or classes of offences . . .”

On April 1, 1937, the Government of Bombay published a notification stating that in the exercise of the powers conferred by s. 241(1) of the Government of India Act, 1935, the Governor of Bombay authorised any officer subordinate to him (i.e. the Commissioner of Police, Bombay), who was authorised to make appointments by any law in force before April 1, 1937, to make appointments to the Civil Service of or Civil Posts under the affairs which are the affairs of the Province of Bombay.

On November 3, 1938, the Government of Bombay issued an order directing that the appointment to the posts of additional Police under s. 9(1) of the City of Bombay Police Act, 1902, be made by the Commissioner of Police, Bombay.

The accused was in due course tried by the Presidency Magistrate, Second Additional Court. It was contended by the defence that the Commissioner of Police having lost the power to appoint additional Police Officers in 1935, the appointment of the complainant as an additional Police Officer came automatically to an end then, and that the arrest by the complainant was therefore not legal.

The trying Magistrate overruled the contention, found the accused guilty of an offence under s. 3(a) of the Prevention of Cruelty to Animals Act, 1890, and sentenced him to pay a fine of Rs. 10, observing as follows :—

“When the Commissioner of Police appointed the agent in question in 1934 he had the power of appointment vested in him under s. 9(1)(a) of Bombay Act IV of 1902. The validity of the appointment in 1934 cannot be and is not disputed by the defence. That being so the fact that in 1935 this power of appointment of additional Police was taken away from the Commissioner of Police and that thereafter it was vested in some other authority does neither invalidate the appointment already made by him when he had the power to do so, nor does the Officer so appointed cease to be an additional Police for the reason that subsequent to his appointment the authority that appointed him ceased to have, for some length

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of time, the power to appoint such Officers, that power being in the meanwhile vested in some other authority."

The accused applied to the High Court in revision.

*I. N. Mehta*, with *I. C. Dalal*, for the accused.

*R. A. Jahagirdar*, Government Pleader, for the Crown.

BEAUMONT C. J. The accused in this case was convicted by the Presidency Magistrate, Second Additional Court, Mazagaon, under s. 3(a) of the Prevention of Cruelty to Animals Act of 1890. He was driving a victoria, which had in it six full grown men and six beddings and six bags, and the suggestion is that he was thereby overloading his gharry and causing unnecessary pain and suffering to the horse.

Section 3 provides that if any person treats any animal so as to subject it to unnecessary pain or suffering, he shall be guilty of an offence. Section 3-A expressly makes overloading an animal an offence, but as no rules have been published, specifying the maximum weight that may be carried, there might be a difficulty in prosecuting under s. 3-A. Therefore, the case is brought under s. 3(a), and under that section it is to be shown that unnecessary pain or suffering was caused to the animal.

The principal point taken in this revision application is that the accused was not properly arrested, and, therefore, it is suggested that the conviction was bad. Whether that result would follow on improper arrest, it is unnecessary to decide, because, in my opinion, the accused was properly arrested. He was arrested by an agent of the Society for the Prevention of Cruelty to Animals, and the agent in question had been appointed in the year 1934 by the Commissioner of Police to act as an Additional Police Officer for the purposes, amongst other sections, of s. 3 of the Prevention of Cruelty to Animals Act. No time for the duration of the appointment was specified, and, in my opinion, the appointment would continue during the life of the agent, or until the appointment is revoked by competent authority. Subsequently, the power of appointing Additional Police Officers became vested in the Local Government, and in 1938 the Local Government again delegated the power to the Commissioner of Police. It is suggested that the appointment of this agent, who arrested the accused, had lapsed, because, at one period since his appointment, the Commissioner of Police ceased to have power to appoint Additional Police Officers. I do not think there is any force in that contention. If the agent was an Additional Police Officer for the purposes of this Act, as I think he was, he could arrest without warrant under s. 33(1) of the City of Bombay Police Act. In my opinion, therefore, the arrest was legal.

The question whether the victoria was overloaded and caused unnecessary suffering and pain to the horse is merely a question of fact, and there is no ground on which we should interfere in revision when the fact is established that there were six grown up men with all their luggage in the victoria.

The application, therefore, fails.

*Application dismissed.*

Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.

PARASHURAM DETARAM SHAMDASANI

1941

v.

September 11.

SIR HUGH GOLDING COCKE.\*

*Criminal Procedure Code (Act V of 1898), Secs. 548, 554—Copies of proceedings—Right of party to inspect whole record—Right to take copies of any part of such record—High Court Criminal Circular No. 160 A—"Papers exhibited in the proceedings," interpretation of—Indian Evidence Act (I of 1872), Sec. 76.*

There is a common law right of a person to take inspection of a document in which that person is interested, for the protection of such interest.

*Mutter v. Eastern and Midlands Railway Co.*<sup>1</sup> and *Chandi Charan Dhar v. Boistab Charan Dhar*,<sup>2</sup> followed.

Except as controlled by any rule made by the High Court under s. 554 of the Criminal Procedure Code, 1898, a Magistrate or a Judge of a subordinate Court has a discretion to allow inspection of the record of his Court. Such discretion must be exercised judicially. In exercising his discretion the Magistrate or the Judge will be bound to have regard to the terms of s. 548, and it will generally be improper for him to refuse inspection of any document of which a party is entitled to a certified copy under the section.

The right to a certified copy pre-supposes a right of inspection, because a party cannot be expected to make up his mind whether he wants to have a copy of a document, if he is not entitled in the first place to read it, and see what it is about. Therefore, under s. 548 of the Code a party has prima facie an implied right to ask the presiding Magistrate or Judge to allow him inspection of the record referred to in the section.

Whatever meaning be assigned to the expression "papers exhibited in the proceedings", used in Criminal Circular No. 160 A issued by the High Court under s. 554 of the Criminal Procedure Code, it does not deprive the Court of the right which it previously enjoyed of granting inspection of the whole record to a party properly entitled thereto.

RIGHT of inspection of the record in a criminal case.

The applicant, P. D. Shamdasani, filed a complaint originally on December 20, 1926, against the opponents, who were the auditors of the Central Bank of India, Ltd., charging them with having wilfully made, in their report at the foot of the balance sheet dated December 31, 1925, a statement, as required by s. 145 (2)(c) of the Indian Companies Act, 1913, which was "false in material particulars knowing it to be false," an offence punishable under s. 282 of the Act and/or s. 197 read with s. 193 of the Indian Penal Code, 1860. The complaint was dismissed, on December 12, 1929, on account of the complainant's absence at a hearing of the case, and the accused were discharged.

On December 14, 1929, the complainant refiled the complaint adding one more accused and laying certain additional evidence. That complaint went

\* Criminal Application for Revision No. 240 of 1941, from an order passed by I. S. Haji, Presidency Magistrate, Sixth Court, Mazagaon, Bom-

bay.

1 (1888) 38 Ch. D. 92.

2 (1903) I. L. R. 31 Cal. 284.

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from one Court to another until it was referred on October 25, 1935, to the Court presided over by I. S. Haji. The case took about three hundred hearings (including adjournments) between November 16, 1935, and April 26, 1941, and the progress made was that the complainant's examination-in-chief remained to be concluded and the evidence of the witnesses summoned for the prosecution remained to be taken. No charge was framed against the accused.

The case stood adjourned to April 26, 1941. The complainant was not present at the hearing. The trying Magistrate therefore dismissed the complaint and discharged the accused.

On June 18, 1941, the complainant appeared before the Magistrate and applied to have a search of the record of the case.

The Magistrate dismissed the application, observing as follows :—

"The complainant appears today with a written application and prays that a permission be given to him to take a search of the record of proceedings in this case. In his application the complainant states that the search is required in connection with an application to the High Court for quashing certain proceedings which he alleges are null and void. The complainant was questioned and he stated that he wanted to have a search of the record of evidence, of the exhibits and of the orders passed in this case from time to time. . . . The complainant, in my opinion, has not made out any prima facie case for the search or inspection of the record of proceedings in this case. The complaint, for the purpose of his application in revision, is time-barred in respect of the orders passed in this case sixty days prior to this application. Under s. 548, Criminal Procedure Code, the complainant is only entitled to a copy of the orders, depositions and other part of the record in this case. If the complainant wants copies of the notes of evidence and of the orders passed in this case from time to time including the order of April 26, 1941, discharging the accused, he will be furnished with the same on his depositing the necessary amount as cost for the same."

The complainant applied to the High Court in revision.

The applicant (complainant) in person.

S. G. Velinkar, with *Payne & Co.*, for opponents Nos. 2 and 3.

B. G. Rao, Assistant Government Pleader, for the Crown.

BEAUMONT C. J. This is an application in revision against an order made by the learned Presidency Magistrate, Sixth Court, refusing the applicant leave to inspect the record in certain criminal proceedings in that Court.

It appears that the applicant lodged a complaint against the auditors of the Central Bank, and after the matter had proceeded for a considerable time, the applicant was absent from Court at one hearing, and the accused were discharged. The applicant now says that he wants to inspect the orders made by the Court in those proceedings, the depositions of witnesses, and the exhibits in the case in order to make up his mind whether he should lodge a fresh complaint; and the question is whether he has a right to such inspection.

The application raises the general question of the right of inspection of the record of a criminal Court subordinate to this Court. Reference has been made to s. 76 of the Indian Evidence Act, but that section does not really assist us on the point we have to determine. All that that section does is to give to a party, who has the right to inspect a public document, as defined in s. 74, the right to demand a copy of it on certain terms. But the right



conferred by that section is confined to persons who have the right to inspect a document, and the Indian Evidence Act does not specify the persons who have a right to inspect public documents. There would seem to be in England a common law right of inspection of public documents by a person interested in the document, so far as may be necessary for the protection of such interest. The rule is stated in *Mutter v. Eastern and Midlands Railway Co.*<sup>1</sup> in these terms (p. 106):—

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“When the right to inspect and take a copy is expressly conferred by statute, the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred the extent of such right depends on the interest which the applicant has in what he wants to copy, and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle...”

That passage was cited and followed in India in *Chandi Charan Dhar v. Boistab Charan Dhar*.<sup>2</sup>

Under the Criminal Procedure Code, s. 548 gives to any person affected by a judgment or order passed by a criminal Court the right to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record on the terms specified in the section. Then s. 554 gives a right to Chartered High Courts to make rules for the inspection of the records of subordinate Courts. For many years after s. 548 was passed, there were no rules of this Court relating to inspection, and I understand that the practice was for a Magistrate or Judge to give inspection of the record of his Court as he thought proper. I have no doubt that, except as controlled by any rule made by the High Court, a Magistrate or Judge of a subordinate Court has a discretion to allow inspection of the record of his Court, but such discretion must be exercised judicially. In exercising his discretion a Magistrate or Judge would be bound to have regard to the terms of s. 548, and in my opinion it would be difficult, and generally improper, for him to refuse inspection of any document of which a party was entitled to a certified copy under that section. The right to a certified copy seems to me to presuppose a right of inspection, because a party cannot be expected to make up his mind whether he wants to have a copy of a document, if he is not entitled in the first place to read it, and see what it is about. To require a party to take certified copies of all documents on the record in order to determine of which documents he really requires a copy would seem to involve unnecessary expense and trouble. Therefore, I think prima facie under s. 548 a party would have an implied right to ask the presiding Magistrate or Judge to allow him inspection of the record referred to in the section.

But in 1934 this Court framed a rule under s. 554, which is Criminal Circular No. 160-A, and is in these terms :

“(i) Subject at all times to the convenience of the Court and subject to such regulations as the Presiding Officer of the Court may make in order to ensure the safety of the record, parties to a Criminal Proceeding when they are not represented and their pleaders or advocates when they are represented are entitled, on payment of the prescribed fees, to inspect the papers exhibited in the said proceeding. In no case shall the original papers be removed from the office.”

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The expression "papers exhibited in the proceeding" seems to me to be an unfortunate one. It is neither a technical expression, nor a popular one. If the phrase used had been "exhibits", that would have been a technical expression, but it would have included many things which are not papers. Many articles are exhibited in criminal trials which are not papers, and it is difficult to see why a party interested should not be entitled to inspect an article exhibited. I think, probably the expression was intended to cover the whole record, but even if it be confined, as the opponents contend in this case, to papers which are exhibited in the evidence of witnesses, so as not to include copies of depositions or orders of the Court, I am of opinion that the rule is not exclusive. It does not deprive the Court of the right which it previously enjoyed of granting inspection of the whole record to a party properly entitled thereto; and in revision we are entitled to consider whether the learned Magistrate exercised his discretion on the right ground. He has not given any reason for holding that the applicant is not entitled to inspect the record in this case, and I do not myself see any ground on which the applicant can be refused such right. He is clearly entitled under s. 548, as a person affected by the order of the learned Magistrate discharging the accused, to require certified copies of the orders, depositions and other part of the record. It seems to me to be altogether unreasonable to insist that he must take certified copies of documents in order to determine whether he really wants such copies. The more rational course is to allow him to inspect the documents in order to make up his mind whether he wants to have certified copies or not.

I think, therefore, we must allow the application, and direct that the applicant may inspect, at such time and on such proper conditions as the Magistrate may direct, orders made in the proceedings by the Magistrate, depositions of witnesses and the exhibits in the case.

*Order accordingly.*

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*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

1941  
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LALCHAND HIRACHAND GUJAR

v.

TULJARAM RAOJI GUJAR.<sup>1</sup>

*Provincial Insolvency Act (V of 1920), Secs. 75(1), 70, 69—"Aggrieved by a decision..."—Interpretation—Prosecution of insolvent—Application by creditor—Refusal of application—Appeal from order of refusal—District Court—Jurisdiction to hear appeal.*

The words "aggrieved by a decision come to in the exercise of insolvency jurisdiction", as used in s. 75(1) of the Provincial Insolvency Act, 1920, qualify not only "any other person", but also "the debtor, any creditor, [and] the receiver" appearing in the sub-section.

<sup>1</sup> Criminal Application for Revision No. 182 of 1941, against an order passed by G. H. Salvi, District and Sessions Judge of Satara, summarily

dismissing an appeal from an order passed by B. C. Patil, First Class Subordinate Judge at Satara.

Hence, a creditor who is refused leave, by a Subordinate Judge, to prosecute the insolvent, under s. 70 of the Act, for fraudulent suppression of assets, is not entitled to appeal to the District Judge, as he cannot be said to be aggrieved by the order.

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TULJARAM and others (opponents) filed an application in the Court of the First Class Subordinate Judge at Satara, for being adjudicated insolvents under the Provincial Insolvency Act, 1920.

The applicant Lalchand applied to the Court praying that the opponents be proceeded with under s. 69 of the Act, and alleged that they had omitted to mention the name of one of their creditors and had not disclosed all the property they owned and possessed.

The Subordinate Judge refused to file a criminal complaint as prayed for, observing as follows :—

"The evidence adduced does not disclose that the failure of the insolvents to include some of the properties (viz. a few pro-notes etc.) or the name of one of the creditors was wilful and fraudulent. I do not think that this is a fit case justifying the filing of a criminal complaint. Such a complaint is, in my opinion, sure to end unsuccessfully."

The applicant appealed against the order to the District Judge, but the appeal was summarily dismissed, under O. XLI, r. 11, of the Civil Procedure Code, 1908, for the following reasons :—

"Section 75 of the Provincial Insolvency Act, 1920, gives a right of appeal to a creditor aggrieved by a decision given or an order made in the exercise of insolvency jurisdiction. I do not think that the appellant can be said to have been aggrieved by the order made by the lower Court in this case. The order made does not affect him in any way. This view is supported by the rulings in *Ladu Ram v. Mahabir Prasad* (39 All. 171) and *Iyappa Nainar v. Manicka Asari* (40 Mad. 630). I hold that no appeal lies against the order made by the lower Court."

The applicant applied to the High Court in revision.

*K. N. Dharap*, for the applicant.

*D. V. Patel*, for *H. F. Mudireddi* and *M. J. Rajpal*, for the opponents.

*B. G. Rao*, Assistant Government Pleader, for the Crown.

BEAUMONT C. J. This is an application in revision against an order of the District and Sessions Judge of Satara holding that the appeal to him was incompetent. So the question raised is as to jurisdiction. The applicant was a creditor in the insolvency of the opponents, and he desired to prosecute the opponents under s. 69 of the Provincial Insolvency Act for fraudulent suppression of assets. He applied to the Court for leave to prosecute under s. 70 and the Insolvency Court refused leave. Against that refusal an appeal was brought in the District Court, and the question is whether an appeal lies under s. 75 of the Provincial Insolvency Act. Sub-section (1) of that section provides that—

"The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final."

Section 46 of the previous Provincial Insolvency Act of 1907 provided that—

"Any person aggrieved by an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court."

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Beaumont C.J.

Under the old section it had been held by the High Courts of Allahabad and Madras that a creditor who was refused leave to prosecute was not a person aggrieved by the order within the meaning of that section, and I agree with those decisions. It seems to me that the creditor is not affected one way or the other by the refusal of the Court to prosecute the debtor. The creditor can pursue his rights in insolvency. If he thinks that assets have been wrongly suppressed, he can apply to the Insolvency Court in order that those assets may be dealt with in the insolvency, but he is not really interested in a prosecution.

However, Mr. Dharap for the applicant has contended that in the amended s. 75, sub-s. (1) the words "aggrieved by a decision come to in the exercise of insolvency jurisdiction" qualify only "any other person", and that the debtor, a creditor and the receiver have an unqualified right to appeal. But it is impossible to read the section in that way, because the only reference to the subject-matter of appeal lies in the description of the decision which follows the word "aggrieved". If one reads the words "aggrieved by a decision" and so forth as qualifying only "any other person", then the debtor, a creditor, and the receiver, under the terms of the section, are granted a right to appeal to the District Court without any indication of what they may appeal against. It seems to me that one must read the words "aggrieved by a decision" and so forth as qualifying all the persons who are entitled to appeal. That construction is supported by the second proviso to sub-s. (1) which gives a right of second appeal to the High Court to any such person aggrieved by a decision of the District Court. It is impossible to suppose that the right of second appeal from the District Court was given only to persons other than the debtor, a creditor or the receiver. Moreover sub-ss. (2) and (3) confer a right of first appeal from the District Court only to "such person aggrieved". Sub-section (1) is not very artistically worded, and it is difficult to see the reason for altering the phraseology of the old section; but I have no doubt that it does confer the right of appeal only on persons aggrieved by the order of the subordinate Court. That being so, the learned District Judge was right in holding that the creditor was not entitled to appeal.

The application is, therefore, dismissed.

*Application dismissed.*

Before Mr. Justice Broomfield and Mr. Justice Wassoodew.

RAMCHÊTSING ARJUNSING

v.

DEOJI KALYANJI.\*

1941

September 16.

*Criminal Procedure Code (Act V of 1898), Secs. 516A, 202, 4(k) (1)—Order for custody of property—Commission of offence—Property produced before Court—Pendency of inquiry or trial—Ex parte orders for custody of property.*

On a complaint for an offence of criminal breach of trust, the Magistrate referred it to police for investigation under s. 202 of the Criminal Procedure Code, 1898, and, on an application made by the complainant, passed an *ex parte* order under s. 516A of the Code directing possession of the property to be handed over to the complainant on his executing a surety bond. Shortly afterwards, the accused applied to have possession of the property, but the Magistrate did not pass any order and awaited the police report. Upon receipt of the report the Magistrate ordered process to issue against the accused, and later refused to disturb the order that he had made entrusting the property to the complainant. The accused having applied in revision against the order :—

*Held*, setting aside the order, (1) that it was not justified under s. 516 A of the Code, inasmuch as the Magistrate having referred the complaint to the police for investigation, it could hardly be said that an offence appeared to the Magistrate to have been committed at the date of the order ;

(2) that the order went outside the scope of the section, for the power of the Magistrate to make an order was limited to property which was produced before him ;

(3) that the order was bad for the reason that at its date there was no inquiry or trial pending before the Magistrate.

Circumstances of urgency may necessitate the passing of *ex parte* orders under s. 516 A, but orders passed in that way can only be interim orders subject to vacation, variation or confirmation, after hearing the parties concerned.

ORDER under s. 516A of the Criminal Procedure Code, 1898, for custody of property pending trial.

On April 7, 1941, the complainant Deoji Kalyanji appeared before the Second Class Magistrate at Andheri and complained that the accused Ramchetsing Arjunsing had committed an offence of criminal breach of trust punishable under s. 406 of the Indian Penal Code, 1860, in respect of forty buffaloes, which he alleged were entrusted by him to the accused. On the same day the Magistrate forwarded the complaint to the police for investigation, under s. 202 of the Criminal Procedure Code, 1898.

On April 16, 1941, the complainant applied to the Magistrate for an order under s. 516 A of the Criminal Procedure Code directing that the custody of the buffaloes be given to him. The Magistrate passed an *ex parte* order the same day directing that the custody of the buffaloes should be given to the complainant. The police executed the order and handed over the buffaloes to the complainant on April 17, 1941.

\* Criminal Application for Revision No. 277 of 1941, from an order refusing to report the case to the High Court under s. 438, Criminal Procedure Code, passed by T. P.

Jetley, Additional District Magistrate, Bombay Suburban District, and confirming the order passed by V. V. Vaidya, Second Class Magistrate, Andheri.

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On April 18, 1941, the accused applied to the Magistrate for recovering custody of the buffaloes, stating :—

"The case filed by the complainant has not yet begun, no evidence has been recorded, and the documents produced before the Court clearly show that the ownership of the property is in dispute and eight buffaloes belong exclusively to the accused. It is admitted that the property was in the possession of the accused and it has come in the possession of the accused legally....The order of attachment seems to have been passed *ex parte*. The accused therefore prays that in order to maintain *status quo* the property may be handed over to the accused pending the disposal of the trial."

On April 21, 1941, the police reported the result of their investigation to the Magistrate, who issued process against the accused requiring him to attend the Court on May 15, 1941.

On April 28, 1941, the Magistrate disposed of the application made by the accused on April 18, observing :—

"It is not necessary to pass any orders on the application at this stage when orders in this respect have already been passed, pending decision of the case."

On May 9, 1941, the accused applied to the Additional District Magistrate, Bombay Suburban District, requesting him to report the case to the High Court under s. 438 of the Criminal Procedure Code, for revising the order passed by the Magistrate as to the custody of the buffaloes.

On June 6, 1941, the Additional District Magistrate declined to make the reference, for the following reasons :—

"The word 'inquiry' is meant to include everything done in a case by a Magistrate whether the case has been challaned or not (*Bhalum Singh v. Queen Empress*, P. R. No. 3 of 1897). In this case the Magistrate has passed the order dated April 16, 1941, after the complaint was duly sworn before him and after it appeared to him that the property mentioned in the complaint belonged to the complainant and in respect of which a criminal offence appeared to have been committed. The inquiry by the Police under s. 202 also shows that the accused was the servant of the complainant who entrusted the care of the buffaloes to him as a servant and not as a partner, and the accused according to the police had sold some of the buffaloes entrusted to him under the pretext of meeting the expenses. The Magistrate was, for the reasons mentioned above, quite justified, with a view to safeguard the property, in handing over the buffaloes to the complainant on his executing a bond with surety for the price of the animals."

On July 2, 1941, the accused applied to the High Court in revision.

K. P. Karnik, for the accused.

V. H. Kamat, for the complainant.

R. A. Jahagirdar, Government Pleader, for the Crown.

BROOMFIELD J. In this criminal revision application we are concerned with the question of the legality of an order purporting to have been made under s. 516 A of the Criminal Procedure Code, 1898, in the following circumstances. On April 7, 1941, the opponent complained to the Second Class Magistrate, Andheri, that the applicant before us had committed criminal breach of trust in respect of certain buffaloes. The complainant's story appears to be that in December, 1940, having occasion to leave Bombay, he handed over a herd of forty buffaloes to the accused, who was his servant. He returned to Bombay in March, 1941, and when he called upon the accused to restore the animals the accused refused to do so, alleging that they belonged to him. We under-

stand that the accused's case is that he and the complainant were doing milk business in partnership. The complainant also alleges that the accused has wrongfully disposed of some of the buffaloes. In the verification of the complaint the complainant requested that the animals should be at once restored to him. The Magistrate forwarded the complaint to the Police Sub-Inspector for inquiry and report under s. 202, and in the forwarding endorsement he directed the Police that in case they found that the property belonged to the complainant and that a criminal offence appeared to have been committed in respect of it, it should, if necessary, be handed over to the complainant on his executing a bond with a surety in a sum equal to the valuation of the property, binding himself to produce it when required.

On April 16, the complainant made an application to the Court asking that a warrant should be issued for the attachment of the buffaloes and on the same day the Magistrate made this order :

"As an offence appears to have been committed in respect of the animals aforesaid and the utensils and other articles (to be pointed out by the complainant), they should be attached and handed over during the pendency of the case in possession of the complainant on his executing a bond with a surety on a stamped paper for an amount equal to the Panch valuation of the animals etc., on condition of producing the animals when ordered by the Court so to do."

This order was sent to the police-officer for compliance and it was complied with on April 17, that is to say the property was attached from the possession of the accused and handed over to the complainant who executed the required undertaking and surety bond.

On April 18, the accused applied to the Magistrate complaining of the order of attachment on the ground that it had been passed *ex parte* and for various other reasons and praying that the property should be handed over to him pending the disposal of the trial. No orders were passed on this application at the time. On April 21, process was ordered to issue against the accused. That was after the receipt of the police report, which was to the effect that there was prima facie evidence that at any rate a technical offence of criminal breach of trust had been committed. It was stated in the police report that as the complainant's watchman resided in the stable and there was no possibility of the accused removing the animals, they had not been attached. That no doubt was in reference to the Magistrate's endorsement in forwarding the complaint for inquiry.

On April 28, the Magistrate made this further order disposing of the accused's application of April 18 :—

"It is not necessary to pass any orders in the application at this stage when orders in this respect have already been passed, pending decision of the case."

Section 516A is in the following terms :—

"When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence is produced before any criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of."

The applicant contends that the Magistrate's orders are illegal and not

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warranted by this section for the following reasons : (1) on April 16, when the first order was made, the Magistrate had no reason to suppose that an offence had been committed ; (2) the property in question had never been produced before the Court as required by the section ; (3) it could not be said that the order was made during any inquiry or trial, because at that time the inquiry, which means an inquiry by a Magistrate, or the trial, had not commenced. In our opinion these objections to the order are substantial.

As I have stated, the Magistrate sent the complaint to the police for investigation, and that in itself suggests that without further inquiry or investigation the Magistrate was not satisfied that there was a case justifying the issue of process, in which case it can hardly be said that an offence appeared to him to have been committed. The learned Government Pleader who appears to oppose the application has argued on the strength of an affidavit made by the complainant that the police report was already before the Magistrate on April 16. The original report is before us and it does no doubt bear the date April 16, 1941. But there is nothing to show that it reached the Magistrate on that day. On the contrary it bears the date 21-4 and certain initials which seems to indicate that it was not received by the Magistrate until April 21, the date on which process was ordered to issue. This condition, therefore, viz., that the Magistrate should have reason to suppose that an offence had been committed, does not appear to have been complied with at the date of the order.

Then as to the property not having been produced, the words of the section are perfectly clear, and the power of a criminal Court to make orders as to the temporary custody or protection of property seems to be limited by the language of the section to property which is produced before it. The learned Government Pleader argued that the Court might have ordered production of the property under s. 94 of the Code and that, as the police were directed to attach the property, that was tantamount to production before the Court. But practically what this argument amounts to is that in cases where production before the Court would be inconvenient the words in the section "produced before any criminal Court" may be ignored. No authority has been cited before us for holding that orders under this section may legally be made except in respect of property which can fairly be said to have been produced before the Court.

Then as to the third objection. The word "inquiry" is defined in s. 4(k) of the Code. "Investigation" is defined in s. 4(l). It is clear from these definitions that the investigation by the police under s. 202 is not an inquiry within the meaning of the Code, and therefore on April 16, when the Magistrate made this order, there was no inquiry or trial pending. The learned Government Pleader frankly conceded that in this respect at any rate the order was not in accordance with the provisions of s. 516A, but he argued that the order was in effect confirmed after hearing the parties by the subsequent order made on April 28. That was after the issue of process and after the Magistrate had been satisfied that an offence appeared to have been committed. His view was that under the circumstances it was not necessary for this Court to interfere. The record, however, does not suggest that the parties had been heard on April 28 and the form of the Magistrate's order is not consistent



with the view that he was merely confirming his previous order after hearing the parties. He said in so many words that it was not necessary to pass any orders at all on the application made by the accused on April 18, and his view appears to have been that it was open to him to make an *ex parte* order, such as the order complained of on April 16, and that that order must be regarded as final pending the decision of the case. We think it necessary to point out emphatically that there is no warrant at all for any such view. It may be that circumstances of urgency may necessitate the passing of *ex parte* orders, but orders passed in that way can only be interim orders subject to vacation or variation or confirmation after hearing the parties concerned.

As the Magistrate's orders of April 16 and 28 do not comply with the provisions of the Code and are illegal, we must set them aside. We must also direct that the property attached from the accused should be restored to him. But as the Court is now satisfied that a *prima facie* case has been made out, we consider that it is necessary to prevent abuse of the process of the Court and to secure the ends of justice (vide s. 561A) that the accused should be required to give security. The order of restoration therefore is made subject to the accused giving security to the satisfaction of the Magistrate for the safe custody of the property and its production if and when required. In the event of this condition not being complied with, the Magistrate must make such other orders in respect of the property as are in accordance with law.

*Order accordingly.*

### APPELLATE CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

VISHNU JANARDAN SALVEKAR

*v.*

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July 17.

*Possession—Tenant-in-common—Adverse possession—Evidence of ouster necessary—Decree—Final or declaratory—Res judicata—Civil Procedure Code (Act V of 1908), Secs. 11 and 47.*

Possession of immovable property by one tenant-in-common or joint tenant is possession of all, and is not to be regarded as adverse to other tenants-in-common or joint tenants in absence of evidence of ouster.

A Hindu died leaving two daughters A and B who inherited his property. B died leaving her husband C and a minor son, the plaintiff. C brought a suit in 1924 against A for partition of lands comprising a survey number. The suit was decreed in his favour but the decree was not executed and became time-barred.

\* Second Appeal No. 131 of 1940, from the decision of T. B. Shanbhag, Assistant Judge at Satara, in Appeal No. 314 of 1938, reversing the decree

passed by H. K. Karmarkar, Joint Subordinate Judge at Karad, in Civil Suit No. 133 of 1937.

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The plaintiff brought a suit in 1937 against A's two sons, defendants Nos. 1 and 2, A being dead, for partition of the same survey number. Defendants contended that the suit was barred by limitation, barred under s. 47, Civil Procedure Code, 1908, and barred as *res judicata* :—

*Held*, (1) that, as the parties were tenants-in-common and there was no evidence that the plaintiff was ousted from the property, the plaintiff's title to the survey number was not barred by limitation ;

(2) that the decree of 1924 directed that C was entitled to partition, but as the survey number paid land revenue to Government, the matter rested with the Collector to effect partition, and that whether the decree was regarded as a declaratory decree or as a final decree, there was nothing for the parties to do in execution, and, therefore, s. 47, Civil Procedure Code, did not apply :

*Jagu v. Balu*<sup>1</sup> and *Jacinto v. Fernandez*,<sup>2</sup> referred to ;

(3) that, if the decree of 1924 was a final decree deciding the rights of the parties, there was nothing to prevent the Collector from performing his duties by partitioning the property, and if it was a declaratory decree it was not a decree finally decided within the meaning of s. 11, Civil Procedure Code, and that section was not a bar to the filing of a fresh suit.

*Semble*. In view of the decision in *Subbaya v. Muhammad*<sup>3</sup>, the doctrine enunciated in *Mir Akbarali v. Abdul Aziz*<sup>4</sup>, which was followed in *Rakkhmbai v. Ramchandra*<sup>5</sup>, is no longer good law.

SUIT for partition.

One Balkrishna Umbrani died leaving two daughters, Gaya and Durga, and a daughter-in-law Yeshoda, who was the widow of his pre-deceased son. After his death his daughters succeeded to his property. Durga died in 1914 leaving her husband Janardan and son Vishnu (plaintiff). Janardan filed suit No. 184 of 1924 in the Court of the Second Class Subordinate Judge of Karad for partition and possession of his share in survey No. 22 admeasuring two acres and four gunthas and another survey No. 34 in the village of Marali. The suit was decreed as to survey No. 22, but was dismissed as to survey No. 34 as there was a charge on it for Yeshoda's maintenance. No darkhast was filed in time to execute the decree which was consequently barred by limitation. Janardhan died on March 19, 1925. His son Vishnu was then a minor, and attained majority on February 27, 1934. On February 22, 1937, Vishnu brought a fresh suit for partition of the survey number against Mahadev and Shrikrishna (defendants Nos. 1 and 2) who were the sons of Gaya and who had inherited her property on her death.

Defendants Nos. 1 and 2 contended *inter alia* that the suit was barred as a result of the decree in suit No. 184 of 1924, that it was barred under s. 47 of the Civil Procedure Code, 1908, and that as they had acquired title to the survey number by adverse possession it was barred by limitation.

Defendant No. 3, who was mortgagee of the survey number which was mortgaged by Gaya, supported defendants Nos. 1 and 2.

The trial Judge found that the suit was neither barred by *res judicata* nor under s. 47 of the Civil Procedure Code, nor by limitation. He passed a decree for partition of the survey number awarding the plaintiff a half share in it.

1 (1912) 14 Bom. L. R. 1198.

2 (1939) 41 Bom. L. R. 921.

3 (1923) 25 Bom. L. R. 1275, P.C.

4 (1920) I. L. R. 44 Bom. 934,  
s.c. 22 Bom. L. R. 916.

5 (1920) 23 Bom. L. R. 301.

On appeal, the Assistant Judge held that the suit was neither barred by *res judicata* nor under s. 47 of the Civil Procedure Code, but it was barred by limitation. His reasons were as follows :—

"The only point that now remains is whether the suit is in time. There is no dispute regarding the fact that suit No. 184 of 1924 was instituted on April 1, 1924, and that it was decreed on October 16, 1924. It is equally admitted that the present suit was instituted on February 22, 1937. It is, therefore, obvious that it has been brought more than twelve years from the date of the institution as well as from the date of the decree of suit No. 184 of 1924. Mr. Joshi for the respondent urged that inasmuch as the former decree in suit No. 184 of 1924 was held to be inoperative, the parties were restored to the position in which they were at the time of the suit. The respondent and the appellants, no doubt, owned the property as tenants-in-common. In suit No. 443 of 1919, Gaya, the mother of the appellants, along with Janardhan, the father of the respondent, admitted that they were tenants-in-common in respect of both the survey numbers 22 and 34. Relying upon the admission in exhibit 70, Mr. Joshi for the respondent argued that as no further denial took place after the passing of the decree in suit No. 184 of 1924, though the appellants' right to the suit property in that suit was denied, the claim was not barred by limitation. For this he relied upon *Mir Akbarali v. Abdul Aziz*, 22 Bom. L. R. 916 and *Rakhmabai v. Ramchandra*, 23 Bom. L. R. 301. These decisions no doubt support the point of view put forward by Mr. Joshi. In *Mir Akbarali v. Abdul Aziz*, 22 Bom. L. R. 916, Macleod C.J., at p. 919, observes : 'But we think that it would require very strong evidence indeed on the part of a losing party to acquire a fresh title by adverse possession against the decree of the High Court or of any Court, and he would certainly have to act in such a way that the parties interested could have no doubt whatever with regard to his motives in order that they might be enabled to take proper steps to stop time from running'. Mr. Joshi argued that there was nothing on record to show that after the decree in suit No. 184 of 1924 became incapable of execution, there was no overt act by the appellants denying respondent's interest in the suit property. The respondent, exhibit 83, has admitted that the appellants recovered the income of the property and did not pay his share of the income. He has also admitted that his father had claimed three years' past mesne profits in suit No. 184 of 1924. Even after the decision of the suit the respondent has not recovered any income of the property nor has he been in joint possession with the appellants. In view of the fact that in suit No. 184 of 1924 the respondent's title to the suit property was denied, and taking into consideration that for three years before the suit and for more than twelve years after the suit the respondent was not in possession or enjoyment of the suit property, it is obvious that the respondent's claim is barred by limitation. However, in the absence of any overt act after the decree in suit No. 184 of 1924 became executable, if the law as laid down in *Mir Akbarali v. Abdul Aziz*, 22 Bom. L. R. 196 and *Rakhmabai v. Ramchandra*, 23 Bom. L. R. 301, referred to above, was still good law, I am afraid Mr. Joshi's point of view would have prevailed. But in a recent case of the Bombay High Court it has been observed that the law laid down in *Mir Akbarali v. Abdul Aziz*, 22 Bom. L. R. 916, and followed in *Rakhmabai v. Ramchandra*, 23 Bom. L. R. 301, is no longer good law. This is the view expressed by his Lordship Justice Wassoodew in *Bhogilal v. Ratilal*, 41 Bom. L. R. 497. His Lordship has observed that the law as laid down in *Mir Akbarali v. Abdul Aziz*, 22 Bom. L. R. 916, is no longer good law, at p. 505 of 41 Bom. L. R. I, therefore, hold that the present suit is barred by limitation."

The plaintiff appealed to the High Court.

K. N. Dharap, for the appellant.

P. V. Kane, for the respondents.

BEAUMONT C. J. This is a second appeal from a decision of the Assistant Judge at Satara. The suit was filed on February 22, 1937, and the plaintiff

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A. C. J. asked for possession of half survey No. 22 by partition. The trial Court  
1941 decreed the plaintiff's claim, but in appeal the learned Assistant Judge held  
— that the plaintiff's suit was barred by limitation.

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—  
Beaumont C.J. The property originally belonged to one Balkrishna Umbrani, who died,  
leaving as his heirs two daughters, Gaya and Durga. Durga married one  
Janardhan and died in 1914; and Janardhan was her heir, through whom  
plaintiff claims. The defendants claim under Gaya. In 1924 by suit No.  
184 Janardhan as the heir of Durga sued Gaya for partition of the suit survey  
number and another survey number, which I need not deal with, and a decree  
was made on October 16, 1924, for partition of survey No. 22. That decree  
being more than twelve years before the filing of the present suit in February  
1937, various points arise.

The first point relates to limitation, and it is suggested that on the authority  
of the decision of this Court in *Mir Akbarali v. Abdul Aziz*<sup>1</sup>, which was followed  
in *Rakhmabai v. Ramchandra*<sup>2</sup>, even though at the date of the decree in 1924,  
Gaya may have been wrongfully in possession of the whole property, the effect  
of the decree was to break her possession so far as it was adverse to the  
plaintiff, and that that break continued, at any rate, beyond February, 1925.  
In *Mir Akbarali v. Abdul Aziz* Sir Norman Macleod does appear to have  
held that, where a purchaser is in possession of property, and a decree is passed  
showing that his possession is wrongful, the trespasser will be so impressed  
with the sanctity of the Court's order that he will cease to hold adversely to  
the true owner, and if he continues in possession, he will do so, presumably,  
as a sort of trustee for the true owner, but that after a time he may recover  
his courage, and his possession may again become adverse. The actual words  
in which this singular doctrine is propounded are (p. 919):—

"But we cannot presume since the decree was passed by the High Court on the  
7th July 1896 that the plaintiffs in this suit determined at once to hold adversely to  
the successful party, and in effect in contempt of the decree of the High Court. It  
is quite possible after the decree had been passed, and after the successful party was  
so remiss in seeking to execute it, the plaintiffs might have gathered fresh courage,  
and might have, after a certain period had elapsed from the date of the decree, de-  
termined to set up again a title in themselves against the successful party in that  
suit."

The doctrine seems to be based rather on psychological than on legal  
grounds, and at once introduces into the law of limitation an element of  
uncertainty as to how long the trespasser will remain in a state of nerves.  
That would, presumably, depend on the measure of respect which he entertains  
for the decree; and perhaps the period might be longer in the case of a  
decree of a High Court than in the case of a decree of a subordinate Court.  
The doctrine finds no support in the Limitation Act, and it has recently been  
held by a bench of this Court in *Bhogilal v. Ratilal*<sup>3</sup> that the doctrine is no  
longer good law, having regard to the decision of the Privy Council in *Sub-  
baya v. Muhammad*<sup>4</sup>, where their Lordships observe that when a trespasser  
is in possession, and the Court makes a declaration showing that his pos-

1 (1920) I. L. R. 44 Bom. 934,

s. c. 22 Bom. L. R. 916.

2 (1920) 23 Bom. L. R. 301.

3 (1938) 41 Bom. L. R. 497.

4 (1923) 25 Bom. L. R. 1275, P.C.

session is wrongful, that does not affect the quality of his possession, but merely advertises the fact that it is adverse. I would say that I quite agree with the view expressed by this Court in *Bhogilal v. Ratilal* that the effect of that decision of the Privy Council is to show that the doctrine enunciated in *Min Akbarali v. Abdul Aziz*, followed in *Rakhmabai v. Ramchandra*, is no longer good law, though on any view of the facts, the question does not really arise in this case.

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Now, Gaya and Janardhan as the heir of Durga were tenants-in-common, being joint heirs of the father, and in 1919 they filed a suit against a third party claiming as joint owners. It does not, I think, matter whether they were joint tenants or tenants-in-common, but the passage in Mulla's Hindu Law, 9th edn., at p. 23, s. 31, suggests that they were tenants-in-common. In the suit of 1924 Janardhan alleged that Gaya had been in sole possession of the property for the last three years, because he had been absent on Government service, and he claimed an account of the rents and profits for those three years. Whether one tenant-in-common is entitled to an account against another tenant-in-common in the absence of ouster, may be doubtful. But, at any rate, the learned Judge in that suit did pass a decree in favour of the plaintiff for a half share of the income of the property during the three years before the suit and for mesne profits from the date of the suit till delivery of possession. But it is to be noticed that in that suit the plaintiff did not claim that he had been ousted, and did not ask for mesne profits prior to the suit. All that he claimed was that his co-tenant had been receiving the rents and profits and had not paid his share to him, and on that basis, rightly or wrongly, he was held entitled to a share. But in order that the possession of one tenant-in-common may be held to be adverse to his co-tenant, it must be shown that the co-tenant has been ousted. Prima facie, the possession of one tenant-in-common or joint tenant is the possession of all, and is not to be regarded as adverse to other tenants-in-common or joint tenants in the absence of evidence of ouster. And in this case it seems to me that in the suit of 1924 there was no claim, and no finding, that Janardhan had been ousted, and there is no evidence that Janardhan, and after his death the plaintiff as his son, had ever been ousted. The learned Assistant Judge says :—

"In view of the fact that in suit No. 184 of 1924 the respondent's title to the suit property was denied, and taking into consideration that for three years before the suit and for more than twelve years after the suit the respondent was not in possession or enjoyment of the suit property, it is obvious that the respondent's claim is barred by limitation."

But in view of the fact that the parties were tenants-in-common, it seems to me that it is not obvious that the respondent's claim was barred by limitation, and, in the absence of any evidence that the respondent was ousted from the property, it is not, in my opinion, right to hold that the plaintiff's title is barred by limitation.

Then it is said that the case is barred by *res judicata* or by s. 47 of the Civil Procedure Code. Both those grounds of attack against the suit depend on the nature of the decree passed in 1924. If it was a decree determining a right to partition, which could have been executed, then, no doubt, the case

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would fall under s. 47. But in *Jagu v. Balu*<sup>5</sup>, a preliminary decree directing that the plaintiff was entitled to partition was held to be a merely declaratory decree which, if not subsequently enforced, would not debar the plaintiff from filing a fresh suit, and that s. 47 would not apply to such a case. The property in this case was, I gather, property which paid revenue to Government, and, if so, as held by this Court in *Jacinto v. Fernandez*<sup>6</sup>, the Court had made the only order, which it was competent to make, in directing that the plaintiff was entitled to partition, and the matter then rested with the Collector to effect partition. Whether the decree of 1924 be regarded as a declaratory decree, or as the final decree of the Court, there was nothing for the parties to do in execution, and s. 47 does not apply. So far as *res judicata* is concerned, there is really no substance in the point, because if the decree of 1924 was a final decree deciding the rights between the parties, and if the only difficulty was that the Collector had not performed his duties, there is nothing to prevent him from performing his duties now; and if it was a declaratory decree, it was not a decree finally decided within s. 11, and that section is not a bar to the filing of a fresh suit.

I think, therefore, the learned Assistant Judge was wrong in saying that the plaintiff's suit was barred by limitation, but right in holding that it was not otherwise barred.

The appeal, therefore, must be allowed with costs here and in the lower Courts, and the plaintiff's suit decreed.

SEN J. I agree.

*Appeal allowed.*

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*Before Mr. Justice Broomfield and Mr. Justice Macklin.*

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v.

VITHAL BHIKAN PATIL.<sup>1</sup>

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1; Second Schedule, para. 20; Sec. 141—Award—Application to file award—Withdrawal of application without obtaining permission to file suit—Whether such withdrawal bars suit to enforce award—Application to file award and suit to enforce award whether amount to proceedings in same subject-matter.*

Defendant executed a promissory note in favour of the plaintiff on June 12, 1933. There was a reference to arbitration in 1935 without the intervention of Court and an award was made. The plaintiff made an application to the Court to file the award under para. 20 of the second schedule of the Civil Procedure Code, 1908. The application was registered as a suit. Subsequently he applied for permission to withdraw his application which was granted. He filed a fresh

<sup>1</sup> (1912) 14 Bom. L. R. 1198.

<sup>2</sup> (1939) 41 Bom. L. R. 921.

\* Second Appeal No. 411 of 1939, from the decision of N. J. Shaikh, District Judge, Dhulia, in Civil Ap-

peal No. 46 of 1938, confirming the decree passed by K. M. Hanbarhatty, Subordinate Judge, Nandurbar, in Civil Suit No. 539 of 1936.

suit on October 28, 1936, against the defendant to enforce the award or in the alternative to recover the amount due on the promissory note. The defendant contended that the application to file the award was a suit under para. 20, second schedule, of the Civil Procedure Code, and as no permission to file a fresh suit was obtained from the Court when the application was withdrawn, the suit was barred under O. XXIII, r. 1 :—

*Held*, that the plaintiff's failure to obtain the leave of the Court to bring a suit was not fatal to his suit ;

that it was not material whether the application to file the award was to be regarded as a suit within the meaning of O. XXIII, r. 1, or not, because the rule was essentially a rule of procedure and was applicable under s. 141, Civil Procedure Code :

*Gauri Shankar v. Maida Koer*<sup>1</sup>, referred to ;

that if the word 'suit' in O. XXIII, r. 1, means an application to file an award, it must have that meaning wherever it occurs in that rule ;

that O. XXIII, r. 1, could not be construed to mean that the withdrawal of the application to file the award without liberty reserved was a bar to this institution of the suit ;

that, even if the withdrawal of the application to file the award without liberty to apply barred the suit, it would only be a suit on the same subject-matter, but the application to file the award and the suit to enforce the award were proceedings not in respect of the same subject-matter :

*Muhammad Nawaz Khan v. Alam Khan*<sup>2</sup>, referred to ;

that the plaintiff's claim for relief on the promissory note apart from the award was not on the same subject-matter and could be enforced.

SUIT to enforce an award.

On June 12, 1933, the defendant, Vithal, passed a promissory note for Rs. 1,550-8-0 in favour of the plaintiff, Ganpat.

On June 12, 1935, the matter was referred to arbitration without the intervention of Court. The arbitrators gave their award on the same day.

On June 14, 1935, the plaintiff presented an application to file the award to the Court of the Subordinate Judge, Nandurbar. It was registered as suit No. 349 of 1935. Evidence was recorded, but the defendant denied the very factum of the award.

On September 18, 1936, the plaintiff applied to withdraw his application to file the award and the Subordinate Judge passed the following order.—

"Plaintiff is permitted to withdraw the suit. He should pay the defendant his costs and bear his own."

On October 20, 1936, the plaintiff filed the present suit to enforce the award given on June 12, 1935, or in the alternative to proceed with the suit on the promissory note.

The defendant contended that the application to file the award was suit under para. 20, second schedule, of the Civil Procedure Code, 1908, and, as no permission to file a fresh suit was obtained from the Court when the application was withdrawn, the suit filed by the plaintiff was barred under O. XXIII, r. 1, Civil Procedure Code.

The Subordinate Judge held that the plaintiff's suit was barred by O. XXIII,

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<sup>1</sup> (1904) I. L. R. 31 Cal. 516.

<sup>2</sup> (1891) L. R. 18 I. A. 73.

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r. 1, because the plaintiff had obtained no order from the Court giving him liberty to file a fresh suit.

On appeal, the District Judge confirmed the decree of the lower Court.

The plaintiff<sup>a</sup> appealed to the High Court.

*G. N. Thakor*, with *Y. V. Dixit*, for the appellant

*H. C. Coyajee*, with *G. R. Madbhavi*, for the respondent.

BROOMFIELD J. In this second appeal there is a question as to the construction and application of O. XXIII, r. 1, of the Civil Procedure Code, 1908. The facts are very simple. The defendant executed a promissory note in favour of the plaintiff in June, 1933. In 1935, according to the plaintiff, there was a reference to arbitration without the intervention of the Court and an award. On June 14, 1935, the plaintiff made an application to file the award under para. 20 of the second schedule to the Code, and on September 18, 1936, he applied for permission to withdraw his application. The application was in these terms :—

“Plaintiff has made an application in order to have filed an award made between plaintiff and defendant. The applicant has not to proceed with the work of the said application. The applicant has to file a separate suit in the matter of the subject of the award in the application. So he has to withdraw this application. Therefore the applicant has not to proceed with this application. Therefore permission should be given to plaintiff to withdraw the said application, each party bearing its own costs.”

The order made by the Sub-Judge on this application was—

“Plaintiff is permitted to withdraw the suit. He should pay the defendant his costs and bear his own.”

On October 28, 1936, the plaintiff filed the suit from which this appeal arises, firstly, to enforce the award, and, secondly, to recover the amount alleged to be due on the promissory note. The trial Court and the District Judge in appeal have held that the plaintiff's suit is barred altogether by O. XXIII, r. 1, because the plaintiff obtained no order from the Court giving him liberty to file a fresh suit.

Order XXIII, r. 1, is as follows :

1. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

The learned counsel for the appellant-plaintiff has taken a preliminary point that the Court's order on the plaintiff's application to withdraw did in effect



and substance allow him liberty to bring a fresh suit. The cases cited by Mr. Thakor in that connection—*Golam Mahomed v. Shibendra Pada Banerjee*,<sup>1</sup> *Khudi Rai v. Lalo Rai*<sup>2</sup> and *Narayana Tantri v. Nagappa*<sup>3</sup>—are not on all fours because in those cases there was a request in the applications that liberty to bring a fresh suit should be allowed. In the present case the plaintiff announced his intention of bringing a fresh suit but he did not actually ask for liberty to bring the suit. There is perhaps something to be said for the argument that in substance the plaintiff obtained the Court's permission to bring a fresh suit, but we do not propose to deal with the case on this ground. We are clearly of opinion that in any case the plaintiff's failure to obtain the leave of the Court to bring this suit is not fatal to his suit.

The other points argued by Mr. Thakor are that an application to file an award is not a suit, that even if it is a suit, an application to file an award and a suit to enforce an award do not deal with the same subject-matter, so that cl. (3) of the rule would not apply, and that in any case the rule cannot bar the plaintiff's suit so far as it is a suit on the original cause of action apart from the award.

There are authorities binding on this Court which show that an application to file an award, although it is numbered and registered as a suit, is not a suit for all purposes, e.g. it is not a suit for the purpose of applying the rule of *res judicata*, *Rajmal Girdharlal v. Maruti Shivram*,<sup>4</sup> and there are several authorities of the Allahabad High Court on the same point. Nor is such an application a suit for the purposes of s. 80 of the Civil Procedure Code : *Secretary of State v. Kundan Singh*.<sup>5</sup> As to whether an application to file an award is a suit within the meaning of O. XXIII, r. 1, *Gauri Shankar v. Maida Koer*<sup>6</sup> is the only authority. It was there held that such an application is a suit within the meaning of that rule. There was no discussion of the point and authorities were not cited. But in the view we take it is not really very material whether an application to file an award is to be regarded as a suit within the meaning of this rule or not. The rule is essentially a rule of procedure, and it would seem that it would be applicable under s. 141 of the Code whether an application is to be regarded as a suit or not.

Supposing that the rule does apply, and speaking for myself, I am prepared to concede this, what is the consequence? It is an elementary rule of construction that a word must be given the same meaning wherever it occurs in the same enactment, and *a fortiori* in the same section of an enactment, unless the context forbids it. If "a suit" in the first sentence of cl. (3) of r. 1 of O. XXIII is to be taken to mean an application to file an award, "fresh suit" further on in that clause must mean a fresh application to file an award, and the only effect of holding the rule to be applicable would therefore be that no second application can be made after the withdrawal of a prior application unless liberty to apply again has been reserved. That I think is probably so, but it has no relevance to the facts of the present case.

In connection with this point Mr. Coyajee drew our attention to an old

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1 (1908) I. L. R. 35 Cal. 990.

2 (1925) I. L. R. 5 Pat. 23.

3 (1918) 34 M. L. J. 515.

4 (1920) I. L. R. 45 Bom. 329,

s. c. 22 Bom. L. R. 1377.

5 (1932) I. L. R. 13 Lah. 672.

6 (1904) I. L. R. 31 Cal. 516.

A. C. J. Madras case, *Subbaramien v. Ponnuswamy Chetty*.<sup>1</sup> There an application had  
 1941 been made under s. 230 of the Civil Procedure Code of 1859. Such applications  
 — were required to be numbered and registered as suits. When the claim came on  
 GANPAT for hearing the applicant was allowed to withdraw the proceeding with liberty  
 KINUSHET to bring a fresh suit and he subsequently brought another suit. It was held  
 v. that the former proceeding was a suit within the meaning of s. 97 of that Code,  
 VITHAL which is in many respects similar to the present O. XXIII, r. 1, and that  
 BHIKAN as liberty had been given to bring another suit the subsequent suit was well  
 — brought. Mr. Coyajee cited this case no doubt with the object of showing  
*Broomfield J.* that the word "suit" in the two places in cl. (3) of the rule where it occurs  
 — need not necessarily refer to precisely the same kind of proceeding. But it is  
 clear on reference to s. 230 of the old Code that claim proceedings under the  
 section which were numbered and registered as suits were *in pari materia*  
 with regular suits. The section provided that the Court should proceed to  
 investigate the matter in dispute in the same manner and with the like powers  
 as if a suit for the property had been instituted. It is impossible however to  
 say that an application to file an award and a suit to enforce the award are  
 similarly *in pari materia* : see *Muhammad Nawaz Khan v. Alam Khan*.<sup>2</sup> We  
 do not think that this case therefore is any ground for not applying what Mr.  
 Coyajee concedes is the ordinary rule of construction, and we hold, that if a  
 suit in O. XXIII, r. 1, can mean an application to file an award at all it must  
 mean that wherever the word occurs. The rule cannot be construed to mean  
 that the withdrawal of an application without liberty reserved is a bar to the  
 institution of a suit. That is enough to dispose of this appeal, and as we have  
 not had the advantage of hearing Mr. Coyajee on the other points I will say  
 very little about them.

Even on the view, which seems to me to be impossible, that the withdrawal  
 of an application to file an award without liberty to apply again bars a suit,  
 it would only be a suit on the same subject-matter. There is the authority  
 of the Privy Council in the case just referred to for holding that where an ap-  
 plication to file an award is refused and a suit is afterwards brought to enforce  
 the award, the two proceedings are not in respect of the same subject-matter.  
 The position would seem to be even stronger where the application is with-  
 drawn without any decision. *A fortiori*, it would seem, the plaintiff's claim  
 for relief on the original cause of action apart from the award is not on the  
 same subject-matter.

We think that the lower Courts were wrong in holding the suit to be barred.  
 The decree of the trial Court and also that of the District Judge must be set  
 aside and the suit sent back for trial on the merits. The costs in the trial  
 Court will be costs in the cause. The appellant is entitled to get his costs  
 here and in the Court of first appeal.

*Suit sent back for trial.*

1 (1870) 5 M. H. C. R. 298.

2 (1891) L. R. 18 I. A. 73.

Before Mr. Justice Broomfield and Mr. Justice Macklin.

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v.

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*Indian Succession Act (XXXIX of 1925), Secs. 211, 307—Administrator—Power to dispose of property of deceased—Continuation of business of deceased by administrator—Liability of administrator—Parsis—Usage—Rule of equity, and good conscience—Principles of English law—Alienation by administrator—Permission of Court.*

To validate a mortgage by an administrator, it must first be proved that the mortgage was executed in the due course of administration, and, secondly, that he was entitled to mortgage the general estate.

An executor (unless expressly authorised by the will) or an administrator is not entitled to continue the business of the deceased except for the purposes of winding it up. If he continues it for any other purpose than winding up, it is deemed to be continued at his own risk.

*Italia v. Mohammad*<sup>1</sup>, *Tarakeswar Das Gupta v. Ambika Charan Bhattacharjee*<sup>2</sup>, *Bank of Bombay v. Suleman Somji*<sup>3</sup>; and Williams on Executors, 1931 edn., Vol. II, p. 1171, followed.

The Parsis in the mofussil are, in the absence of any statutory provision, governed in the first place by usage, and, secondly, by the rules of equity and good conscience, i.e. by the general principles of English law applicable to a similar set of circumstances.

*Shapurji v. Dossabhoy*<sup>4</sup>, *Mancharsha Ashpandiarji v. Kamnusa Begam*<sup>5</sup> and *Mithibai v. Limji Nowroji Banaji*<sup>6</sup>, followed.

Accordingly, a Parsi guardian, whether *de facto* or *de jure*, has no authority to alienate the estate of a ward except with the permission of the Court.

*Tulstidas v. Raisingji*<sup>7</sup> and Trevelyan's Law Relating to Minors, 5th edn., p. 167, referred to.

SUIT on mortgage.

The property mortgaged belonged to one Naoroji, a Parsi living in Ahmedabad, who died in the year 1925 leaving behind him his wife Tehemina, one son Jerkish (defendant No. 1), and two daughters, Khurshed and Marukh (defendants Nos. 2 and 3).

On November 17, 1927, Tehemina took out letters of administration to the estate of her deceased husband Naoroji.

On June 10, 1929, Tehemina "for self and as guardian of minor son Jerkish" mortgaged two of the houses, which formed part of the estate of her husband Naoroji, to her brother Temulji for Rs. 4,000, the consideration stated being that "we have to pay assessment of the bid lands in Dhandhuka and Ramalpur."

\* First Appeal No. 224 of 1938, from the decision of L. C. Sheth, First Class Subordinate Judge at Ahmedabad, in Special Suit No. 1200 of 1936.

1 [1940] Mad. 211.

2 (1927) I. L. R. 55 Cal. 892.

3 (1907) L. R. 35 I. A. 139, 149, s. c. 10 Bom. L. R. 1065.

4 (1905) 7 Bom. L. R. 988.

5 (1868) 5 B.H.C.R. (A.C.J.) 109.

6 (1881) I. L. R. 5 Bom. 506.

7 (1932) 34 Bom. L. R. 1483, F.B.

A C. J.      On February 24, 1931, she "for herself and guardian of all the three, minor son Jerkish and minor daughters Khurshed and Marukhi" mortgaged the two houses to Kuberdas (plaintiff) for Rs. 4,000, and paid off Temulji with the amount.

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—

Sometime in 1934 Tehemina died.

On November 23, 1936, the plaintiff sued the three defendants, who were the minor children of Naoroji, to recover the mortgage amount by sale of the mortgaged property.

The trial Court held that the mortgage was not binding on the minor defendants but that it was binding on Tehemina's interest in the estate, which was one-fourth. The Court passed a decree accordingly, observing as follows :—

"The deed not having been passed by Tehemina in her capacity as administratrix it does not bind the estate, unless it is proved that the deed was passed for legal necessity... Except the bare recital in the first deed for 1929, not proved before this Court, there is no evidence oral or documentary to show that there were any arrears of assessment, to pay off which Rs. 4,000 were borrowed from Temulji. The only evidence produced by the plaintiff is to the effect that after the death of Nawroji, Tehemina continued her husband's grass business. Whether the same was for the benefit of the family or not, whether the debt—viz. non-payment of assessment—was incurred during the course of the said business, whether the said arrears are paid by her, all these questions remain unanswered and are not duly proved. In short, plaintiff has failed to prove the legal necessity, necessary to bind the interests of the defendant-minors to pay his debt. According to Parsi law Tehemina has got interest in the estate of her husband and the said interest is one-fourth. To that extent the suit property is liable."

The plaintiff appealed to the High Court.

*G. N. Thakor*, with *B. G. Thakor*, for the appellant.

*J. C. Shah*, for respondents Nos. 1, 3 and 4.

*D. D. Yennemadi*, for respondent No. 4.

MACKLIN J. This appeal arises out of a suit upon a mortgage. In 1925 one Nawroji Pestonji died leaving three children and a widow, by name Tehemina. In November, 1927, Tehemina was given letters of administration to his estate, and in 1929, purporting to act for herself and as guardian of her minor son, she mortgaged certain property to her brother Temulji for Rs. 4,000. In March, 1931, she executed in favour of the plaintiff the mortgage in suit, this time purporting to act for herself and her three minor children. The purpose of the mortgage was said to be the need to pay off the mortgage to her brother, and indeed the old mortgage was endorsed as satisfied on the day of the execution of the new mortgage. In 1934 she died, and another of her brothers, by name Bejanji, became guardian of her minor children. In 1936 the plaintiff brought the present suit. He alleged in his plaint that after Tehemina had taken out letters of administration and obtained property thereunder, including the two houses mortgaged, she mortgaged the houses to her brother for paying the assessment due on certain land, in other words for legal necessity and for the benefit of the estate, and that thereafter for herself and as guardian of her minor son she executed the second mortgage in favour of the plaintiff for the purpose of paying off the old mortgage, in other words for legal necessity and for the benefit of the estate. The written

statement denied that there was any assessment due upon the property mentioned, and it also denied that Rs. 4,000 was borrowed from Temulji for paying the assessment; and the plaintiff was put to the proof of these things. Legal necessity was denied, and the authority of Tehemina to create a burden on the property of the minors was denied also, whether by the mortgage to Temulji or by the mortgage to the plaintiff. The trial Court found that the mortgage in suit was proved, but that it was not binding on the defendants except in so far as Tehemina's one-fourth share in the estate had come to them. It was held that the mortgage was not executed by Tehemina in her capacity of administratrix of the estate of her husband, and that it therefore could not bind the estate unless it were proved to have been passed for legal necessity; and on that question it was held as a fact that no legal necessity was proved. The plaintiff has accordingly come in appeal.

The first point argued by his learned counsel is that the trial Court was wrong in holding that the mortgage was not passed by Tehemina in her capacity of administratrix; and it is argued that once it is held that on a true construction of the deed she did act as administratrix of the estate, then by reason of ss. 211 and 307 of the Indian Succession Act, 1925, the estate would be bound by the mortgage. It is true that she was in fact an administratrix of the estate and had been given letters of administration; and the mortgage mentions that fact. But it seems to mention it only by way of explaining how possession of the property had come to the mortgagor and how from the mortgagor it went into the possession of her brother Temulji. But it is impossible on reading the mortgage by itself to read into it any indication that it was an administratrix as such who was mortgaging the property. It quite clearly says that she mortgaged for herself and as guardian of her minor children; and in the earlier mortgage (which stands on much the same footing) she said that she mortgaged the property for herself and her minor son. The mortgage contains a covenant for the repayment of the amount due by all four of them, and that is hardly consistent with a mortgage executed by an administratrix as such. It is true that the plaint does mention that she had obtained letters of administration and in consequence thereof was in possession of the property to be mortgaged; but otherwise it does not suggest in any way that the suit was brought upon the footing that the mortgage was executed by an administratrix, and no amendment to that effect was ever sought. Nor is there any suggestion in the plaint that she had a right under s. 211 of the Indian Succession Act to mortgage the property on the ground that it vested in her as legal representative of her deceased husband, and the case was not tried on those lines at all.

The appellant plaintiff next contends that even if it is to be held that the mortgage was executed by Tehemina as guardian and not as an administratrix, still she was entitled to do so for legal necessity and legal necessity in fact is proved on the evidence. There is some indication in the course of the evidence that she carried on her husband's business, which was connected with grass, and that the mortgage to her brother was in some way connected with that business. But the difficulty in the way of the plaintiff is that the written statement denied Tehemina's authority to mortgage the property at all, and it seems clear that she had no authority in law to mortgage it even for what (in

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Hindu law) is called legal necessity. Moreover, it seems clear on the authorities that even if she did execute the mortgages as administratrix, it would have to be proved that the mortgage was executed in the due course of administration, and if that were proved, it would still have to be shown that she was entitled to mortgage the general estate as distinct from the business for which the plaintiff alleges there was legal necessity. Even then the plaintiff's difficulty is not at an end, because it is clear that an executor (unless expressly authorised by the will) or an administrator is not entitled to continue the business of the deceased at all except for the purposes of winding it up. If he does continue it for any other purpose than winding up, it is deemed to be continued at his own risk. For these general propositions of law I may refer to *Italia v. Mohammad*<sup>1</sup>, *Tarakeswar Das Gupta v. Ambika Charan Bhattacharjee*<sup>2</sup>, where the English cases are discussed, *Bank of Bombay v. Suleman Somji*<sup>3</sup> and "Williams on Executors", 1931 edn., Vol. II, p. 1171.

The next contention raised on behalf of the plaintiff is that, assuming Tehemina executed the mortgage for herself and as guardian of her children and not as administratrix, she was entitled to do so for legal necessity and in fact legal necessity is proved on the evidence of the case. But the written statement denied Tehemina's authority to mortgage the property at all, and it is argued on behalf of the defendants that a Parsi guardian cannot alienate property on behalf of her wards even for legal necessity. This point was not taken at the trial, and it is contended that we should not allow it to be raised now, since it is a question which depends partly upon evidence of Parsi usage. The legal position of Parsis in the mofussil appears to be that in the absence of any statutory provision relating to them they are governed in the first place by usage, and, secondly, by the rules of equity and good conscience : see *Shapurji v. Dossabhoy*<sup>4</sup> and *Mancharsha Ashpandiarji v. Kamrunisa Begam*.<sup>5</sup> In *Mithibai v. Limji Nowroji Banaji*<sup>6</sup> it was stated that in the absence of evidence of any specific law or usage applicable to a particular case, the law applicable to Parsis in the mofussil of the Presidency of Bombay is that of justice, equity and good conscience alone, and it was stated that in applying this rule to the facts of any particular case the Courts would be guided by the general principles of English law applicable to a similar set of circumstances. If there were any Parsi custom or usage by which guardians were permitted to alienate the property of their wards, it is difficult to believe that some of such cases would not have come before the Courts. But it does not appear that there have been any such cases, and we therefore think ourselves entitled to assume that Parsi usage is not on those lines. In so far as Parsi law is governed by the general principles of English law, it must, I think, be held that a Parsi guardian has no authority to alienate the estate of a ward except with the permission of the Court ; and that applies to every guardian, no matter how appointed and whether *de facto* or *de jure*. In Trevelyan's "Law Relating to Minors", 5th edn., p. 167, it is so stated quite definitely with regard to guardians other than those appointed by the Court and other than

1 [1940] Mad. 211.

2 (1927) I. L. R. 55 Cal. 892.

3 (1907) L. R. 35 I. A. 139, 149,  
 s. c. 10 Bom. L. R. 1065.

4 (1905) 7 Bom. L. R. 988.

5 (1868) 5 B.H.C.R. (A.C.J.) 109.

6 (1881) I L. R. 5 Bom. 506.

Hindus and Mahomedans. In *Tulsidas v. Raisingji*<sup>1</sup>, in which it was decided that a *de facto* guardian has power under Hindu law to alienate a ward's property for legal necessity, the learned Chief Justice observed (p. 1494) : "It is of course clear that under English law a *de facto* guardian of an infant cannot sell the infant's property", and it has been suggested in the course of the argument in this case that the natural guardian of the minors' estate was not the mother of the minors and therefore Tehemina was no more than a *de facto* guardian. In Halsbury's Laws of England (2nd edn., Vol. XVII, pp. 699 and onwards) much is said as to the powers of a guardian with respect to the property of the minors, but there is no suggestion anywhere that the guardian has power to alienate the minor's property except by permission of the Court. It seems clear therefore that Tehemina had no authority to execute either of the mortgages in suit. It follows that the question of legal necessity does not arise at all, and I do not feel called upon to go into the evidence on that point. Nor do I feel called upon to discuss the correctness of the learned Judge's rejection of various applications made by the plaintiff for the admission of evidence at the close of the case, for the examination of certain witnesses, and for the amendment of the plaint so as to show the guardian of the minors as also being an administrator of the estate, the plaintiff having only recently come to know that he had taken out letters of administration. On the view we take of the nature of the mortgage (that it was not by an administratrix but by a guardian) and also in view of the fact that Tehemina had no authority in law to mortgage the property of her wards, the granting of those applications would not now serve any useful purpose, even if we thought that they ought to have been granted in the first instance.

The appeal fails and must be dismissed with costs.

*Appeal dismissed.*

#### FULL BENCH—APPELLATE CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, Mr. Justice Wassooden  
and Mr. Justice Sen.*

BAI KOKILABAI

*v*

KESHAVLAL MANGALDAS & Co

1941

July 18.

*Workmen's Compensation Act (VIII of 1923), Sec. 12—Selling agents undertaking to take delivery of goods at manufacturer's godown—Selling agents employing contractor for transport of goods—Contractor employing workmen to remove goods from godown—Accidental death of workman in course of such work—Whether claim for compensation against selling agents sustainable—Construction of Act*

<sup>1</sup> (1932) 34 Bom. L. R. 1483.

\* First Appeal No. 340 of 1940, against the decision of D. D. Bakhale,

Commissioner for Workmen's Compensation, Bombay, in Application No. 22/B.-2 of 1940.

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—

*in light of cases decided under English Workmen's Compensation Act, whether desirable.*

The sole selling agents of a mill company manufacturing cloth, under an agreement with the company, undertook to take delivery of the goods at the company's godowns. The selling agents employed a firm, of whom one N was a partner, to transport the goods from the company's godowns to their shop. On one occasion when the selling agents desired to transport some bales from the company's godowns to their shop, N's firm hired a lorry from a lorry-owner. B who was a cleaner on the lorry was engaged by N to help to remove the bales from the godown and to stack them in the lorry. In the course of this work B was accidentally killed. On a claim for compensation made by B's mother against the selling agents under s. 12 of the Workmen's Compensation Act, 1923:—

*Held*, that on the construction of the agreement the work which was being done by the contractor, i.e. N's firm, at the time when the accident occurred was work ordinarily done by the selling agents, and therefore the selling agents were liable to pay compensation under s. 12 of the Act :

*Rabia v. The Agent, G. I. P. Railway*,<sup>1</sup> commented on.

*Wadilal Lallchand v. Bai Radhabai*,<sup>2</sup> disapproved.

*Karnani Industrial Bank, Limited v. Ranjan*,<sup>3</sup> referred to and explained.

To construe an Indian Act in the light of cases decided under an English Act differently worded is much more likely to cause confusion than to render assistance. There is no justification for incorporating into the administration of the Indian Act difficulties which arise on the construction of the English Act.

SUIT for compensation under the Workmen's Compensation Act, 1923.

Keshavalal Mangaldas & Co. were the sole selling agents of the Sassoon Spinning and Weaving Co., Ltd., under an agreement dated January 7, 1939. The relevant clauses of the agreement were as follows :—

"3. The salesmen shall from time to time secure and give orders to the company for the sale of their Grey Fancy or Coloured Cloth and the company shall execute such orders without prejudice to their right to refuse to carry out any particular orders as hereinafter mentioned.

6. As soon as the Grey Fancy or Coloured Cloth is manufactured the company shall store it in their godowns and from time to time give from the registered office delivery orders of such portions thereof as the salesmen shall require on payment in cash of a sum equivalent to the sale price of the quantity so required by them and the amount so paid by the salesmen shall be taken into account when the accounts between the parties are finally adjusted as hereinafter provided and at the time of such final adjustment the company shall give credit to the salesmen for interest at the rate of four per cent. per annum on the amount so credited to them, and the salesmen shall give credit to the company for interest at the rate of four per cent. per annum on the amount of the sales effected by the salesmen on behalf of the company from day to day. But the company shall give credit at the end of each year to the salesmen for an amount equivalent to interest for six days at four per cent. per annum on the amount of the sales effected by the salesmen for that year.

7. The salesmen shall sell the goods so delivered to them by the company from time to time at a shop in Bombay either wholesale or in retail on account of the company at the last rates obtainable in the market but which shall not in any

1 (1928) I. L. R. 53 Bom. 203,  
s. c. 31 Bom. L. R. 311.

2 (1941) F. A. No. 151 of 1940,

decided by Broomfield and Divatia JJ., on April 4, 1941 (Unrep.).

3 (1932) I. L. R. 60 Cal. 24.



event be less than the rates fixed by the company. If the company shall find subsequently that the rates stated as realised were less than those paid by the buyers the company shall be at liberty to determine this agreement without any notice to the salesmen.

8. The salesmen shall take delivery of the said goods from the company's godowns at their own expense and they the salesmen shall also bear all expenses connected with the subsequent sales thereof such as rent of shops and warehouses, wages of clerks and workmen employed by the salesmen and costs of advertisements etc.

20. All goods taken delivery of by the salesmen from the godowns of the mill premises of the company shall always remain at the risk of the salesmen including therein the risk of fire, plunder or destruction of the goods by rats or the damage thereof by water or in any other way unless it is proved that the said goods had been damaged and spoiled at the mill premises before they were taken delivery of by the salesmen."

The selling agents used to take delivery of the goods from the mill company's godowns and have them transported to their own godown near the Mangaldas Market in Bombay. For the transport of the goods the selling agents employed a firm, Savala Subbarao & Co., of which one Narayan was a partner.

On August 30, 1939, the selling agents asked Savala Subbarao & Co. to remove some bales of cloth from the mill company's godowns to their shop. Narayan hired a motor lorry belonging to one Krishna. One Bhikoo was a cleaner on this motor lorry and he was engaged by Narayan to help to remove the bales from the godown and stack them in the lorry. In the course of this work one of the bales fell on Bhikoo and he was crushed to death.

On January 8, 1940, Kokilabai (applicant), the mother of Bhikoo, applied to the Commissioner for Workmen's Compensation to recover compensation from the selling agents under s. 12 of the Workmen's Compensation Act as principals.

The Commissioner dismissed the application observing as follows :—

"The learned counsel for the applicant has referred me to the provisions of articles 20 and 8 of the agreement and asked me to infer therefrom that it was ordinarily part of the trade or business of the opposite party to transport the bales from the mill godown to their own godown. In my opinion this conclusion does not follow. Article 20 has, it seems to me, no bearing on this question. Article 8 does not in terms require the selling agents themselves to transport the goods from the company's godown to any other place. It merely states that the expenses shall be paid by the salesmen. It may be that such transport may be ancillary or incidental to the principal business of the opposite party namely that of selling agents; but the words 'any work which is ordinarily part of the trade or business of the principal' in s. 12 would not, in my opinion, cover such a transaction. Thus Murphy J. observed in *Rabia v. G. I. P. Railway*, 31 Bom. L. R. 1929 : "Under the old English Act which has since been amended there was a saving clause in the words 'ancillary or incidental to the trade or business'... I think that the effect of the word 'ordinarily' used in s. 12(1) of the Indian Act is very similar". On the facts before me, I cannot come to the conclusion that transport of the goods from the mill godown to the godown of the opposite party was ordinarily part of the trade or business of the opposite party. That being so, the opposite party are not, whoever else is, liable for payment of compensation to the claimant."

The applicant appealed to the High Court.

The appeal was heard by a full bench consisting of Beaumont C. J., Wassoodew J. and Sen J.

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KOKILABAI

v.

KESHAVLAL

MANGALDAS

&amp; Co.

—

F.B. S. C. Joshi, with P. S. Bakhale, for the appellant.  
 1941 N. H. Bhagwati, instructed by Madhavji & Co., for the respondents.

BAI S. C. Joshi. The question arising on the appeal is whether the work on  
 KOKILABAI which the deceased workman was employed was ordinarily part of the trade  
 v. or business of the selling agents. In considering this question it is neces-  
 KESHAVALAL sary to refer to the agreement of January 7, 1939, which was entered into by  
 MANGALDAS the selling agents with the Sassoon Spinning & Weaving Co., Ltd. Under  
 & Co. the agreement the selling agents became the sole selling agents. They had  
 — a shop in the Mangaldas Market and also a godown. They had to take  
 delivery of the bales and to transport the goods to their shop or godown.  
 Thus both the functions formed part of their business or trade. It was while  
 transporting the goods that the workman died, and our submission is that  
 accordingly the selling agents are liable.

The question of law arises out of the agreement, and the Commissioner  
 having misconstrued the agreement a question of law arises which this Court  
 is entitled to consider. I rely upon cls. 5, 7, 8 and 20 of the agreement.

N. H. Bhagwati. In the present case the work is one of transporting the  
 goods and the question is whether the selling agents are liable as principals.  
 This question depends upon the construction of the agreement. The test is,  
 did the work which the selling agents were doing form part ordinarily of  
 their trade or business? If the work does not fall within this description,  
 the selling agents would not be liable. I rely on s. 12, sub-ss. (1) and (4).  
 Taking these provisions together, it is obvious that the work which the  
 selling agents do or which they ordinarily do is the work which is to be  
 taken into consideration. If the work done by them is only incidental, they  
 would not be liable. The question, therefore, is, whether the work of trans-  
 port is part of their business as selling agents. No doubt the work of trans-  
 port is necessary; but the further question is whether the work of a carrier  
 is part of their business. It may be that under the agreement they are bound  
 to take delivery; but that does not mean that the work in question is ordi-  
 narily part of their business. Sale of goods does not include transport of goods  
 and therefore transport does not form part of their business. The expression  
 'ordinarily' means regularly, usually, and normally.

Counsel next referred to *Robia v. The Agent, G. I. P. Railway*,<sup>1</sup> and to  
 pp. 206, 207, 209, 210 and 213 of the report.

The following authorities were cited: *Pearce v. London and South Western  
 Railway*,<sup>2</sup> *Wrigley v. Bagley and Wright*,<sup>3</sup>; *Periyakkal v. Agent, S. I. Ry.  
 Co., Ltd.*,<sup>4</sup>; *Hockley v. West London Timber and Joinery Company*,<sup>5</sup>;  
*Skates v. Jones & Co.*,<sup>6</sup>; *Karnani Industrial Bank, Limited v. Ranjan*,<sup>7</sup>; *Spiers  
 v. Elderslie Steamship Company, Ltd.*,<sup>8</sup> and *Hayes v. S. J. Thompson & Co.*,<sup>9</sup>

Counsel also referred to Halsbury's Laws of England, 2nd ed., Vol. XXXIV,  
 p. 905, para. 1245.

1 (1928) I. L. R. 53 Bom. 203,  
 s. c. 31 Bom. L. R. 311.

2 [1900] 2 Q. B. 100.

3 [1901] 1 Q. B. 780.

4 (1935) I. L. R. 58 Mad. 804.

5 [1914] 3 K. B. 1013, 1015, 1016.

6 [1910] 2 K. B. 903, 907.

7 (1932) I. L. R. 60 Cal. 24, 25.

8 (1909) 2 B. W. C. C. 205.

9 (1913) 6 B. W. C. C. 130.

*Joshi* was not called upon in reply.

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BEAUMONT C. J. This is an appeal arising under the Workmen's Compensation Act, 1923, preferred by the workman against the opposite party, whom I will refer to as the "selling agents."

The facts found are that the selling agents are the sole selling agents of the Sassoon Spinning and Weaving Co., Ltd., whom I will refer to as the "mill company," under an agreement dated January 7, 1939. By cl. 3 of that agreement the selling agents have to procure orders for the sale of the mill company's cloth, and under cl. 6 it is provided that the mill company shall store their manufactured cloth in their godowns and give delivery orders of such portions as the selling agents shall require to the selling agents. Then cl. 7 provides that the selling agents shall sell the goods so delivered to them at a shop in Bombay, and cl. 8 provides that the selling agents shall take delivery of the goods from the mill company's godowns at their own expense. So that what it comes to under that agreement, so far as material, is that the mill company manufacture cloth and store it in their godowns, and the selling agents have to take delivery at the mill company's godowns and to sell the goods at a shop in Bombay, which necessarily involves that they must transport the goods from the mill company's godowns to the selling agents' shop.

On August 30, 1939, the selling agents desired to transport some bales from the mill company's godowns to the selling agents' shop, and they employed a firm, of which one Narayan was a partner, to carry out the transport, and that firm hired a lorry from a lorry owner, and the workman in question was a cleaner on that lorry. Now, it is found as a fact by the Commissioner that the workman was engaged by Narayan to help to remove bales from the godowns and to stack them in the lorry, and it was in the course of that work that he was accidentally killed. It is, I think, clear that Narayan on behalf of his firm was the employer of the workman within s. 2(e) of the Act, he having temporarily borrowed the services of the workman, and the Commissioner has found as a fact that the accident arose out of, and in the course of the employment. But the selling agents would not be liable to pay compensation, unless the case can be brought within s. 12 of the Act, which deals with work done on behalf of an employer by a contractor. Sub-section (1) of that section provides so far as material :

"Where any person (hereinafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to any workman employed in the execution of the work compensation."

Sub-section (4) provides :

"This section shall not apply in any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken or usually undertakes, as the case may be, to execute the work or which are otherwise under his control or management."

The Commissioner held that transport of goods from the mill company's godowns to the shop of the selling agents was not ordinarily part of the trade or business of the opposite party, and in so holding, I think, he was influenced

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by a decision of this Court in *Rabia v. The Agent, G. I. P. Railway*<sup>1</sup>, to which I will refer presently.

The question, which arises under s. 12(1), is normally a pure question of fact. The essential question is whether the contractor was engaged in work which was ordinarily part of the trade or business of the principal. It will be observed that the question relates to the business of the particular principal, and not generally to businesses of the class of that carried on by the principal, so that the question can only be answered by reference to evidence as to the nature of the principal's business. In the present case the nature of the selling agents' business is defined by the selling agreement, and the answer to the question is simple, because the work, which the selling agents do, on the true construction of that agreement, must include removing goods from the mill company's godowns to the shop of the selling agents. Such work not only ordinarily forms part of the business of the selling agents, but is an essential part of it, and the selling agents cannot escape liability by employing a contractor to do such work. I cannot, therefore, agree with the finding of the learned Commissioner.

This case has been referred to a full bench, because it would seem that two cases decided by this Court are calculated to cause some confusion to the Commissioner, and it is desirable to get the questions, which arise under s. 12, straight.

The first case is the one to which the Commissioner refers, *Rabia v. The Agent, G. I. P. Railway*. What the Court held there was that the erection of pillars to carry an electric cable in connection with the electrification of a part of the system of the G. I. P. Railway Company formed no part of the ordinary work of such company. As the decision turned entirely on facts, it is not necessary to express any opinion as to its correctness. But the Court discussed at some length English cases on the Workmen's Compensation Act of 1897, s. 4 of which dealt with sub-contracting and contained an exception in the case of any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by the undertakers. Sir Amberson Marten, who delivered the leading judgment, noticed that the words of s. 4 of the English Act were different from the words of s. 12 of the Indian Act, but he expressed the view that, notwithstanding that, some assistance might be derived from the English authorities. I venture to think that to construe an Indian Act in the light of cases decided under an English Act differently worded is much more likely to cause confusion than to render assistance, and I think that the English cases have caused some confusion in this case to the Commissioner, because he cites a passage from the judgment of Murphy J., in *Rabia's* case, in which he expressed the opinion that the words in the English Act "ancillary or incidental to the trade or business" had much the same effect as the word "ordinarily" in the Indian Act. I am quite unable to agree with that view. It seems to me that work, which is ancillary or incidental to a business, may or may not ordinarily form part of that business. The questions under the two Acts are quite distinct, and I can see no justifica-

tion for incorporating into the administration of the Indian Act difficulties which arose on the construction of the English Act.

The other case is a very recent decision of this Court in *Wadilal Lalluchand v. Bai Radhabai*<sup>1</sup>. In that case the opponents were a piecegoods shop, and they employed a man named Kondiba to transport goods for sale in their shop from a warehouse in the docks, and an accident occurred to the workman in the course of such transport. The Commissioner held that Kondiba was employed by the opponents, and that the workman, who was employed by Kondiba, was really an employee of the opponents, so that no question under s. 12 arose in his view of the case. But this Court held that there was no evidence to justify the finding of the Commissioner, and that in fact Kondiba was a contractor, and a question, therefore, arose under s. 12 whether he was employed in connection with work ordinarily forming part of the business of the opponents. Now, seeing that the Commissioner had not directed his mind to that question, in my view, the proper order for the Court to have made was to send the case back to the Commissioner to decide the questions of fact arising under s. 12(1) and (4). Instead of adopting that course the Court proceeded to decide the questions of fact, as though they were questions of law. The Court referred to *Rabia v. The Agent, G. I. P. Railway*, and also to *Karnani Industrial Bank, Limited v. Ranjan*,<sup>2</sup> and stated that in the latter case a contract was given by a bank for the purpose of constructing a building in which the bank was to be housed, and for that purpose they had engaged a contractor, and it was held that the bank was not liable under s. 12 of the Act, in spite of the fact that there was a clause in the memorandum of association of the bank which entitled it to build houses among other things, and that the decision was that it could not be said that the building of houses was the business of the bank. As a matter of fact, the case decided nothing of the sort, as I will show in a moment. Then this Court went on to say :

"We think, therefore, that on the principle of the two decisions in *Rabia v. The Agent, G. I. P. Railway* and *Karnani Industrial Bank, Ltd. v. Ranjan*, the work of unloading the bales and bringing them to the market cannot be regarded as part of the business of the appellants."

I must confess that I feel the greatest difficulty in understanding what that proposition really means. The learned Judges cannot, I think, have been directing their minds to the question of fact which really arose under s. 12(1), since to say that, because erecting pillars for an electric cable is no part of the business of a particular railway company, and because building a house is no part of the business of a particular bank, therefore transporting piecegoods to a shop in which they are to be sold is no part of the business of the particular shop, involves a glaring *non sequitur*. The Court evidently considered that these two cases lay down a principle, but what that principle is I do not know. *Rabia's* case decided a mere question of fact. The case of *Karnani Industrial Bank, Ltd. v. Ranjan* really laid down the correct principle, but this Court seems to have misunderstood the case. It did not decide that the building of a house was no part of the business of the particular

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bank Sir George Rankin in giving the leading judgment observed in effect that from such knowledge as he possessed of banking business, he thought it unlikely that the business of the bank would include the business of building a house ; but he said expressly that he could not lay down as a proposition of law that the building of houses formed no part of the ordinary business of this particular bank, and that the matter must go back to the Commissioner for a finding on that question of fact. That was the order which the Court made.

In my opinion, the judgment in *Wadilal Lallchand's* case cannot be supported. In cases, which arise under s. 12, the Commissioner must find the necessary facts. In that case it was relevant to find whether it was the ordinary practice of the opponents to take delivery of goods at the docks and to arrange for their transport to the shop, or to take delivery at the shop. Without findings on these points, it could not be determined whether the transport was part of the ordinary business of the shop.

Mr. Bhagwati has referred us to the modern English Workmen's Compensation Act and to authorities under it. The Act of 1906, which is now replaced by the Act of 1925, repealed the Act of 1897, and it is relevant to note that s. 12 of the Indian Act is an exact replica of s. 6 of the English Act of 1906, except that it has substituted the very material words "which is ordinarily part of the trade or business of the principal" for the words "undertaken by the principal." So that whereas the English Act only applies to work of a contractor undertaken by the principal, the Indian Act applies to work done by a contractor which is ordinarily part of the trade or business of the principal. The variation was obviously deliberate, and the two phrases do not mean the same thing. It may be that work, which is ordinarily part of the trade or business of the principal, nevertheless was not work undertaken in the particular case, or usually undertaken by the principal. In my opinion to consider cases decided on the English Act merely leads to confusion. It may be noticed that sub-s. (4) of s. 12 of the Indian Act is a replica of sub-s. (4) of s. 6 of the English Act, and refers to work undertaken, or usually undertaken, by the principal. However, as I have said, we are not concerned in this case with any question arising under sub-s. (4), because it is perfectly plain on the agreement between the selling agents and the mill company that the selling agents did undertake to do the transport work from the mill company's godowns and it was there that the accident occurred.

As the question in this particular case turns entirely on the construction of the agreement between the selling agents and the mill company, this Court can deal with the question itself, and need not refer it back to the Commissioner to find the facts. On the construction of the agreement I have no doubt that we must hold as a fact that the work, which was being done by the contractor at the time when the accident occurred, was work ordinarily done by the selling agents.

That being so, the appeal must be allowed with costs, and the case must go back to the Commissioner to settle the compensation.

WASSOODEW, J. I agree.

SEN J. I agree.

*Appeal allowed.*

## ORIGINAL CIVIL.

*Before Mr. Justice Chagla.*

DEVSEY KHETSEY

v.

HIRJI KHAIRAJ.

1941

August 7.

*Civil Procedure Code (Act V of 1908), O. I, r. 10—Partnership suit—Death of plaintiff—Application by defendant to make him plaintiff and the heirs of plaintiff as defendants—Jurisdiction—Practice.*

Where in a suit for dissolution of partnership and partnership accounts, the plaintiff dies, the Court has jurisdiction, under O. I, r. 10, Civil Procedure Code, 1908, on an application by the defendant, to transpose him as plaintiff in the suit and to make the heirs of the original plaintiff as defendants.

*Edulji Muncherji Wacha v. Vullebhoy Khanbhoy*<sup>1</sup>, followed.

APPLICATION for transposition of parties.

The plaintiff Devsey filed a suit on August 2, 1939, for dissolution of partnership between him and the defendant Hirji, and for partnership accounts. On December 19, 1939, the plaintiff died. When the suit came on for hearing the defendant applied to transpose him as plaintiff in the suit and to give him leave to bring the heirs of the original plaintiff as defendants to the suit.

*V. F. Taraporevala*, for the defendant.

CHAGLA J. The plaintiff filed the suit on August 2, 1939, for dissolution of partnership that subsisted between him and the defendant and for the usual partnership accounts. It was alleged in the plaint that the partnership had been dissolved on June 1, 1939. After the suit was filed, the defendant took out a notice of motion on October 2, 1939, for certain reliefs, and an order was made on October 10, 1939. The defendant made his affidavit of documents on November 17, 1939. On December 19, 1939, the plaintiff died.

On March 18, 1940, the defendant adopted rather curious proceedings. He took out a chamber summons for bringing on the record of the suit in place of the original plaintiff Bai Moorbai, the widow of the original plaintiff, Damji Devsey and Dhanpati Devsey, all three as heirs and legal representatives of the original plaintiff. The defendant also sought by the summons liberty to amend the plaint and proceedings. On this summons Mr. Justice Kania made an order on August 9, 1940, whereby he gave the defendant liberty to bring on record of this suit Bai Moorbai, Damji Devsey and Dhanpati Devsey as heirs and legal representatives of the deceased plaintiff and also gave the defendant liberty to amend the plaint and proceedings accordingly. On September 16, 1940, the defendant's attorneys wrote to Bai Moorbai drawing her attention to the order that had been made by Mr. Justice Kania and enclosing with the letter a copy of the said order and also stating that by the said order she had been directed to amend the plaint and proceedings in the suit and calling upon her to amend the plaint and proceedings within a week in default they threatened further proceedings against her.

O. C. J. Suit No. 1068 of 1938.

1 (1883) I. L. R. 7 Bom. 167.

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It is clear from Mr. Justice Kania's order that it is not Bai Moorbai who was directed to amend the plaint and proceedings. Liberty was given to the defendant to do so. I am not concerned whether in law the defendant could have availed himself of the liberty given to him by the order of Mr. Justice Kania, but in fact he has not availed himself of that liberty, and today the position is that the plaint and proceedings on the record of this Court are what they were when the suit was filed by the plaintiff. When the suit was called on before me today, Mr. Taraporevala wanted me to transpose the defendant as the plaintiff and to give him leave to bring the heirs of the original plaintiff as the defendants to the suit. Now, it is clear that a partnership suit, as was pointed out by Mr. Justice West in *Edulji Muncherji Wacha v. Vullebhoy Khanbhoy*<sup>1</sup>, is a suit of a peculiar character, and the parties to such a suit do not stand to each other precisely in the same relation as parties to suits generally and that each of the parties to a partnership suit, however he may be formally ranked, is really in turn plaintiff and defendant and in both capacities comes before the Court for the adjudication of his rights relatively to the other partners, which the Court endeavours to determine by its decree. In that case the facts were somewhat similar to the facts in this case. There the plaintiff who had filed a partnership suit had settled with most of the defendants and wanted leave to withdraw the suit or, in the alternative, to have the suit dismissed. Ten of the defendants supported the plaintiff's application. Two of the defendants objected and applied, under s. 32 of the Civil Procedure Code (Act X of 1877), that they might be made plaintiffs and that the plaintiff might be made defendant. Elaborate arguments were addressed to Mr. Justice West, and although Mr. Justice West felt some difficulty as no case on the point appeared to be forthcoming either in India or from English Courts, he ultimately made the order stating that he clearly had jurisdiction to do so.

Now, there is no doubt that under O. I, r. 10, the Court has the jurisdiction in proper cases to transpose defendants as plaintiffs, and I think that in this case where partnership accounts have to be taken it would work great hardship if the death of the original plaintiff, who filed a partnership suit for partnership accounts, should put an end to the suit, and therefore I am inclined to grant the application made to me by Mr. Taraporevala.

The order that I will make will be that the defendant in the suit should be transposed as the plaintiff and he as the new plaintiff should amend the plaint and proceedings in this suit. The written statement that he has filed as the original defendant he will be allowed to treat as the plaint in the proceedings which will be amended according to my order. The defendant will bring the heirs of the original plaintiff, Bai Moorbai, Damji Devsey and Dhanpati Devsey, on record as defendants to the suit. I will also give liberty to the defendant to amend his written statement in order that any reliefs which he might have asked, if he had been the plaintiff in the suit, might be incorporated in his written statement. The defendant will serve the writ of summons and a copy of the order I am making today within four weeks upon Bai Moorbai, Damji Devsey and Dhanpati Devsey. I direct that the newly added defendants should put in any further pleadings if they be so advised



within two months from today and they should make their affidavit of documents within three months from today. The suit will be on board for hearing on January 5, 1942, as a part-heard suit.

*Order to transpose parties made.*

Attorneys for plaintiff : *Thakoredas & Madgavkar.*

Attorneys for defendant : *Haridas & Co.*

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DEVSEY

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Chagla J.

*Before Mr. Justice Kania.*

THE CENTRAL BANK OF INDIA, LTD.

v.

PRABHAKAR ANANDRAO DABHOLKAR

1941

September 3.

In re BAI MOTIBAI.\*

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 52, 54—Decree—Execution—Immoveable property—Custody of Court receiver—Mode of execution against property in custody of receiver—Practice and procedure.*

Order XXI, r. 52, of the Civil Procedure Code, 1908, is only a mode of attachment of property in the custody of the Court. It does not deal with the leave necessary to be obtained for proceeding under it. The rule is not limited so as to exclude immoveable property.

*Pratapmall Rameshwar v. Chunilal Jahurji*, distinguished.

The words used in r. 52 are not permissive but are imperative for the judgment-creditor. The judgment-creditor has to apply for attaching the property in the hands of the receiver. He may, while making the application, put before the Court sufficient grounds to prevent the Court from making the ordinary order prescribed by the rule or limit the operation of such order to a named property or a named period. At the time of considering the judgment-creditor's application and making an order under the rule, the Court has jurisdiction to vary the terms and directions given to its officer.

The rule does not permit the judgment-creditor to proceed under O. XXI, r. 54, merely after he obtains leave to proceed to execute the decree on the ground that the property is in possession of a Court officer.

CHAMBER summons.

Proceedings in execution.

On July 11, 1934, the applicant Bai Motibai obtained a decree (in suit No. 1896 of 1933) for Rs. 18,000 against Prabhakar Dabholkar and others (defendants) in the High Court. The decree made the amount payable by monthly instalments of Rs. 75 each commencing from August 1, 1934. In default of payment of any three instalments, the whole decree became payable.

On January 22, 1940, the applicant applied to execute the decree by attachment and sale of the right, title and interest of the defendants in certain immoveable property belonging to them and situated at Chowpatty in Bombay. As the decree was more than two years old, notice under O. XXI, r. 22, was issued and served. The notice was made absolute on June 28, 1940. On July 25, 1940, warrant of attachment was issued under O. XXI, r. 54.

\* O. C. J. Suit No. 352 of 1935.

1 (1932) I. L. R. 60 Cal. 345.

O. C. J. The attachment was levied on August 2, 1940. On March 24, 1941, warrant of sale was issued under O. XXI, r. 64. The Commissioner issued notice to claimants on July 18, 1941. The notice was published in newspapers on July 30, 1941.

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Meanwhile, on March 4, 1934, the Central Bank of India, Limited (plaintiffs), filed a suit in the High Court against the defendants on mortgage of properties belonging to defendants inclusive of their property at Chowpatty. On February 19, 1936, a preliminary mortgage decree was passed for Rs. 3,20,582-6-8, and one H. C. Captain was appointed receiver of the properties with power to sell. The decree absolute was passed on September 29, 1938.

On August 21, 1941, the applicant took out a chamber summons for an order "that the applicant be granted leave to continue the attachment proceedings taken by her in regard to the properties at Chowpatty in execution of the decree in suit No. 1896 of 1933 and to proceed with the sale of the right title and interest of the respondents (defendants) to the said proceedings in the said properties or in the alternative that the applicant be given leave to ignore the receivership of the said Chowpatty properties."

The summons was heard.

*C. K. Daphtary*, for the applicant.

*Sir Jamshedji Kanga*, for the plaintiffs.

KANIA J. The applicant, as the Committee of a lunatic, filed suit No. 1896 of 1933 and on July 11, 1934, obtained a decree for Rs. 18,000 against the defendant-mortgagors in his suit. That decree was payable by instalments. In 1940 an application was made for execution, i.e. to sell the defendants' right, title and interest, *inter alia*, in the property at Chowpatty. A notice under O. XXI, r. 22, was then issued and made absolute. On July 25, 1940, an application under O. XXI, r. 54, was made and on August 2, 1940, the attachment was levied. On March 24, 1941, a warrant of sale was issued under O. XXI, r. 64, and on July 18, 1941, claims were invited. Notice of that was published on July 30, 1941. It appears that this suit was filed by the bank as mortgagees against the defendants to realise their mortgage claim. On February 19, 1936, a preliminary mortgage decree was passed and Mr. Captain was appointed receiver. On September 29, 1938, the decree absolute was passed and Mr. Captain's appointment as receiver was confirmed. He was also given power to sell the property. It is alleged by the applicant that she was ignorant of all these proceedings and had taken steps to execute the decree in ignorance of the fact that Mr. Captain was appointed a receiver in the mortgage suit. This summons is taken out by the applicant to obtain from the Court leave to continue the attachment proceedings with regard to the Chowpatty property in execution of her decree and to proceed with the sale thereof, or, in the alternative, that leave may be granted to the applicant to ignore the receivership of the said property.

Mr. Daphtary first argued that leave of the Court was necessary because the property was in possession of the Court by reason of the appointment of the receiver, and the Court would object to its possession being disturbed. No express provision of law is found in that connection, but this is based on

the fundamental principles of law. He argued that O. XXI, r. 52, was only a mode of attachment of property in the custody of the Court. It did not deal with the leave necessary to be obtained for proceeding under O. XXI, r. 52. That argument is correct. He further contended that O. XXI, r. 52, was applicable only when the property was not immoveable property. His contention is that when the property was immoveable the procedure prescribed by O. XXI, r. 54, may be adopted without proceeding under O. XXI, r. 52. I do not accept that contention. The words used in r. 54 are similar to the words used in rr. 46 and 47 and there appears no reason why the words in r. 52 should be limited so as to exclude immoveable property. The only argument advanced in support of that contention is that the words are followed by "interest or dividend becoming payable thereon." I do not think these words are placed to limit the general meaning of the word "property" in r. 52.

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In this connection strong reliance was placed on *Pratapmall Rameshwar v. Chunilal Jahuri*<sup>1</sup>. There the Court was dealing with an act of insolvency of a debtor who had allowed his property to remain under attachment for over twenty-one days. The larger question, whether the word "property" in O. XXI, r. 52, included immoveable property, was not decided, but it was assumed to include it. In the course of the judgment it was pointed out that there may occur collusive suits between partners or members of a family and a suit for dissolution of partnership or partition may be filed in which a receiver would be appointed with a view to defeat the claims of creditors or delay the same indefinitely. It was discussed that in such a case the Court may give leave to execute the decree by attachment of the immoveable property as if no receiver was appointed. On considering the rules framed by the Calcutta High Court in its Original Civil Jurisdiction it appears that there is a well-settled practice prevailing there on which Chapter XVII of their rules is framed. In our High Court there are no rules similar to those rules and under the circumstances that case is clearly distinguishable. Again, I am unable to read the words used in r. 52 as permissive. In my opinion they are imperative for the judgment-creditor. He has to apply for attaching the property in the hands of the receiver, and while making the application he may put before the Court sufficient grounds to prevent the Court from making the ordinary order prescribed by that rule or limit the operation of such order to a named property or a named period. The Court has jurisdiction at the time of considering the judgment-creditor's application and making an order under O. XXI, r. 52, to vary the terms and directions given to its officer; but, I am unable to hold that O. XXI, r. 52, permits the judgment-creditor to proceed under O. XXI, r. 54, merely after he obtains leave to proceed to execute the decree on the ground that the property is in possession of a Court officer. The present application is not under O. XXI, r. 52, and therefore must be dismissed with costs. Counsel certified. The applicant to pay the costs of the plaintiffs. Defendants Nos. 1, 2 and 6 to bear their own costs.

*Application dismissed.*

Attorneys for plaintiffs : *Ardesir, Hormusji, Dinshaw & Co.*

Attorneys for defendants : *Mulla & Mulla.*

Attorneys for applicant : *Dharamsi, Dinkarraji & Nandlal.*

<sup>1</sup> (1932) I. L. R. 60 Cal. 345.

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

Present :

LORD ATKIN, SIR GEORGE RANKIN AND LORD JUSTICE CLAUSON.

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MOHAMMAD NAWAZ KHAN.

*Religious endowment—Original right in property with proprietary body—Dedication of property by user to purposes of shrine—Whether burden of proof on persons asserting such dedication—Rule of practice of religious institutions—Whether practice of particular institution can be presumed from practice obtaining in majority of such institutions in a Province.*

Where the original right in certain land was with a proprietary body, the burden of proving its dedication by user to the purposes of a shrine lies heavy on the persons asserting it, and it is beside the point to show that the evidence produced by the proprietary body does not exclude the theory of dedication. The case of dedication is not made out merely by evidence of neighbourly or considerate conduct towards a religious institution or by showing that small profits have not been churlishly exacted by the proprietor from persons held in general esteem.

Ascetics and religious institutions exhibit great diversity of character and *Udasis* in particular conform to no single type. In any case to presume that a particular *Udasi* shrine followed a certain practice because on a count of all religious institutions throughout the Province the practice was found to obtain in a majority of the cases is a course of reasoning unwarranted by principle or authority. The rule of practice of a religious institution should be collected from its own constitution or practice as proved in evidence.

*Greedharee Doss v. Nundokissore Doss*<sup>1</sup>, referred to.

THE facts are fully set out in the judgment of the Board.

*W. Wallach*, for the appellants.

*J. M. Gower K. C.* and *J. E. Godfrey*, for the respondents.

SIR GEORGE RANKIN. The dispute in this case relates to an area of twenty-eight kanals and one marla (nearly three acres) situated in the village of Kot Fateh Khan in the Attock district of the Punjab. Within this area lies the tomb (*samadh*) of a Hindu ascetic Baba Than Singh who is said to have died in or about 1793. This tomb has long been held in veneration and had become a *Udasi* shrine (*dehri* or *deri*) before the Punjab came under British rule. The tomb of his disciple Chet Ram lies near to that of Than Singh, but the religious institution is known as the Deri Baba Than Singh. It would appear to be in enjoyment of one if not two jagirs or assignments of revenue dating from Sikh times. At its head there has been a long succession of mahants, and in the area now in question have lived the sadhus con-

nected with the institution as well as the mahant. A *langar* or free kitchen with certain buildings attached thereto has also been maintained there. The various compounds or closets comprised in the area are referred to in the judgments and decrees of the Courts in India as *ihatas* Nos. 179 to 230, these being the numbers given to them in the *khassra abadi* register of 1862 at the first regular settlement.

The village is said to have been founded in the 16th century by an ancestor of respondent No. 1, Lieutenant Sardar Mohammad Nawaz Khan (herein called the respondent). Its inhabitants, apart from those connected with the shrine, are Muslim cultivators and one or two *kamins* e.g. the blacksmith, the carpenter. At the first regular settlement in 1862 the proprietors consisted of a number of members of the respondent's family, but in or about 1882 a partition was made between three branches of the family. By this the village was divided into three portions called Abadi Kot Khas, Abadi Kot Bala and Abadi Deri Baba Than Singh. This last portion was included in the share which fell to the respondent's predecessor. It includes the land in suit which is separated from that part of the village Kot Khas in which the cultivators and *kamins* live by some thirty yards or more of cultivated land.

The respondent was a minor when in 1903 he succeeded to the property on the death of his father, and from 1903 to 1924 the Court of Wards was in charge of his estate. Since 1924 the respondent has had the management of his own property and has asserted rights as proprietor of the village over the area in question which are now contested by those interested in the shrine. It is not now disputed by the respondent that the sites of the two *samadhs* must be treated as having been dedicated to the religious institution and that the *langar* buildings belong to it permanently. But he contests the appellants' claim on behalf of the shrine that the whole area of twenty-eight kanals and one marla together with the various houses thereon is in the same position as the *samadhs*, and that he has no rights in it; as also their claim that in any event the right of occupation is vested in the shrine and continues so long as the shrine exists. He claims moreover certain rights by village custom in the *malba* or materials of which the houses are built, which rights are denied by the appellants.

These matters came originally before a tribunal constituted under the Sikh Gurdwaras Act (Punjab Act VIII of 1925). An application having been made to have the shrine declared to be a Sikh gurdwara, the mahant objected that it was a *Udasi* institution and not within the Act. The respondent by petition dated April 25, 1931, objected that the area claimed as belonging to the institution was his sole property; that he was the owner of the *malba* of the houses and buildings, and that their sites reverted to him if a non-proprietor occupant died childless, or abandoned the building, or alienated it without his permission. In effect his claim was to treat the mahant and the sadhus as non-proprietors occupying separate houses with permission of the proprietors and subject to the rights which the custom of the village gave to the proprietor. The mahant's objection at first succeeded, but in March, 1935, it was compromised on appeal to the High Court and the institution was declared to be a Sikh gurdwara. It thus became necessary to decide the various matters raised by the respondent's petition and

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P. C. the tribunal received oral and documentary evidence thereon in considerable  
1941 quantity. On November 18, 1935, the tribunal by a majority determined  
that—

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the petitioner is owner of the sites of *ihatas* Nos. 179 to 230 but as long as the shrine exists there is no right of reversion in favour of the petitioner; it has a right of occupation of the whole area of 28 kanals 1 marla and there is no right of reversion, in favour of the petitioner, of the site or *malba* of any house over this area in the event of the occupant thereof dying issueless or abandoning or alienating the building without the permission of the proprietor.

Apart from the two *samadhs* and the *langar*, Hilton J., the President of the tribunal, dissented from this decision of his two colleagues save as regards the declaration of the respondent's ownership. On appeal to the High Court Coldstream and Blacker JJ. agreed with Hilton J. The High Court's decree of July 16, 1936, declared the petitioner (the present respondent) to be the owner of the sites of *ihatas* 179 to 230 "except the sites of the two gurdwaras Dehri Bhai Than Singh and Dehri Bhai Chet Ram"; and also to be entitled to the *malba* of the superstructures situated on the disputed areas in the event of the occupant thereof dying issueless or abandoning or alienating the building without the proprietor's permission. From this last declaration however they excepted the superstructures of the "gurdwaras" and of the *langar* and the buildings appertaining thereto.

Neither of the Courts in India has taken the view, for which the appellants contend, that the area in dispute has as a whole become dedicated to the shrine so as to make an end of the respondent's ownership therein. But the two members of the tribunal who were in the majority considered that the right of occupation, whether or not given at different times to individual sadhus, was given to the institution, which occupied the various houses through them as its members. Rai Bahadur Lala Dwarka Parshad said in his judgment that "it was a case of dedication by user"; also "It is the shrine that has the right of occupation over this whole area of twenty-eight kanals and so long as it exists there is no case of reversion to the Sardar." The other member, Sardar Man Singh, added that as the sadhus were all ascetics, whatever they acquired was for and on behalf of the *dehri* and not for themselves. For this he vouched as authority para. 89 of Rattigan's "Digest of Civil Law for the Punjab" :—

89. All property acquired by individual members of a religious fraternity belongs, as a general rule, to the religious institution to which they are attached.

The papers prepared in 1862 at the first regular settlement were prepared before the village had been partitioned and at a time when there were a considerable number of proprietors. The  *khasra abadi*  register (a list of inhabited sites) and the map of 1862 disclose some sixty "*ihatas*" as being houses or areas of land held therewith in the occupation of individuals who are for the most part without women or children. The great majority of them, if not indeed all, are clearly sadhus, but in two cases it is noticed that one house is a school and the other a police station. The sadhu in every case is entered in the register as "owner" of the house, but too much need not be made of this expression. In another of these settlement papers—a statement of owners' and tenants' holdings called the *muntakib assamiwar*

*khasra*—the owner as distinct from the tenant is entered as “shamilat deh” (village common land). In the *wajib-ul-arz* prepared at this time it is stated in para. 8 relating to “income from cesses” :—

“A person who wishes to take up residence, does so with our (proprietors’) permission. If a person demands any help for the construction of a Kotha, he is helped with wood. He is entitled to reside as long as he likes. When he deserts the place, he is not entitled to sell the house. After he has left, the proprietor of the place shall be entitled to Malba. The proprietor may make Abad in the Kotha any person he likes, subject to the condition that if the former returns to the village after 2-4 years and his house is in a sound condition, then he is given on his request the same Kotha for residence.”

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The only point material to the present case in which this differs from the ordinary custom (set forth in para. 236 of Rattigan’s “Digest”) concerns the right to the *malba*—the latter giving to the non-proprietary resident a right to sell the materials of the house on his occupation ceasing.

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In 1882, the mahant having died, a question arose as to the continuation by Government of the jagir of the village of Jassian and the revenue Court required the tahsildar of Fateh Jang to report on the condition of the *dehri* now in question and its *langar*. This official requested Sardar Fateh Khan, a predecessor of the respondent, to enquire, and his report of June 10, 1882, (exhibit O/31), is in evidence. It describes this *abadi* as a separate and important colony and it gives the *dehri* a good character, saying that its kitchen not only feeds its sadhus and faqirs but also wayfarers and that it gives each faqir one rupee per month for clothes, etc. The appellants also seek to rely on exhibit O/32 a “list of houses attached to Dehri Baba Than Singh” made out—it does not appear by whom—for the revenue Court on this occasion. This list has been treated as inadmissible by the High Court, but, if it be admitted, it shows the bulk of the houses as having a sadhu for “owner”, though a number are entered as *musafirkhana* making them appear as intended for use by wayfarers rather than residents—an appearance which would make a better impression upon any revenue official dealing with the continuation of the jagir : otherwise it does not substantially alter the picture presented by the settlement papers of 1862 save that it shows the pakka buildings to be sixteen and the kacha to be forty-two.

At the second regular settlement of 1882 in the *khasra paimaish* papers (statement of measurements) under the heading “owner” in respect of these twenty-eight kanals one marla is the entry “village abadi”. The area itself is described as unculturable inhabited land (*abadi ghair mumkin*). In the record of rights at the third settlement, 1905, and at the fourth, 1925, the entry “village abadi” is put in the column headed “tenant” as well as in the column headed “owner” and to the description *ghair mumkin abadi* is added “of Dehri Baba Man Singh”—which the respondent claims to be in recognition of the partition of 1882. In none of the settlements after the first is there any entry in a settlement paper corresponding to the entry which has been cited with reference to persons wishing to reside in the village. This the High Court has noted, but the learned Judges following a previous decision of their own Court in *Dhuman Khan v. Gurmukh Singh*<sup>1</sup>

<sup>1</sup> (1935) I. L. R. 17 Lah. 403.

P. C. have held that it does not detract from the force of the entry as after the  
 1941 first settlement the revenue authorities did not concern themselves with recording rights in the village abadi. This is a matter of the revenue history of the Province, and their Lordships see no reason to think that the High Court is not correctly informed.

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Two matters which their Lordships do not find it necessary to discuss may here be mentioned and put aside. The first is an arbitration held in 1904 by an Assistant Commissioner, Mr. C. F. Usborne, in a dispute about the right to receive the rents paid for shops opened or erected in the area in suit at the time of the Baisakhi fair. The award of March 27, 1904, was that half the rent should be taken by the respondent and the other half by the sadhu in whose house the shop was put up. Both sides crave this in aid, the respondent pointing to the fact that the houses were held to belong to the individual sadhus, the appellants to the fact that the proceedings were brought by the mahant. The second matter is the claim made by the respondent in 1925 to receive *huq buha* or door tax from the mahant Parkasha Nand under the *wajib-ul-arz* of 1862. This claim succeeded before the revenue Courts which were ultimately held by the Board to have exclusive jurisdiction over the claim, but doubts had been thrown upon the right by opinions of the civil Courts and the Board did not pronounce upon the matter. (*Sardar Mohammed Nawaz Khan v. Bhagata Nana*<sup>1</sup>). Their Lordships are not to be understood as thinking that the results of these two disputes are irrelevant in the present case. On the contrary their view is that on balance they are not without weight in favour of the respondent, but that in view of more direct and cogent evidence a discussion of them would encumber the present case unnecessarily.

The respondent's fifty-nine witnesses may be taken to establish that since he came of age in 1924 he has exercised the rights claimed by him, and the appellants' evidence is that of late years he has done so somewhat harshly having had a number of the kacha houses demolished. On the other hand—and Mr. Wallach for the appellants has most forcefully laid stress upon this as his main point—the respondent's evidence does not include anything to show that his father before his death in 1903 or any previous proprietor had taken possession of sadhus' houses on their death or departure from the village or had otherwise exercised the customary rights now claimed. For the time (1903 to 1924) of the management of the Court of Wards while the respondent was a minor, there is some such evidence. The responsible official who was manager from 1918 to 1923 (P.W. 5) speaks to the supply of timber to a sadhu called Budh Prakash and says that the house of another sadhu called Narain Das was, on his death, about 1922, taken by the Court of Wards. The evidence of this witness (P.W. 5) as also of the assistant managers from 1914-7, 1917-23, and of several other witnesses shows that there was no *musafirkhana* in this part of the village; though witnesses for the appellants say that the people of Qutbal about 1917 built one which has been demolished. One sadhu Bawa Mohan Das (P. W. 24) fully supports the respondent on all points, but is much exposed to suspicion of partisanship.

Some at least of the sadhus appear to have had *chelas* who lived with them



and in some cases at least the *chela* succeeded in fact to the possession of the *guru's* house at his death. The witnesses called for the appellants include some who say in general terms that the sadhus' houses were given to them by or belonged to the *dehri*, or that the sadhus were living through the mahant, or that when a sadhu went away the mahant got the key of his house and managed it, or that the mahant got the sadhus' houses repaired or that pilgrims were put up in the houses as the mahant directed. But this evidence is poor in quality and is wholly lacking in particulars. The Mahant Bhaqta Nand who succeeded Parkasha Nand in 1928 and who compromised with the appellants in 1935 over their claim that the shrine was not a *Udasi* institution but a Sikh gurdwara was called on their behalf and said that all the kacha houses except three or four were in his possession and were the property of the *dehri*, that he used some of them for his servants and some as store-houses. On the other hand he says "I took the right of residence from Garib Das and also from Sarup Das. If a sadhu lives in a certain house he cannot be ousted by the mahant unless he does something against the principles of the *dehri sahib* but no sadhu could alienate his right of residence to anybody except the *dehri sahib*."

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The general effect of the evidence for the appellants is that in 1889 and down to 1933 the houses in this *abadi* were some forty or fifty in number of which a dozen or so were pakka, i.e., built of masonry, while the rest were kacha, i.e., of mud and stones; and that all, or all save three or four, had been demolished recently, that is about 1934. The Court of Wards manager says that in his period of office (1918 to 1923) the pakka buildings were the *langar*, the mahant's bungalow, the main *dehri*, the second *dehri* and two houses one on each side of the latter. Also that there were about twelve kacha houses inhabited by sadhus most of whom lived there permanently but some of whom came and went though they had houses there. The papers of 1862 show some 68 compounds, but apparently the number of sadhu tenants holding houses is in the neighbourhood of thirty. The list, exhibit O. 32, given to the revenue Court in 1882 mentions sixteen pakka and forty-two kacha buildings. The general effect of this evidence is to show that between 1862 or 1882 and 1920 or thereabouts there was a considerable diminution in the number of the kacha houses, but their Lordships are not prepared to go all the way with Hilton J. in saying that "this fact can only be attributed to the proprietor having gained possession of them according to the custom". If the number of sadhus for any reason became less, such houses, unoccupied, would tend to fall down and might not be repaired or rebuilt by the mahant or by anyone else whether they belonged to the *dehri* or to the individual sadhus.

It appears unreasonable on the evidence to doubt that the original right in the land in suit was with the proprietary body. Hence the first question is whether the appellants have proved a dedication by user of the whole of the area to the purposes of the shrine. This burden lies heavy on the appellants, and it is beside the point to show that the respondent's evidence does not exclude the theory of dedication. For practical purposes the shrine would hardly be treated as other than a permanent institution, and it is not easy to envisage conduct which would show an intention to dedicate the right of

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occupation until such time as the shrine should cease to exist and which would yet fall short of a simple out-and-out dedication of the whole interest as in the case of the *samadhs* themselves. But in their Lordships' opinion the evidence falls far short of establishing that the individual houses of the sadhus were dedicated to the shrine in either sense or at all. The settlement papers of 1862 and of the later settlements make it almost hopeless to challenge, as regards this *abadi* of some three acres, the proprietorship of the respondent. They exclude any suggestion that in 1862 or later the mahant had become entitled to the *abadi* by any form of dedication and indeed there is no trace of any such claim having been brought to notice at any of the settlements or having been taken account of at the time of the partition between the members of the proprietor's family. Yet the case now made by the appellants and pleaded in their written statement of July 20, 1935, is that the respondent "has no right title or interest in the said area." That the right of occupation but not the proprietorship has been dedicated is not an impossible position as a matter of law, and it might be affirmed without contradicting the entries in the settlement papers as to the proprietorship. But it is equally inconsistent with the settlement papers to suppose that the mahant or the *dehri sahib* itself was the sole and quasi-permanent tenant of this area. No trace of such a claim can be discerned in the map or *khasras* of 1862. The individual occupiers of the different houses are set forth in detail as the persons having the right of occupation. For the purposes of the question whether the proprietors' rights in those three acres of *abadi* have been parted with wholly or partially by way of dedication to the shrine, the particular custom as to *malba* laid down in the *wajib-ul-arz* of 1862 is only of subsidiary importance. If it be postulated for the sake of argument that the case falls under the general custom referred to by Hilton J. and stated in Rattigan's Digest in para. 236, the case as to the dedication is not substantially altered though the claim to *malba* would be inconsistent with the assumption made. But their Lordships agree with the High Court in thinking that the special custom is proved, and in any case they think it reasonably clear that individual sadhus minded to attach themselves to the shrine were from time to time permitted by the proprietors to set up for their own habitation kacha houses in its neighbourhood, thus making it an *abadi* fairly enough described as a separate colony—a colony which not only enjoyed considerable reputation but also had the good will of the respondent's predecessors such as Sardar Fateh Khan. The absence of evidence that the respondent's predecessors refused to allow one sadhu to succeed another in the occupation of the houses, or took away the materials, or installed a different class of tenant, is sufficiently explained by the circumstances and by the lapse of time and in no way warrants an inference of dedication whether of the right of occupation or of the whole interest in the land. Such a conclusion requires to be supported by clear and specific evidence of individual transactions which require the hypothesis of dedication to account for them—all the more so that it is contrary to the custom recorded in 1862 and to the position recorded at four settlements. The case of dedication is not made out merely by evidence of neighbourly or considerate conduct towards a religious institution or by showing that small profits have not been churlishly

exacted by the proprietor from persons held in general esteem. Nor is it to be made out by showing that the sadhus dependent on the mahant got his help for repairs, or allowed him to assign pilgrims to them at the time of *mela*, or sought his help in other ways. As Hilton J. has observed, "there is no evidence that the manager of the institution obtained the proprietors' permission to build houses for sadhus." There is moreover no foundation for the contention that the mahant was in management and control of the houses occupied by sadhus in such sense that the sadhus enjoyed a sort of service occupation of the property of the institution. Save as regards the *samadhs* themselves and the *langar* buildings the case of dedication by user fails.

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MENT OF  
GURDWARA  
PENJA SAHIB  
MOHAMMAD  
NAWAZ  
KHAN

Sir George  
Rankin

The appeal made to para. 89 of Rattigan's "Digest" is in these circumstances of no avail to the appellants. If it were intended as the statement of a legal presumption based upon a general custom of the Punjab, their Lordships, in view of the wide sweep of the proposition and of the importance of presumptions in India, would have desired and indeed expected ampler authority for it than they have been able to discover. Of the two cases cited as authority by the learned author their Lordships have been able to examine the first, *Tota Puri v. Padam Puri*,<sup>1</sup> and cannot find that it affirms any such proposition. Ascetics and religious institutions exhibit great diversity of character and *Udasis* in particular conform to no single type. In any case to presume that a particular *Udasi* shrine followed a certain practice because on a count of all religious institutions throughout the Province the practice was found to obtain in a majority of the cases is a course of reasoning unwarranted by principle or authority. Their Lordships would be very slow to apply to such an institution as this *dehri* a rule not collected from its own constitution or practice as proved in evidence. Of the rule now in question it may be further said that unless it be written large in the conduct and history of the "fraternity", the greatest doubt is thrown upon it. However, from the introduction to ch. VI of the "Digest" and from para. 84 it appears that the force of such considerations did not escape the learned author; who insists that there is no general law applicable to religious institutions in the Punjab and appears to recognise in the light of long-standing decisions of the Board that they are to be governed only by customs and usages which they can be shown to accept. Thus in *Greedharee Doss v. Nundokissore Doss*<sup>2</sup> a case about a Hindu *math* in Bengal, it was said by the Board "the only law as to these mahants and their office, functions and duties is to be found in custom and practice, which is to be proved by testimony." Paragraph 89 of the "Digest" is not really put forward as a statement of any legal presumption: though it uses the words "general rule", it is not the statement of a rule but of something which has been found by enquiry to be true of most fraternities.

Their Lordships are not satisfied that the sadhus living in this *abadi* were members of such a "fraternity" as is contemplated by the paragraph; but, whether they were or were not, it is, in their Lordships' view, established by the evidence that the houses in which the sadhus lived were treated by them and by the mahant as their own and not as belonging to the *dehri*.

1 (1874) P. R. No. 21 of 1874.

2 (1867) 11 M. I. A. 405, 428.

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 Sir George Rankin

It cannot, in these circumstances, be held that the rights which the sadhus obtained as a result of their being allowed to live in this *abadi* became enlarged as against the respondent by virtue of any such rule as is put forward. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of respondent No. 1. The Registrar in taxing such costs will take note of and deal with any complaint made by the appellants as to the inclusion in the record of unnecessary documents such as those specified in para. 9 of the appellants' case.

R.C.C.

*Appeal dismissed.*Solicitors for appellants : *Charles Russell & Co.*Solicitors for respondents : *Sharpe, Pritchard & Co.*

### APPEAL FROM ORIGINAL CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice; and Mr. Justice Kama.*

1941

NADIRSHAW H. CONTRACTOR

v.

September 22.

GAJRAJ SHEOKARANDAS.\*

*Indian Arbitration Act (IX of 1899), Sec. 15—Award—Filing of award in Court—“Enforceable as if it were a decree of the Court”—Interpretation—Execution of award—Period of limitation—Indian Limitation Act (IX of 1908), arts. 183, 181.*

The expression “enforceable as if it were a decree of the Court”, used in s. 15 of the Indian Arbitration Act, 1899, includes both the manner of execution and the time within which execution must take place.

An award, filed in the High Court, can, by virtue of s. 15 of the Indian Arbitration Act, 1899, be executed as a decree of the High Court at any time within twelve years from its date, under art. 183 of the Indian Limitation Act, 1908.

*Chaitram, Sagormull v. Hardwar Mull & Co.*,<sup>1</sup> followed.

PROCEEDINGS in execution.

Gajraj Sheokarandas obtained an award for Rs. 8,383-10-0 against Nadirshaw H. Contractor in Bombay on July 27, 1929. The award was filed in the High Court on August 16, 1929, under the provisions of the Indian Arbitration Act, 1899.

On January 6, 1941, the decree-holder applied to the High Court to execute the award, by issue of notice to the judgment-debtor under O. XXI, r. 22, of the Civil Procedure Code, 1908. The notice was issued on February 5, 1941. On April 7, 1941, the Court (Somjee J.) made the notice absolute.

The judgment-debtor appealed.

*H. D. Banaji*, for the appellant.

*Sir Jamshedji Kanga*, for the respondent.

\* O. C. J. Appeal No. 12 of 1941 :  
 Award No. 146 of 1929.

1 (1927) I. L. R. 55 Cal. 499.

BEAUMONT C.J. This is an appeal from a decision of Mr. Justice Somjee given in chambers making absolute a notice under O. XXI, r. 22, of the Civil Procedure Code, 1908, which empowers the Court to authorise execution of a decree more than two years after the date of the decree. In this case there was no decree; there was only an award made on July 27, 1929, and filed in this Court on August 16, 1929, under the Indian Arbitration Act, 1899. The present application was made on January 6, 1941, and a notice was issued under O. XXI, r. 22, of the Civil Procedure Code

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1941

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SHEBOKARAN-  
DAS

The question at issue is, whether the award which has been filed in this Court can be enforced within twelve years of the date of the award or whether the period of limitation is three years; i.e. whether the case falls under art. 183, or art. 181, of the Indian Limitation Act, 1908. Article 183 limits the time for enforcement of a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction to twelve years from the date when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right. Under s. 15 of the Indian Arbitration Act of 1899, which is the section applicable to this case, it is provided that an award on a submission, on being filed in Court, shall be enforceable as if it were a decree of the Court. The argument for the appellant is that art. 183 taken by itself does not apply to an award, since it only embraces a judgment, decree or order of a Chartered High Court; and s. 15 does not make an award a decree of the Court, it only provides that it is to be enforceable as if it were a decree of the Court, which expression refers to the manner of execution, and does not relate to limitation. That s. 15 has not the effect of making the award a decree of the Court has been recognised by the Privy Council in *Sassoon & Co. v. Ramdutt Ramkissen Das*,<sup>1</sup> and by this Court in *Tribhuwandas Kalliondas Gajjar v. Jivanchand*,<sup>2</sup> but neither of those cases was dealing with the question of limitation. We have also been referred to cases on the English Arbitration Act, including *De La Bere v. Pearson, Limited*,<sup>3</sup> but the English Act provides for enforcing an award in the same manner as a decree. So also does s. 59(1)(a) of the Bombay Co-operative Societies Act of 1925 which was the statute with which this Court was dealing in *Raghavendra v. Industrial Bank, Guledgud*.<sup>4</sup> The expression "in the same manner as" would seem to refer to the method of execution, and would not, I think, cover the time within which execution must be enforced. But s. 15 speaks of the award being enforceable as if it were a decree of the Court, and it seems to me much easier to read that expression as including both the manner of execution and the time within which execution must take place. It may be said with force that if a decree of the Court is enforceable within twelve years, but an award is only enforceable within three years, then after the expiration of three years, the award is not enforceable as if it were a decree of the Court.

The exact point with which we have to deal was decided by the Calcutta High Court in 1927 in *Chaitram Sagormull v. Hardwar Mull & Co.*<sup>5</sup> In that case a bench of the Calcutta High Court held that a decree filed under the

1 (1922) I. L. R. 50 Cal. 1, P.C.

2 (1910) I. L. R. 35 Bom. 196,  
s. c. 12 Bom. L. R. 860.

3 [1907] 1 K. B. 483.

4 (1935) 38 Bom. L. R. 927.

5 (1927) I. L. R. 55 Cal. 499.

O. C. J. Indian Arbitration Act, 1899, was enforceable within twelve years, i.e. that it  
 1941 fell under art. 183 of the Indian Limitation Act. It is obviously undesirable  
 — that different High Courts should give a different interpretation to an Act  
 NADIRSHAW common to the whole of India, and we would not be justified in differing from  
 CONTRACTOR the High Court of Calcutta on this question, unless we felt certain that  
 v. that decision could not be reconciled with the plain meaning of the statute.  
 GAJRAJ I am certainly not prepared to apply that criticism to the Calcutta case.  
 SHROKARAN- The point is obviously susceptible of argument, and as the Calcutta High  
 DAS Court in a judgment which discusses the practice in detail has arrived at  
 — a particular view as to the construction of s. 15, and the decision has stood  
 Beaumont C.J. for some years, I see no reason why we should differ from it. I think  
 — we ought to follow it. The point is not of very much practical consequence  
 because under s. 17 of the new Arbitration Act, awards have to be filed and  
 a decree has to be passed in terms of the award as is the case under s. 16,  
 schedule II, of the Civil Procedure Code, so that this decision will only  
 apply to such cases as still come under s. 15 of the old Act. We think that  
 the decision of the learned Judge was right, and the appeal is dismissed with  
 costs.

KANIA J. The narrow point for consideration is whether the words "enforceable as if it were a decree of the Court" in s. 15 of the Indian Arbitration Act (IX of 1899) are equivalent to enforceable in the manner of a decree of the Court. Our attention has been drawn to several cases in which the words "enforceable in the same manner as" have been construed, and it has been pointed out that by reason of the use of those words an award does not obtain the character of a decree in all respects. We are not oppressed by those decisions because the words actually used here are not "enforceable in the same manner as" a decree.

The words "enforceable as if" are, in my opinion, capable of being read as meaning "enforceable in the manner and to the same extent as a decree." I do not think by giving the words that meaning I am doing any violence to the language actually used. To put it in a still different way while the words "as if" must go with the word "enforceable", they do not reduce the qualities attachable to the award in enforcing the same as if it were a decree of the Court. One qualification or privilege of a decree of this Court on the original side is that it can be enforced for twelve years. It does not seem to strain the language of s. 15 of the Indian Arbitration Act to say that the words "as if" would include the quality of being enforceable within the time prescribed by art. 183. The construction put on those words by the Calcutta High Court does not appear to be unduly straining the language, and on the principle that as far as possible in the construction of an Act of Legislature applicable to the whole of India, one High Court should follow the considered opinion of another High Court, the decision under appeal should be upheld and the appeal must be dismissed with costs.

*Appeal dismissed.*

Attorneys for appellant : *Aibara & Co.*

Attorneys for respondents : *Manilal, Kher, Ambalal & Co.*

## ORIGINAL CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Kania.*

*In re* GOVINDRAM GORDHANDAS.\*

1941

*Indian Income-tax Act (XI of 1922), Secs. 5(2), 66(2)—Transfer of income-tax cases September 26. by Central Board of Revenue—Completed assessments not affected by transfer—Further proceedings by assessee covered by transfer—Hearing of appeal under order of transfer—Hearing valid—Power to state case to High Court.*

On March 31, 1939, the assessee was assessed to income tax by the Income-tax Officer, Special Circle, Bombay, who was subordinate to the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan. On April 1, 1939, the Income-tax Act, 1922, was amended, one of the effects of which was that a Commissioner of Income-tax (Central) was appointed. On April 15, 1939, a demand for payment was made on the assessee. The assessee applied under s. 27 of the Act to get the assessment set aside, but his application was rejected. On April 18, 1939, the Central Board of Revenue, acting under s. 5(2) of the Act, as amended, transferred among others the case of the assessee by name to the Commissioner of Income-tax (Central). On May 10, 1939, the assessee appealed against his assessment, and the appeal was disposed of by the Appellate Assistant Commissioner, Ss. I to VI, A-Range, Bombay, who was appointed, under the amended Act, to hear appeals against assessments made by the Income-tax Officer, Special Circle, Bombay, which appeals were pending on June 3, 1939. The assessee then applied to the Commissioner of Income-tax (Central) asking him to state a case to the High Court, under s. 66(2) of the Act, in the matter of his assessment, but the Commissioner refused to do so on the ground that he had no jurisdiction to deal with the matter. On application to the High Court :—

*Held*, (1) that the order of transfer of cases, under s. 5(2) of the amended Act, did not include assessments already completed on March 31, 1939, though it did operate on any further proceedings relating to the assessee :

*Dayaldas Kushiram v. Commissioner of Income-tax, Central*<sup>1</sup>, followed ;

(2) that the Appellate Assistant Commissioner, Ss. I to VI, A-Range, Bombay, was the proper tribunal to hear the appeal filed by the assessee, whether the transfer made on April 18, 1939, embraced the assessment in question or not ;

(3) that inasmuch as the assessment made on March 31, 1939, had not been validly transferred to the Commissioner of Income-tax (Central), that Officer had no jurisdiction to entertain the application and to state a case under s. 66(2) of the Act ;

(4) that that Officer could not therefore be ordered to state a case and that the application failed.

APPLICATION under s. 66(3) of the Indian Income-tax Act, 1922, requesting the Commissioner of Income-tax (Central) to state a case to the High Court under s. 66(2) of the Act.

The applicant Govindram Gordhandas (assessee) was assessed to income-tax for the year 1934-35 by the Income-tax Officer, Special Circle, Bombay, on March 31, 1939, on an income of Rs. 5,95,000.

\* Income-tax Application No. 2 of 1941.

1 [1940] Bom. 650,  
s.c. (1939) 42 Bom.L.R. 414.

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On April 1, 1939, the Income-tax Act came to be amended. Under s. 5(2) of the Act the Central Government was empowered to appoint a Commissioner of Income-tax for any area to discharge without reference to area the functions of a Commissioner in respect of any cases or classes of cases assigned to him by the Central Board of Revenue; and s. 5(3) empowered the Central Government to appoint for any area as many Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers as it thought fit. Section 5(7) provided that Assistant Commissioners of Income-tax and Income-tax Officers should be subordinate to the Commissioner of Income-tax for the area in which they performed their functions, or where they performed functions assigned to them by a Commissioner of Income-tax appointed without reference to area, to that Commissioner.

The assessing officer, viz. the Income-tax Officer, Special Circle, Bombay, was, on the date of assessment, subordinate to the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan.

On April 15, 1939, the Income-tax Officer, Special Circle, issued a notice of demand to the assessee under s. 23(4) of the Act. On the same day the assessee applied to the officer under s. 27 to cancel the assessment. The application was summarily rejected on April 17, 1939. The rejection was communicated to the assessee on April 24, 1939.

Meanwhile, on April 18, 1939, the Central Board of Revenue assigned the assessee's case, amongst others, to the Commissioner of Income-tax (Central), Bombay, who was appointed under the amended Act.

On April 27, 1939, the Commissioner of Income-tax (Central) assigned the assessee's case to the Income-tax Officer, Section I (Central).

The special circle was abolished as from April 29, 1939, by a notification dated June 3, 1939.

On April 28, 1939, the Income-tax Officer, Section I, Central, intimated to the assessee that his case had been assigned to the Commissioner of Income-tax (Central) by the Central Board of Revenue to the exclusion of the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan under s. 5(2) of the Income-tax Act, 1922, as amended by Act VII of 1939, and that the Commissioner of Income-tax (Central) had allotted the assessee's case to the Income-tax Officer, Section I, Central, under s. 5(5) of the Act.

On May 10, 1939, the assessee filed two appeals, one against the assessment order of the Income-tax Officer, Special Circle, dated March 31, 1939, and the other against the order under s. 27 passed on April 17, 1939.

The Appellate Assistant Commissioner, Sections I to VI, A-Range, Bombay, who was subordinate to the Commissioner of Income-tax (Central), heard both the appeals and dismissed them on May 7, 1940.

On July 10, 1940, the assessee applied to the Commissioner of Income-tax (Central) to refer to the High Court under s. 66(2) of the Act the questions of law arising in his case. The application was rejected on January 31, 1941, on the ground that the Commissioner was not competent to deal with the application.

On March 6, 1941, the assessee applied to the High Court for an order under s. 66(3) of the Act requiring the Commissioner of Income-tax (Central)



tral) to state a case and refer it to the High Court.

The application was heard.

*Sir Jamshedji Kanga*, with *N. P. Engineer*, for the applicant.

*M. C. Setalvad*, Advocate General, for the respondent.

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BEAUMONT C. J. This is an application asking us to direct the Commissioner of Income-tax, (Central), to state a case. The learned Commissioner has refused to state a case, not because he denies that a point of law arises, but because he considers that he has no jurisdiction to deal with the matter. That is the question which we must decide on this application.

The assessee was assessed on March 31, 1939, by the Income-tax Officer, Special Circle, and on the next day the amendments to the Indian Income-tax Act came into operation. On April 15 a demand for payment was made on the assessee. He applied under s. 27 of the Act to get the assessment set aside, but his application was rejected. On April 18 the Central Board of Revenue, acting under s. 5(2) of the Act, as amended, transferred the case of the assessee by name to the Commissioner of Income-tax (Central). Now, this Court held in *Dayaldas Kushiram v. Commissioner of Income-Tax, Central*<sup>1</sup>, that cases transferred under s. 5(2) of the Act could not include assessments already completed. That decision binds us, and it follows that the assessment, which was completed on March 31, 1939, was not included in the transfer of the assessee's case; any further proceedings relating to the assessee were validly transferred, but the completed assessment was not transferred.

On May 10 the assessee appealed against his assessment, and his appeal was admittedly disposed of by the Appellate Assistant Commissioner, Sections I to VI, A-Range, Bombay. In my view, that Assistant Commissioner would have been the tribunal to hear the appeal, whether the transfer made on April 18 embraced this assessment or not, so that his entertainment of the appeal is a neutral act. The original assessment was made by the Income-tax Officer, Special Circle, and by virtue of notifications 46 and 47, published in the *Gazette of India* of June 3 and 10, 1939, "Sections I to VI, (Central)" were in effect substituted for "Special Circle", and by Notification of February 24, 1940, the Central Board of Revenue directed that the Appellate Assistant Commissioner of Income-tax, Bombay, "A" Range, should perform his functions in respect of assessee's who had preferred appeals against the assessments made or orders passed by the Income-tax Officer, Special Circle, Bombay, and whose appeals were pending on June 3, 1939. That includes the appeal of the present assessee. If the case had been properly transferred to the Commissioner of Income-tax (Central), there is no doubt that the appeal would have been heard by the Assistant Commissioner, Bombay, A-Range, dealing with Sections I to VI (Central), which included all cases transferred to the Commissioner of Income-tax (Central). If it was not transferred, it seems to me that the same gentleman must have heard the appeal under the notification of February 24, 1940. The question, therefore, is, whether the Assistant Commissioner heard the appeal as an officer subordi-

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nate to the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, that is to say, the local Commissioner, or whether he heard it as an officer subordinate to the Commissioner of Income-tax (Central) under s. 5(7). Now, under s. 5(2) of the Act, the Commissioner of Income-tax (Central) can only deal with cases which had been transferred to him, and that must mean validly transferred to him. Therefore, one comes back to the question whether the assessment of March 31, 1939, had been validly transferred to the Commissioner of Income-tax (Central), and, as I have said, on the authority of the case decided by this Court, we must hold that it had not been transferred. If that is so, the Commissioner of Income-tax (Central) has no jurisdiction to entertain this case. If that is so, it may follow that under s. 5(7) the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, has jurisdiction to state a case under s. 66(2), but we are not concerned with that. All we have to determine is whether the Commissioner of Income-tax (Central) has jurisdiction to state a case under s. 66(2); and, in my opinion, if this assessment of the assessee has not been validly transferred to such Commissioner, he cannot state a case, and he has no jurisdiction to entertain the matter at all. That was the view he took, and as we agree with him that he has no jurisdiction to state a case, we cannot order him to do so.

The petition, therefore, must be dismissed with costs.

KANIA J. Two points arise for consideration on this application. (1) Whether, after the assessment was made on March 31, 1939, the order transferring the case to the Commissioner of Income-tax (Central) by the Central Board of Revenue, and thereafter by the order of the Commissioner of Income-tax (Central) to the Income-tax Officer (Central) was valid in law, having regard to the fact that the assessment order was made before the amended Income-tax Act of 1939 came into operation. (2) If that transfer was invalid, whether the decision of the Appellate Assistant Commissioner, as given, was in his capacity as a subordinate to the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, or as a subordinate to the Commissioner of Income-tax (Central).

It may be noticed that before the amendment of 1939 the Income-tax Act provided for the appointment of a Commissioner of Income-tax, and it was within his power to distribute the work and allot functions to Assistant Commissioners and Income-tax Officers. By the amendments made in 1939 the appointment of Commissioners without any reference to areas was contemplated, and Assistant Commissioners were appointed by the Central Board of Revenue and functions were allotted to them by that Board.

As regards the first point, the question of the right of an assessee in respect of assessment orders made before April 1, 1939, for reassessment came to be considered by this Court in *Dayaldas Kushiram v. Commissioner of Income-tax, Central*<sup>1</sup>. In the judgment of the learned Chief Justice there are observations which deal with the right of appeal against an assessment order before March 31, 1939. On the principles adopted in that case, he considered it logically to follow that such rights as had been acquired in res-

<sup>1</sup> [1940] Bom. 650, s.c. (1939) 42 Bom.L.R. 414.

pect of the orders of assessment, whether they were in respect of reassessment or appeal, stood on the same footing. As the point did not arise in the reference, I expressed no views on that question. In my opinion, on the facts, that question is not material here.

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*Kania J.*

The appeal from the assessment order dated March 31, 1939, should be decided by the Assistant Commissioner having power to decide appeals against assessment orders made in the Special Circle. The Appellate Assistant Commissioner, 'A Range', appointed after the amendment, at first had jurisdiction to hear appeals in respect of orders made by Income-tax Officer of 'Special Circle', Sections I to VI (Central) and also specified wards. He was a named individual. Under the old as also the amended Act there is no objection to appoint one Assistant Commissioner with powers to hear appeals in all such cases. The hearing of the appeal over the order in this matter by that individual, therefore, will be when he was Assistant Commissioner having jurisdiction to hear appeals in all those matters. By reason of the amendments made in the order of his appointment, and published in the Government of India notification on June 3 and 10, 1939, the words 'Special Circle' were omitted from the original order. The result was that the Appellate Assistant Commissioner remained invested with the powers to hear appeals in respect of Sections I to VI (Central), and Wards A to AA. It appears, therefore, to be contended on behalf of the assessee that that Assistant Commissioner had no jurisdiction to hear the appeal in respect of his assessment order passed when the assessee was under the Special Circle. To remove that difficulty, an order was issued and notified in the *Gazette of India* on February 24, 1940. The terms of that notification are material and have been quoted in the judgment of the learned Chief Justice. It is clear from that notification that the Central Board of Revenue invested the Appellate Assistant Commissioner, Bombay, "A Range," with powers to hear appeals in respect of assessment orders made by Income-tax Officers in the Special Circle. That Assistant Commissioner, whose jurisdiction was otherwise defined in the notification published on July 15, 1939, thus acquired jurisdiction in respect of all appeals against orders made by the Income-tax Officer, Special Circle. The question is, whether the appeal decided in this case by the Assistant Commissioner, 'A Range', under the powers given by the notification dated February 24, 1940, is by the Assistant Commissioner subordinate to the Income-tax Commissioner (Central), or to the Income-tax Commissioner, Bombay Presidency, Sind and Baluchistan. Having regard to s. 5(7), it is clear that the function to hear this appeal was not assigned to him by the Commissioner of Income-tax without reference to area, that is, Central. He was given those powers by the Central Board of Revenue under the notification mentioned above. If so, the Assistant Commissioner was subordinate to the Commissioner of Income-tax for the area, that is, the Commissioner of Income-tax for Bombay Presidency, Sind and Baluchistan. Therefore, the application to be made by the assessee for stating a case under s. 66(2) should be to the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan. Clearly he has not done that.

It was argued before us that the Commissioner of Income-tax (Central), who is the opponent here, kept the papers before him for over two months

O. C. J. and gave his decision after six months. It is pointed out that in the affidavit  
 1941 filed in reply it is not disputed that a question of law, which is referable  
 — under s. 66(2), arises. The only contention urged is that the opponent is  
*In re* not the person who is to make the reference, as he has no jurisdiction. An  
 GOVINDRAM appeal was made to the Court that this was unfair, and revenue authori-  
 GORDHANDAS ties should not act in that manner. But the remedy for that is with the  
 — assessee. He should apply to the proper authorities, and as public officers  
*Kania J.* there is no reason to believe that if their department has committed an error  
 — or allowed proceedings to drift whereby the rights of the subject are preju-  
 diced in any way, they will not put the matter right. The Court is not  
 concerned with the moral aspects. The Court is called upon to decide on  
 the construction of the Income-tax Act, whether the opponent should be com-  
 pelled to state a case as asked for. To that the clear answer appears to be  
 that he cannot be asked to do so.

I agree, therefore, that the application fails and must be dismissed with costs.

*Petition dismissed.*

Attorneys for applicant : *Payne & Co.*

Attorney for respondent : *D. H. Nanavati*, Solicitor to Central Govern-  
 ment, at Bombay.

## APPELLATE CIVIL.

*Before Mr. Justice Broomfield and Mr. Justice Macklin.*

1941

SHANKAR BALA JAGTAP

*v.*

*August 7.*

GOTIRAM PANDURANG PAWAR.\*

*Indian Registration Act (XVI of 1908), Sec. 17—Transfer of Property Act (IV of 1882), Secs. 55(4) (b)—Statutory charge—Vendor's lien—Agreement giving up claim to refund of consideration money on redemption of mortgage.*

The plaintiffs, who had mortgaged their land, sold, under a registered deed, a portion of it to defendant No. 1 for Rs. 3,000, which sum was to be spent in redeeming the mortgage, and defendant No. 1 was to take possession of the land sold to him and to deliver rest of the land to plaintiffs. The mortgage deed provided that if there was any balance left out of Rs. 3,000 after redemption it was to be given to plaintiffs, and if the sum was found insufficient to pay off the mortgagee the plaintiffs were to make the shortage good. On the next day there was another agreement between the parties, which was in writing but

\* Letters Patent Appeal No. 24 of 1940, against the decision of Kania J., in Second Appeal No. 805 of 1938, preferred against the decision of D. G. Kamerkar, Assistant Judge at

Poona, in Appeal No. 59 of 1936, confirming the decree passed by D. S. Lupane, Subordinate Judge at Sasvad, in Civil Suit No. 285 of 1932.

was not registered, under which the plaintiffs gave up their claim to any balance that might be left after paying off the mortgage and defendant No. 1 undertook to redeem the mortgage whatever it cost. Defendant No. 1 next sued to redeem the mortgage, and got a decree without having to pay any money for redemption. The plaintiffs then sued to recover the amount of Rs. 3,000 less expenses incurred by defendant No. 1, contending that the second deed not having been registered was inadmissible in evidence :—

*Held*, negating the contention and dismissing the suit, (1) that the statutory charge under s. 55(4) (b) of the Transfer of Property Act, 1882, being on the property sold, i.e. the equity of redemption, could not materialise, inasmuch as there was an implied contract to the contrary, viz. that the price was to be paid on redemption and not before ;

(2) that it was extremely doubtful whether the statutory provision would operate to give the plaintiffs a charge on the land after redemption ;

(3) that even assuming that it could, the charge would only arise when the ownership of the land passed to defendant No. 1, i.e. on redemption of the mortgage, but before that time there was a contract to the contrary, viz. the second agreement, by reason of which no charge for the balance of the price could arise, since the claim to that balance had been abandoned ;

(4) that the second agreement did not therefore require registration, because it did not operate to extinguish any right or interest to or in the land, plaintiffs at that time having no such right or interest.

SUIT to recover money.

In 1868 Shankar and others (plaintiffs) mortgaged with possession their land inclusive of survey No. 493.

On August 29, 1916, plaintiffs sold, by a registered deed, survey No. 493 to Pandurang (defendant No. 1) for a sum of Rs. 3,000, on condition that defendant No. 1 was to apply that sum in paying off the mortgage, and take survey No. 493 into his possession and to deliver possession of the rest of the land to plaintiffs, that if there was any balance left out of Rs. 3,000 after redemption it was to be handed over to plaintiffs, and that if defendant No. 1 spent any sum in excess of the amount in redemption, the excess was to be made good by plaintiffs.

On August 30, 1916, the parties entered into another agreement (exhibit A), which was in writing but was not registered, whereby plaintiffs gave up their claim to the balance, if any, left on redemption of the mortgage, and defendant No. 1 undertook to redeem the mortgage whatever the cost on his own account.

In 1917 defendant No. 1 sued to redeem the mortgage, and obtained a decree, on September 11, 1920, for redemption of the mortgage without having to pay any money, as it was found that the mortgage was already paid off. The decree was affirmed on appeal on September 27, 1921.

On July 4, 1932, plaintiff filed a suit to recover from defendant No. 1 the unspent balance of Rs. 3,000 together with interest.

The trial Court decreed the suit, holding that exhibit A could not be given in evidence for want of registration, for the following reasons :—

“The agreement clearly contradicts the terms of the sale deed, exhibit 26, which is a registered document. The term varied is about the price of the land. The agreement therefore obviously offends the provisions of s. 92 of the Evidence Act. The proviso 4 to s. 92 is not applicable to the present case, as the disposition of

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A. C. J. the property in question is effected by a registered sale deed. An unregistered agreement cannot alter the terms of a registered document. The agreement 'A' deprives the vendors of their right to recover the balance of the purchase money after defraying the costs of the litigation and payment of the amount found due under the mortgage, which was given to them by the sale-deed. The agreement therefore purports to limit an interest in the immoveable property. Hence I conclude that it requires registration, and in the absence of the same, it is not admissible in evidence, as such agreement must be deemed to be void, as it offends the provisions of statutory law. In support of my view I rely on the authorities mentioned below :—

(41 Cal. 493, 37 Cal. 293, 23 Bom. L. R. 1066 and 26 Cal. 707)."

This decree was, on appeal, affirmed by the Assistant Judge, on the following grounds :—

"Without doubt the sale-deed, exhibit 26, had created an interest in immoveable property of the value of more than Rs. 100\* in favour of defendant No. 1; and, correspondingly, it had created a right to the vendors to receive benefit to the extent of Rs. 3,000 on account of purchase money in the form stated in the sale-deed. That right had not been merely a right to moveable property. It had, as a necessary concomitant of it, an interest in immoveable property in the form of a statutory charge on the property sold, for the amount of price. If a charge were to be created on immoveable property of Rs. 100 and upwards, the same would require a registered document. This has been well-established law. See, for instance, *The Bengal Banking Corporation v. Mackertisch* (10 Cal. 315), *Bai Narmada v. Bhagwanrao* (12 Bom. 505). There can be no distinction on principle between a charge created by act of parties and a charge created by operation of law, in this respect. See *Tirthadas v. Sadusing*, 25 Bom. L. R. 313, 314. Since the charge in favour of the vendors had been created and did require for its creation a registered instrument, it follows that it could be superseded, limited or extinguished only by another registered instrument. It could not be superseded, limited or extinguished by an unregistered instrument; and proviso 4 to s. 92 of the Evidence Act could not prevail. This is not necessarily so by reason only of cl. (b) to sub-s. (1) of s. 17 of the Registration Act. But it is the more so on account of the general principle underlying the registration law and the salutary principle embodied in s. 92 of the Evidence Act. The decided authorities also are to the same effect. See *Sadaruddin Ahmed v. Chajju* (31 All. 13, F.B.), which was a case of a compromise entered into between parties to a registered deed, subsequent to the deed and varying the terms and conditions of the deed as the period to redeem: *Tikaram v. The Deputy Commissioner of Barabanki* (26 Cal. 707, at p. 710); and *Pranal Anni v. Laxmi Anni* (22 Mad. 508). Compare also *Harkisandas v. Bai Dhanu* (50 Bom. 566), wherein a full bench of the Bombay High Court have held that a simultaneous agreement in writing purporting to affect the terms of a sale-deed so as to modify and convert it into a mortgage does require registration and is inadmissible in evidence. The agreement in this case purported not merely to remit the payment of price, but to extinguish the right of the vendors to any balance of purchase money. Moreover, it purported to modify even the liability of the vendee defendant No. 1 in respect of the amount he was to pay to the Nhalve Kasars. Whereas under the sale-deed, exhibit 26, his liability had been limited to Rs. 3,000 only, under the subsequent agreement his liability had been enhanced indefinitely. He was to bear all that indefinite liability; and, correspondingly, he was to retain all the benefit. I have no hesitation, therefore, to hold that the subsequent agreement document did require registration; and that for want of it, it had been inadmissible into evidence."

The appeal was heard by Kania J., who allowed it on March 8, 1940.

KANIA J. This is a second appeal from the decision of the Assistant Judge at Poona, who confirmed the decree of the trial Court.

The plaintiffs brought this suit to recover a sum of Rs. 4,999 (after remitting Rs. 521) on the ground that under an agreement dated August 29, 1916, the defendants had agreed to pay the balance to them, after satisfying the claim of the mortgagees. After that agreement it was ascertained that no money was payable to the mortgagees. It was therefore contended that the whole sum of Rs. 3,000 was payable to them with interest. The defence was that on August 30, 1916, under a written agreement between the parties it was agreed that any balance, which may remain after the mortgage claims were satisfied, was to be retained by the defendants. The lower Courts have excluded this subsequent agreement on the ground that it was not registered. They proceeded to deal with the plaintiffs' rights after excluding that agreement and held that as no money was paid to satisfy the mortgage claims, the whole balance should be awarded to the plaintiffs.

In order to appreciate the rival contentions it is necessary to bear in mind the terms and scheme of the two documents. The first document of August 29, 1916, is a sale deed for Rs. 3,000 of the land particularly described in that conveyance. After reciting that the property was sold the document proceeds as follows :—

"You should take the remaining mortgaged lands from the possession of the creditors as indicated above and give them into our possession. If the sum that is found due to the creditors after taking accounts is less than the purchase amount you should pay the balance to us. You have no right over that sum. If perhaps the sum found due to the creditors after taking accounts is more we shall repay that out of the other mortgaged properties. You are not to be burdened with that. If it becomes necessary to file a suit in Court for the redemption of the lands from the said creditors. . . . You should incur the costs of the suit and should deduct the same from the sale price to be paid to us. The consideration is as under :

After deducting the sum that will have to be paid to the creditors after taking accounts and the costs of the suit, if a suit is required to be filed for the purpose of redeeming the lands, from the sum of Rs. 3,000 you should pay the balance found due to us and should hand over the remaining mortgaged lands to us. . . . We have sold you absolutely the land as described above, for the consideration of Rs. 3,000."

The second document executed the next day, after reciting the document of August 29, 1916, provided as follows :

"In that there is a term in the deed that after paying whatever is found due to the creditor after taking accounts the balance is to be paid to us. But you are not to pay us at all the balance that will be left over. Only that you are to keep with yourself permanently the land that has been sold to you and you are to give us the remaining mortgaged lands that will be freed from the mortgage. You are only to pay off the encumbrance in favour of the creditor and the land is to remain with you as sold absolutely for that and for your labour."

On behalf of the respondents it was argued before me that in respect of the balance of the purchase price there was a statutory charge in favour of the vendors under s. 55(4) of the Transfer of Property Act. The effect of the second document was to extinguish that charge and therefore the document required registration. In the alternative it was contended that the second document purported to alter the consideration for the first. That is altering a term of the contract and therefore required registration. It was lastly contended that if it was found that nothing was payable to the mort-

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gagees, there was no provision in the deed as to what should be done to the balance, and therefore the judgments of the lower Courts are correct.

In my opinion the first contention is unsound. There is nothing in the document itself to show that there arose a charge in favour of the vendors. It does not appear on the face of the document what amount if any would be payable to the vendors for the balance. Indeed the document contemplates the contingency of the sum of Rs. 3,000 not being sufficient to satisfy the claims of the mortgagees and the costs to be incurred in litigation. It was therefore provided that if any amount in excess was to be spent the vendors would pay the same. Under these circumstances, I am unable to consider that the property was under a statutory charge of over Rs. 100. In respect of that balance therefore no interest in any immovable property was created.

Even assuming it to be otherwise, the effect of the second document, in my opinion, was not to extinguish any charge. What was stipulated was that the balance if any was not to be paid to the vendors. The fact, that after four years it was ascertained that no money was payable to the mortgagees who were in possession, cannot govern the question whether the document when executed required registration. The simple term in that document was that the stipulation about the payment of the balance was given up. In my opinion that stipulation did not affect immovable property, and the document was being tendered for a collateral purpose that did not create, affect or extinguish any interest in immovable property. Under the circumstances the first contention must be rejected.

The contention that the second document altered the consideration is also unsound. I am concerned in this litigation only with this particular stipulation and nothing else. A promisee has a right at any time to give up the performance of any part of the promise. That does not require any consideration under the Indian Contract Act. In the present case the giving up of the right to receive the balance does not amount to an alteration of the term about consideration but is merely giving up of a right to the performance of a part of the contract between the parties.

The last contention is clearly unsound. A day after the first agreement the contracting parties agreed that the only obligation of the purchaser was to satisfy the claims of the mortgagees, and to see that the lands which were covered by the mortgage were delivered free to the vendors. Both expressly and impliedly therefore the obligation of the purchaser to pay any money was cancelled and it is therefore improper to contend that the document does not provide for the contingency of nothing being found payable to the mortgagees. Towards the close of the document it is expressly provided that the only obligation which remained on the purchaser was to see that the lands mortgaged were delivered free from encumbrances to the vendors.

I therefore think that the lower Courts were in error in rejecting the agreement of August 30, 1916. It should have been admitted in evidence. Giving effect to the terms of that document it is clear that the plaintiffs have no right to sue for the balance alleged to be due under the arrangement contained in the document of August 29, 1916. The basis of the suit having gone, the suit does not lie.

The appeal is therefore allowed, the decision of the lower Courts is set



aside and the suit is dismissed with costs throughout.

The plaintiffs appealed under the Letters Patent.

A. G. Desai, with B. N. Gokhale, for the appellants.

G. S. Gupta, for the respondents.

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BROOMFIELD J. This is a Letters Patent appeal from a judgment of Mr. Justice Kania who, disagreeing with both the lower Courts, dismissed a suit brought by the appellants to recover the price of land sold by them to defendant No. 1 by sale of the land.

The appellants were the owners of a field survey No. 493 and some other lands which were in the possession of mortgagees under a mortgage of 1868. On August 29, 1916, they executed a sale deed, exhibit 26, in favour of defendant No. 1. The material terms of this document, which was registered, are as follows :—

"Land thus bounded, along with the trees, shrubs etc., thereon and along with all their component parts, has been sold for the said sum of Rs. 3,000. You should therefore take into your possession all the mortgaged lands from the creditors, either by mutual consent, or through Court and out of them you should keep in your possession the land sold and described above and pay assessment and should make a *vahiwat* permanently and without any trouble, from generation to generation including sons and grandsons. No right, title or interest has been left therein in us or in our heirs and executors, etc. You should take the remaining mortgaged lands from the possession of the creditors as indicated above and give them into our possession. If the sum that is found due to the creditors after taking accounts is less than the purchase amount, you should pay the balance to us. You have no right over that sum. If perhaps the sum found due to the creditors after taking accounts is more, we shall re-pay that out of the other mortgaged properties. You are not to be burdened with that. If it becomes necessary to file a suit in Court for the redemption of the lands from the said creditors we shall render every possible assistance in that matter and will join in the suit. You should incur the costs of the suit and should deduct the same from the sale price to be paid to us. The consideration is as under :—

After deducting the sum that will have to be paid to the creditors after taking accounts and the costs of the suit if a suit is required to be filed for the purpose of redeeming the lands, from the sum of Rs. 3,000, you should pay the balance found due to us and should hand over the remaining mortgaged lands to us. If the costs exceed the amount, we shall pay the excess. We have sold you absolutely the land as described above, for the consideration of Rs. 3,000 without any oral and written terms of any kind whatsoever."

Stated briefly, the effect of this was that the plaintiffs sold their equity of redemption in survey No. 493 to defendant No. 1 for Rs. 3,000, but this sum was to be spent in redeeming the mortgage on that field and the other lands and only the balance if any remaining after doing this and after deducting the cost of litigation was to be paid to the plaintiffs. The plaintiffs agreed to pay any excess over Rs. 3,000. The other mortgaged lands were to be handed over to them.

On the following day, August 30, the parties entered into an agreement which was reduced to writing. That is exhibit A. The material portion of this document is :—

"We have yesterday (date August 29, 1916) executed a sale deed in your favour for Rs. 3,000 in respect of the land, survey No. 493 of Saswad. In that there is

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a term in the deed that after paying whatever is found due to the creditor after taking accounts, the balance is to be paid to us.' But you are not to pay us at all the balance that will be left over. Only that you are to keep with yourself permanently the land that has been sold to you and you are to give us the remaining mortgaged lands that will be freed from the mortgage.

You are only to pay off the encumbrance in favour of the creditor and the land is to remain with you as sold absolutely for that and your labour."

According to this writing then the plaintiffs gave up their claim to any balance there might be after paying off the mortgagees, and defendant No. 1 on the other hand apparently became liable to redeem the mortgage whatever it cost. This document was not registered.

Defendant No. 1 duly filed a redemption suit No. 16 of 1917 and in September, 1920, he obtained a decree for redemption without any payment being required to be made to the mortgagees. The decree was confirmed in appeal in September, 1921. There were some review proceedings which ended in March, 1924, but they left the decree as it was.

In July, 1932, the plaintiffs sued defendant No. 1, his brothers and subsequent purchaser of part of the property to recover Rs. 4,999 by sale of survey No. 493. This amount was made up of Rs. 3,000, the purchase price under exhibit 26, plus Rs. 2,760 interest from the date of the appellate Court's decree in the redemption suit, less Rs. 240 allowed to defendant No. 1 for expenses of the litigation, less Rs. 521 which were remitted. This suit was obviously based on the vendors' charge for unpaid purchase money under s. 55(4)(b) of the Transfer of Property Act.

The trial Court held that exhibit A was inadmissible in evidence. Defendant No. 1 was allowed Rs. 500 for the expenses of the litigation and the plaintiffs were given a decree for Rs. 3,746. The decree was confirmed in appeal by the Assistant Judge. I may say that both the lower Courts relied very largely on s. 92 of the Indian Evidence Act, but that has nothing to do with the case, exhibit A not being an oral agreement.

There was a second appeal which was heard by Mr. Justice Kania. The principal points argued before him in support of the lower Courts' finding were that there was a statutory charge in favour of the vendors under s. 55(4)(b) and that the effect of the second document exhibit A was to extinguish that charge, so that the document required registration. In the alternative it was contended that the second document purported to alter the consideration for the first. This alternative is really the same point in a different form. The cases in which it has been held that an unregistered writing cannot alter the terms of a registered instrument all turned on the point that the unregistered writing in question affected immoveable property and therefore itself required registration. Substantially there is only one point in the appeal viz. whether exhibit A is compulsorily registrable under s. 17(1)(b) of the Indian Registration Act, and that depends on whether the sale deed gave the plaintiffs a charge under s. 55(4)(b) of the Transfer of Property Act, and whether, if so, exhibit A operated to extinguish that charge.

Mr. Justice Kania says in one place that no interest in immoveable property was created in respect of the balance, if any, payable to the plaintiffs. But I gather that what he really meant was that the value of the interest

was not Rs. 100 or over and therefore even if exhibit A extinguished that interest it did not require registration. He says :—

“It does not appear on the face of the document what amount if any would be payable to the vendors for the balance. Indeed the document contemplates the contingency of the sum of Rs. 3,000 not being sufficient to satisfy the claims of the mortgagees and the costs to be incurred in litigation. It was therefore provided that if any amount in excess was to be spent the vendors would pay the same. Under these circumstances, I am unable to consider that the property was under a statutory charge of over Rs. 100.”

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But, with deference, we think it is incorrect to make the money value of the statutory charge under s. 55(4) (b) depend on the probability or otherwise of the charge being required. There must always be more or less uncertainty as to the extent to which, if at all, it may be necessary to rely upon the charge. What the statute says is that where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, the buyer has a charge upon the property for the amount of the purchase money remaining unpaid. When the ownership passes at once, the money value of the charge at the date of the sale deed must, we think, be the amount of the purchase money remaining unpaid at that date, neither more nor less. It may be pointed out that the charge is not excluded by the fact that the buyer is to pay the money to a creditor of the seller : *Sivasubramania Ayyar v. Subramania Ayyar*<sup>1</sup> and *Naima Khatun v. Sardar Basant Singh*<sup>2</sup>.

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It has also been held by Mr. Justice Kania that even if a charge is created by the sale deed in favour of the plaintiffs it was not extinguished by their agreeing that the balance if any was not to be paid to them. This agreement he thought did not affect immovable property. He has also observed that a promisee has a right at any time to give up the performance of any part of the promise. This was in answer to the argument that exhibit A altered the consideration for the sale deed, but, as already pointed out, that seems to be merely a part of the same point. No doubt the promisee may give up part of the consideration if he wishes. He cannot be compelled to take the whole of his pound of flesh. But the question here is not whether he can give it up but whether he can be forced to give it up. That depends in the present case on whether plaintiffs are bound by the agreement exhibit A. To make them bound it is necessary to prove the agreement and it cannot be proved if it is compulsorily registrable. If the plaintiffs are really entitled to the charge which they are seeking to enforce and became entitled to it on the date of the sale deed, the agreement to relinquish their claim to a possible balance had the effect of depriving them of the right which they had to the land as security, and we think it could hardly be disputed in that case that exhibit A would operate to extinguish their right and would be compulsorily registrable under s. 17(1) (b) of the Indian Registration Act.

In our opinion, however, there is a simple answer to the plaintiffs' claim and it is this. The statutory charge under s. 55(4) (b) is on the property sold. In this case the property sold was the equity of redemption in the land. That is all the plaintiffs had to sell. The agreement was, however,

1 (1916) I. L. R. 39 Mad. 997, F.B.

2 (1933) I. L. R. 56 All. 766, F.B.

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that the price was to be paid on redemption and not before. So that there could be no question of any charge on the equity of redemption, there being an implied contract to the contrary. Anyhow plaintiffs are not seeking to enforce a charge on the equity of redemption; they are seeking to recover their money by sale of the land after redemption of the mortgage. It seems to us to be, to say the least of it, extremely doubtful whether the statutory provision could operate to give the plaintiffs a charge on the land after redemption. But, assuming for the sake of argument that it could, the charge would only arise when the ownership of the land passed to defendant No. 1 i.e. on redemption of the mortgage. But before that time there was a contract to the contrary embodied in exhibit A, by reason of which no charge for the balance of the price could arise, since the claim to that balance had been abandoned. On this view exhibit A did not require registration, because it did not operate to extinguish any right or interest to or in the land, plaintiffs at that time having no such right or interest. Mr. Justice Kania, therefore, was right in admitting exhibit A in evidence and as a necessary consequence dismissing the plaintiffs' suit.

The appeal is dismissed with costs.

*Appeal dismissed.*

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Sen.*

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v.

VITHALDAS BHAGWANDAS DARBAR.\*

*Civil Procedure Code (Act V of 1908), O. XXI, r. 2; O. XXXII, r. 7—"Or," interpretation of—Mortgage decree—Application by decree-holder to record adjustment—Minor judgment-debtors—Dismissal of application for want of prosecution—Execution of decree by decree-holder whether permissible.*

In O. XXI, r. 2, sub-r. (3), of the Civil Procedure Code, 1908, the disjunctive "or" must be read as the conjunctive "and".

*Mt. Champi Bai v. Pearey Lal*<sup>1</sup>, disapproved.

Where some of the judgment-debtors are minors, the Court, before recording an adjustment under O. XXI, r. 2(1), of the Civil Procedure Code, is bound, under O. XXXII, r. 7, of the Code, to satisfy itself that the compromise is for the benefit of the minors.

*Arunachellam Chetty v. Ramanadhan Chetty and Alamelu Achi*<sup>2</sup>, *Kastori Singh v. Pati Ram*<sup>3</sup> and *Veerappa v. Veluswami*<sup>4</sup>, followed.

Under O. XXI, r. 2, of the Civil Procedure Code, although the Court is not concerned to consider the merits of the adjustment, it is concerned to consider whether the arrangement to be recorded is an adjustment, that is to say, a legal adjustment. The Court is not a mere recording machine under the rule.

\* First Appeal No. 90 of 1941, from the decision of L. Y. Ankalgi, First Class Subordinate Judge at Bijapur, in Darkhast No. 101 of 1939.

1 [1938] A. I. R. All. 116.  
2 (1905) I. L. R. 29 Mad. 309.  
3 [1940] A. I. R. All. 16.  
4 [1933] A. I. R. Ran. 186.

There is nothing in O. XXI, r. 2(1), of the Civil Procedure Code, to prevent the decree-holder withdrawing his application before it is recorded. There is nothing in the sub-rule which says that the moment a certificate is presented it becomes binding for all time and that the parties cannot change their minds and withdraw from the compromise.

#### EXECUTION.

On November 30, 1936, one Vithaldas (plaintiff) obtained a decree against Dattatraya and others (defendants Nos. 1 to 5) for a sum of Rs. 81,000, which was made payable by instalments. Defendants Nos. 3 to 5 were the minor sons of Dattatraya, defendant No. 1.

On November 19, 1937, the plaintiff made an application under O. XXI, r. 2(1), of the Civil Procedure Code, 1908, to the Court to record an adjustment. The terms of the adjustment were that in satisfaction of his decree the plaintiff was to take certain immoveable properties of the defendants. At the same time an application was made to the Court for sanction of the compromise on behalf of the minor defendants Nos. 3 to 5. Notices were issued but on February 24, 1938, the application to record the compromise was dismissed for want of prosecution.

On February 7, 1939, the plaintiff issued the present darkhast against the defendants. The defendants contended that the mere institution of the application of November 19, 1937, amounted to a valid certification of adjustment of the decree which was thereby extinguished and could not therefore be executed. The trial Judge held that the decree had not been extinguished and that the darkhast was maintainable. He observed as follows :—

"It is undisputed that the decree-holder did not plead in his application for certification that he had received money out of Court and his decree was satisfied. But on the other hand he set out a particular adjustment whereunder valuable landed and house property of defendants was alleged to have been offered to him by them in satisfaction of his decree. It is not only that but the interests of three minor judgment-debtors were involved under this alleged adjustment and therefore the decree-holder had applied to Court to issue notice to the guardian of the minor judgment-debtors and had sought for the permission of Court to sanction such adjustment of the decree. Obviously then the decree-holder pressed for the compliance of these two specific conditions before the Court recorded the adjustment of the decree. The decree-holder made no secret of his intention and he treated the adjustment as provisional till the above two conditions were fulfilled. The adjustment of the decree must be to the satisfaction of the decree-holder as laid down in sub-cl. (1) of r. 2 of O. XXI. In order to attain that, the decree-holder cast a liability on the judgment-debtors as well as the Court. The judgment-debtors were required to give their consent to the alleged adjustment and abandon their rights over the property involved therein. The Court was also required to fulfil its part of the liability by sanctioning leave to the adjustment so far as the minors were concerned. Both of these conditions were neither imaginary nor self-imposed but they were quite essential for a valid certification. ... Further in case of minors where a decree is sought to be adjusted the leave of the Court is absolutely necessary under O. XXXII, r. 7, even in execution proceedings. (Vide 26 Bom. 109, *Virupaxappa v. Shiddappa and Basappa*, 56 Mad. 430, *Muthalakkammal v. Narappa Reddiar*). Adjustment of decree without the leave of Court cannot be certified under O. XXI, r. 2, sub-cl. (1) (vide 29 Mad. 309, *Arunachellam Chetty v. Ramanaadhan Chetty*, and 146 I. C. 707, *R. V. Veerappa Chettiar v. M. R. V. Veluswami Thevar*). In the present case, there was neither such a leave of the Court nor a final certification."

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A. C. J. The defendants appealed to the High Court.

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*H. C. Coyajee*, with *S. B. Jathar* and *K. R. Bengeri*, for the appellants.

DATTA-

*M. C. Setalvad*, Advocate General, with *R. A. Jahagirdar*, Government

TRAYA

Pleader, for the respondent.

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DAS

BEAUMONT C. J. This is an appeal raising a question in execution. In the year 1936 the respondent obtained a decree against the appellants for a sum of Rs. 81,000 odd, which was made payable by instalments. On November 19, 1937, the decree-holder made an application to the Court, which is exhibit 1, asking the Court to record an adjustment, the terms of the adjustment being that in satisfaction of the decree, the decree-holder was to take certain immoveable properties. At the same time an application was made to the Court for sanction of the compromise on behalf of defendants Nos. 3, 4 and 5, who were minors. Notices were issued, but eventually on February 24, 1938, the application to record the compromise was dismissed for want of prosecution. The present darkhast was issued on February 7, 1939, and the learned First Class Subordinate Judge of Bijapur has held that it is entitled to proceed. Hence this appeal.

The contention of the appellants is that the application of November 19, 1937, was a certification of an adjustment under O. XXI, r. 2(1), Civil Procedure Code, 1908, which became binding immediately on presentation, that the fact that it was not recorded by the Court is irrelevant, and that it was not competent for the decree-holder to withdraw the application. The argument would, I think, have been the same even if the judgment-debtor had agreed that the application should be withdrawn; the appellants' contention being that as soon as such an application is presented to the Court, that disposes of the decree, which cannot afterwards be executed.

The question turns primarily on the construction of O. XXI, r. 2. Sub-rule (1) provides :

"Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly."

An application under that rule being made by the decree-holder is *prima facie* an application against his own interest; he is admitting that he has received part payment or something less than the whole claim in satisfaction of the decree, and, therefore, it is not surprising to find that no duty is cast upon the Court to consider whether the arrangement is a proper one or not. But at the same time the duty is imposed upon the Court of recording the certificate. In my opinion, although the Court is not concerned to consider the merits of the adjustment, it is concerned to consider whether the arrangement to be recorded is an adjustment, that is to say, a legal adjustment. To put an illustration, which I put in the course of the argument, supposing a decree-holder were to come forward and say "the judgment-debtor has agreed in satisfaction of my foregoing the decree to give me his daughter in marriage." That is not an extravagant illustration, having regard to the habits of some of the backward classes in this country, but it is obvious that in such

a case no Court would record such an arrangement; the Court would be bound to hold that it was not a legal adjustment. In my opinion, further, where, as here, some of the judgment-debtors are minors, the Court is bound under O. XXXII, r. 7, to satisfy itself that the compromise is for the benefit of the minors before recording it. I feel no doubt that that duty is cast upon the Court before it records an adjustment under sub-r. (1) of O. XXI, r. 2(2), and that view has been taken by the High Court of Madras in *Arunachellam Chetty v. Ramnadhan Chetty and Alamelu Achi*,<sup>1</sup> by the Allahabad High Court in *Kastori Singh v. Pati Ram*,<sup>2</sup> and by the Rangoon High Court in *Veerappa v. Veluswami*.<sup>3</sup>

But Mr. Coyajee for the appellants relies strongly on a decision of a single Judge of the Allahabad High Court in second appeal in *Mt. Champi Bai v. Pearey Lal*.<sup>4</sup> In that case it was, no doubt, held that the fact that a Judge had wrongly declined to record an adjustment under sub-r. (1) would not prejudice the judgment-debtor, and that the Court in execution was entitled to act upon the certificate, although not recorded. The view of the Court depended on sub-rs. (2) and (3) of O. XXI, r. 2. Sub-rule (2) enables the judgment-debtor to apply to the Court to certify the adjustment, where the decree-holder has omitted to do so; and, as such an application is *prima facie* in the interest of the applicant, and not, like an application, under sub-r. (1), against his interest, the rule naturally provides that the Court shall serve notice upon the decree-holder to show cause why the adjustment should not be certified, and if the decree-holder fails to show cause, then only is the Court required to record the adjustment as certified. Then sub-r. (3) provides :—

“A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.”

The view of the Allahabad High Court, relying on the use of the disjunctive “or” between “certified” and “recorded”, was that “certified” means certified under sub-r. (1), and “recorded” means recorded under sub-r. (2); but that ignores altogether the obligation imposed on the Court under sub-r. (1) to record the adjustment, and it seems to me that that construction of O. XXI, r. 2, would defeat to a large extent the purpose of the rule. The purpose of the rule appears to be to ensure that an executing Court can either act upon the decree in the form which it originally took, or, if there has been an adjustment, it can act upon an adjustment recorded by the Court. So that the execution Court is not concerned to go into disputes as to whether the decree has been adjusted, and if so, on what terms. It has the record of the Court. But if all that is required is a certificate of the adjustment under sub-r. (1), and, be it noted, there is nothing to show that the adjustment must be certified in writing under that sub-rule, it is obvious that the execution Court may be called upon to decide disputed questions as to whether there has been a certification of adjustment, and, if so, what were the terms of the adjustment. In my opinion, such a construction is against the meaning of the rule, and I think that, to give effect to the words of the whole

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1 (1905) I. L. R. 29 Mad. 309.

2 [1940] A. I. R. All. 16.

R. 129.

3 [1933] A. I. R. Ran. 186.

4 [1938] A. I. R. All. 116.

A. C. J. rule, the disjunctive "or" in sub-r. (3) must be read as the conjunctive  
 1941 "and". I think further that the view taken in *Mt. Champi Bai v. Pearey Lal* (supra) is not consistent with the cases, to which I have referred, as to  
 — the duty of the Court, where a minor is concerned, to satisfy itself that the  
 DATTA- adjustment is for the benefit of the minor before it allows such an adjust-  
 TRAYA ment to be recorded.  
 KASHINATH  
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VITHALDAS In my opinion, therefore, the adjustment not having been recorded, the  
 BHAGWAN- decree stands.  
 DAS

— It would be possible, I think, to dispose of this appeal without going as  
 far as that, because even if a certificate alone, without any record by the  
*Beaumont C.J.* Court, is a sufficient compliance with sub-r. (1), I can see nothing in that  
 — sub-rule to prevent the decree-holder withdrawing his application before it is  
 recorded. There is nothing in the sub-rule which says that the moment a  
 certificate is presented, it becomes binding for all time, and that the parties  
 cannot change their minds and withdraw from the compromise. However,  
 I feel no doubt myself that the Court is not, under sub-r. (1), a mere  
 recording machine; it has to satisfy itself that the adjustment, which it is asked  
 to record, is a legal adjustment.

We were referred to a recent decision of the Privy Council in *Prakash Singh v. Allahabad Bank, Ltd.*<sup>1</sup>, in which this rule was discussed; but all that their Lordships held there was that an application under sub-r. (1) to record an adjustment was not an application within the meaning of art. 181 of the Indian Limitation Act. That has nothing to do with the case with which we have to deal.

I may mention, merely as illustrating the danger of recording an adjustment in a case in which minors are interested without seeing that it is to their benefit, that when this appeal first came before this Court the respondent offered to adhere to the compromise, and we thereupon directed that the matter should be considered by the guardian *ad litem* of the minors, and that, if he approved of the compromise, he should make an affidavit to that effect. He was not prepared to say that he thought the compromise beneficial to the minors.

In my opinion, there is no substance in the appeal, and it must be dismissed with costs.

Rule in Civil Application No. 239 discharged with costs.

*Appeal dismissed.*



## ORIGINAL CIVIL.

*Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Kania.*

*In re* THE LOKAMANYA TILAK JUBILEE NATIONAL  
TRUST FUND, BOMBAY.

*In re* G. V. SALVEKAR.\*

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October 1.

*Indian Income-tax Act (XI of 1922), Secs. 4(3) (i), 41—"Charitable purposes"—Trust wholly for religious and charitable purposes—Exemption from income-tax—Rate of assessment.*

A trust fund was created having for its objects (a) the advancement of any purpose which might in the uncontrolled opinion of the managing committee be national or of national importance for the inhabitants of British India, (b) the political advancement of India having for its goal the acquisition of complete national autonomy or "swarajya", (c) the diffusion of political education and knowledge as to the political affairs of India and propagandist work both in India as well as in any part of the world, (d) any object which might conduce to any of the aforesaid objects. A question having arisen whether the income of the fund was exempt from payment of income-tax under s. 4(3) (i) of the Indian Income-tax Act, 1922, as being a trust wholly for charitable purposes, and if not so exempt, what was the rate of assessment:—

*Held*, (1) that the four sub-clauses setting out the objects of the fund were distributive;

(2) that sub-cl. (a) went beyond the definition of "charitable purposes" contained in s. 4 of the Act, inasmuch as the selection of the purpose rested in the uncontrolled opinion of the managing committee;

(3) that sub-cl. (b) also went too far, because it was really a gift for political purposes;

(4) that therefore the income of the trust fund did not fall within the purview of s. 4(3) (i) of the Act and was assessable to income-tax;

(5) that the case fell within the first proviso to s. 41(1) of the Act, and the tax should be assessed at the maximum rate.

*Held*, further, by Kania J., that sub-cl. (c) which contained the words "political education and knowledge" coupled with "propagandist work both in India as well as in any part of the world" fell within the rule stated in *Tribune Press Trustees, Lahore v. Income-tax Commissioner*<sup>1</sup>; and

that sub-cl. (d), being the general clause dealing with objects subsidiary to the three objects mentioned in the preceding sub-clauses shared the same infirmity.

*Per Beaumont C. J.* Trusts for the benefit of the inhabitants of a particular locality are regarded as charitable; but trusts for the benefit of a particular political party, or for the advancement of particular political opinions, are not regarded as charitable.

The definition of "charitable purposes" as contained in s. 4(3) of the Indian Income-tax Act goes further than the definition of charity to be derived

\* Income-tax Reference No. 3 of 1941, made by J. B. Shearer, Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan,

under s. 66(2) of the Indian Income-tax Act, 1922.

1 (1939) L. R. 66 I. A. 241,  
s. c. 41 Bom. L. R. 1150.

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from the English cases, because it embraces purposes of general public utility.

There is no authority for the proposition that a gift for such purposes as a particular individual or individuals may consider to be charitable is good.

*Per Karia J.* When there is a general charitable intention, the Court will uphold it, and if within that limit discretion is given to the trustees to select an object, the trust will not fail because of the discretion so given.

If the dominant purpose of a trust is political, it is not a charitable object within the meaning of the Indian Income-tax Act.

REFERENCE under s. 66(2) of the Indian Income-tax Act, 1922.

The trusts in respect of the Lokamanya Tilak Jubilee National Trust Fund were declared by a trust deed dated December 31, 1920.

The objects of the trust were as under :—

(a) The advancement of any purpose which might in the uncontrolled opinion of the Managing Committee be national or of national importance, for the inhabitants of British India by any means which in the like opinion of the Managing Committee be constitutional.

(b) The political advancement of India having for its goal the acquisition of complete national autonomy or "Swarajya" to be attained by all constitutional means.

(c) The diffusion of political education and knowledge as to the political affairs of India and propagandist work, both in India as well as in any part of the world outside India, having for its aim the acquisition of complete national autonomy or "swarajya" as aforesaid.

(d) Any object which may conduce to any of the aforesaid objects.

The assessee, who was the managing trustee of the fund, was assessed on a total sum of Rs. 12,443 as the trust income for the assessment year 1939-40, under s. 23(3) of the Indian Income-tax Act, 1922, at the maximum rate, under the first proviso to s. 41 of the Act by the Income-tax Officer, Market Ward, Bombay.

The assessee preferred an appeal, under s. 30 of the Act, to the Appellate Assistant Commissioner of Income-tax, A Range, Bombay, who upheld the assessment.

The assessee petitioned to the Commissioner of Income-tax praying that the assessment be revised under s. 33 of the Act, or that, in the alternative, a reference be made to the High Court on the questions of law arising in the case.

The Commissioner referred the following questions for the opinion of the High Court :—

(1) Whether the Income-tax Officer was correct in holding that the income of the trust does not fall within the purview of s. 4(3) (i) of the Act?

(2) Whether the Income-tax Officer was correct in levying income-tax at the maximum rate under the first proviso of s. 41(1) of the Act?

The opinion of the Commissioner on the questions referred was thus expressed :—

"It will appear from the objects of the trust, mentioned in paragraph 3 above, that the main and dominant purpose of the Trust is the political advancement of India, having for its goal the acquisition of complete national autonomy or 'swarajya' to be attained by all constitutional agitation and means. Thus the object of the Trust is political and as observed by their Lordships of the Privy Council in the *Tribune* case (I. T. R. 1939, 415) a political object is not a charitable object.

The objects of the Trust are, it is submitted, not charitable purposes within the meaning of s. 4(3) of the Act. It is submitted that the present case is different from the *Tribune* case, decided in favour of the assessee as in that case the object of the settlor was to supply the province with an organ of educated public opinion and not, as in the present case, the political advancement of India with a view to acquire complete national autonomy or swarajya. Attention is invited to the cases of *Bowman v. Secular Society Ltd.* (1917, A. C. 406), *In re Tetley* (1923, 1 Ch. 258), *The Bomar Law Memorial Trust v. Commissioners of Inland Revenue* (1923, 17 T. C. 508) and the recent decision of this Honourable Court in *Subhas Bose v. Gordhandas Patel* (42 Bom. L. R. 89).

In regard to the second question, it is submitted that in the present case the beneficiaries being indeterminate and unknown, the first proviso to s. 41(1) is clearly applicable and the tax is leviable at the maximum rate.

I therefore respectfully submit that both the questions set out in paragraph 7 above be answered in the affirmative.\*

The reference was heard.

*Sir Jamshedji Kanga*, instructed by *Y. V. Dixit*, for the assessee. The question here is, whether the trust income should be exempted under s. 4(3) (i) of the Indian Income-tax Act, 1922. The funds of this trust are held for charitable purposes and therefore the income derived therefrom must be exempted. We rely on the definition of "charitable purposes" contained in the Act. "Charitable purposes" includes "education" and "the advancement of any other object of general public utility." The four sub-clauses in the trust deed which define the object of the trust fund should be read conjunctively and not disjunctively. The dominant motive is to create a charitable trust. All the objects specified in the sub-clauses are to be carried out. Sub-clauses (a) and (c) specifically create a charitable trust. The words in sub-clause (a) are "The advancement of any purpose...of national importance for the inhabitants of British India" and in sub-clause (b) "The diffusion of political education and knowledge as to the political affairs of India." Under these sub-clauses there is a direct gift to inhabitants of India. The trust is for the benefit of India and therefore falls under the following English cases: *Mitford v. Reynolds*<sup>1</sup>; *Nightingale v. Goulbourn*<sup>2</sup>; *Nightingale v. Goulbourn*<sup>3</sup> and *Smith*, *In re: Public Trustee v. Smith*<sup>4</sup> (arguments on p. 154).

In *Subhas Chandra Bose v. Gordhandas Patel*<sup>5</sup> the words used were "political uplift of India." The words used in these clauses are different.

Counsel referred to the arguments of A. M. Latter K. C. for the appellants in *Tribune Press Trustees, Lahore v. Income-tax Commissioner*<sup>6</sup>.

*M. C. Setalvad*, Advocate General, for the Commissioner. On the true construction of the trust deed the sub-clauses are disjunctive. The trustees can apply the fund to any one use, e.g. they can utilise it for "the political advancement of India having for its goal the acquisition of complete national autonomy or 'Swarajya' to be attained by all constitutional agitation and means" [sub-cl., (b)]. A political object will not be a charitable purpose

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1 (1841) 1 Phillips Reports 185, 190.

2 (1847) 5 Hare 484, 486.

3 (1848) 2 Phillips Reports 594.

4 [1932] 1 Ch. 153, 158.

5 [1940] Bom. 254, 273, 276, s. c. (1939) 42 Bom. L. R. 89.

6 (1939) L.R. 66 I.A. 241, 243, 246, s. c. 41 Bom. L. R. 1150.

O. C. J. as laid down in *Subhas Chandra Bose v. Gordhandas Patel*<sup>1</sup> and *Tribune Press Trustees, Lahore v. Income-tax Commissioner*.<sup>2</sup> This trust has various objects and purposes and not one indivisible object. In sub-clauses (a), (b) and (c) there are areas of distribution suggested which are not charitable. This makes the trust a bad charitable trust. The managing committee can in their discretion apply the funds for non-charitable purposes [sub-cl. (a)]. This vitiates the trust as a charitable trust. Counsel referred to Tudor on Charities, 5th ed., p. 64 : "The charitable application of the gift must be compulsory, otherwise it will fail, for if the gift is such that the trustee is not bound to apply it to purposes strictly charitable it is not, in the eyes of the law a charitable gift at all... the question which should be asked in all cases where there is an apparent vagueness as to the objects of a gift, and it is sought to uphold it as a gift to charity, is this : Is it clear that the only possible objects of the gift are charitable objects in the technical sense of the word ? If the answer is in the affirmative, the Court will uphold the gift, if in the negative, the gift is void for uncertainty."

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BEAUMONT C. J. This is a reference made by the Commissioner of Income-tax under s. 66(2) of the Indian Income-tax Act, 1922, and it raises two questions :

(1) Whether the Income-tax Officer was correct in holding that the income of the trust does not fall within the purview of s. 4(3) (i) of the Act ?

(2) Whether the Income-tax Officer was correct in levying income-tax at the maximum rate under the first proviso to s. 41(1) of the Act ?

The trust, with which we have to deal, is a trust known as the "Lokamanya Tilak Jubilee National Trust Fund," and the principal question which arises is, whether the funds of the trust are held for charitable purposes within s. 4(3) (i). Its objects are set out in the trust deed dated December 31, 1920, clause 11 of which is in these terms :

"The objects of the said Trust Fund shall be—

"(a) The advancement of any purpose which might in the uncontrolled opinion of the Managing Committee be national or of national importance for the inhabitants of British India by any means which in the like opinion of the Managing Committee be constitutional.

"(b) The political advancement of India having for its goal the acquisition of complete national autonomy or 'Swarajya' to be attained by all constitutional agitation and means.

"(c) The diffusion of political education and knowledge as to the political affairs of India and propagandist work both in India as well as in any part of the world outside India having for its aim the acquisition of complete national autonomy or 'Swarajya' as aforesaid.

"(d) Any object which may conduce to any of the aforesaid objects."

This Court in *Subhas Chandra Bose v. Gordhandas Patel*<sup>3</sup> had occasion to consider the general questions which arise in cases of this kind as to whether trusts for a national or political purpose can be regarded as charitable. The actual case, with which we had to deal there, was a trust for the political

1 [1940] Bom. 254,  
s.c. (1939) 42 Bom. L.R. 89.  
2 (1939) L. R. 66 I. A. 241,

s. c. 41 Bom. L. R. 1150.  
3 [1940] Bom. 254,  
s.c. (1939) 42 Bom. L.R. 89.

uplift of India, and we held that the trust was not charitable. As I expressed my opinion in that case on the general principles which apply to cases of this character, it is not necessary that I should repeat them.

There is, I think, no doubt on the authorities that trusts for the benefit of the inhabitants of a particular locality are regarded as charitable, and I will assume that that principle would apply to the inhabitants of British India. On the other hand, it is clear that trusts for the benefit of a particular political party, or for the advancement of particular political opinions, are not regarded as charitable. The objects specified in the four paragraphs of cl. 11 of the trust deed, with which we have to deal, are, in my opinion, clearly distributive. The whole of the trust fund can be applied for any one or more of the objects specified, and if any of those objects do not fall within the purview of the legal definition of "charity", the trust cannot be regarded as a good charitable trust. One has, of course, to bear in mind the definition of "charitable purposes" in s. 4(3) of the Indian Income-tax Act, which provides that "charitable purposes" include relief of the poor, education, medical relief and the advancement of any other object of general public utility. That goes further than the definition of charity to be derived from the English cases, because it embraces purposes of general public utility; and if all the purposes in cl. 11 could be regarded as of general public utility for the benefit of the inhabitants of British India, then the trust would be, in my opinion, a good charitable trust. But, to my mind, sub-cl. (a) and (b), at any rate, cannot be brought within those limits. Sub-clause (a) includes the advancement of any purpose which may in the uncontrolled opinion of the Managing Committee be national or of national importance for the inhabitants of British India by any means which in the like opinion of the Managing Committee be constitutional. It is impossible to say that the Managing Committee may not regard purposes, which are not according to law charitable, as being nevertheless of national importance for the inhabitants of British India, and the Committee may regard methods as constitutional which the law would not regard as constitutional. Assuming the objects specified in sub-cl. (a) to be charitable, this is not the case of a gift for such charitable purposes as the Managing Committee may think fit. A gift of that sort would, no doubt, be good, because the Managing Committee would be bound to keep within the ambit of charity, and if they go beyond the legal boundary, they can be controlled by the Court. But I know of no authority for the proposition that a gift for such purposes as a particular individual or individuals may consider to be charitable is good. There are many purposes which an individual, acting quite bona fide, may regard as charitable, but which the law does not so regard. Therefore, I think sub-cl. (a) goes too far; and I think, sub-cl. (b) goes too far also, because it is really a gift for political purposes. Assuming that the attainment of national autonomy may be regarded as a national purpose accepted generally by, and for the good of, the inhabitants of British India, there is a very keen divergence of opinion as to the methods by which that national autonomy should be attained; and it is impossible, I think, to avoid the conclusion that a gift for the attainment of that object by such methods as the Managing Committee may approve is really a gift for political purposes,

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and as such falling within the ruling in *Bowman v. Secular Society, Limited*<sup>1</sup>. In my opinion, therefore, it is impossible to say that the Income-tax Officer was wrong in holding that the income of the trust does not fall within the purview of s. 4(3) (i), and we must answer the first question in the affirmative.

With regard to the second question, it seems to me that the first proviso to s. 41(1) of the Indian Income-tax Act is perfectly plain. It provides in connection with funds held by a trust that where income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate. It may be rather hard on this trust fund that it should be charged at a higher rate than the amount of its income would attract if it belonged to an individual. But that is not a matter with which the Court can deal. In my opinion, it is perfectly plain that the case falls within the first proviso to s. 41(1), and, therefore, we must also answer the second question in the affirmative.

The assessee to pay costs.

KANIA J. I agree. In order to get an exemption the assessee must bring his case within s. 4(3) (i). The words there used are that the income should be derived from property held under trust wholly for religious or charitable purposes. By the explanation added at the end, the term "charitable purposes" is stated to include an object of general public utility. Even so, it is for the assessee to show that his case falls within that extended meaning.

Certain propositions of law now appear to be well settled as a result of authorities. First, that when there is a general charitable intention, the Court will uphold it, and if within that limit discretion is given to the trustees to select an object, the trust will not fail because of the discretion so given. If a trustee selects an object which is not charitable according to law, the Court can intervene and rectify the error. Secondly, there are cases, which are compendiously described as "locality cases," of which *Smith, In re : Public Trustee v. Smith*<sup>2</sup> is a good illustration. In that case the gift was "unto my country England." It was held that every area and purpose which would fall within that gift was charitable, and the gift was upheld. Thirdly, it is held that if the dominant purpose of the trust is political, it is not a charitable object within the meaning of the Income-tax Act. That was held in *Tribune Press Trustees, Lahore v. Income-tax Commissioner*<sup>3</sup>. It was laid down in the same case that propagandist work does not form part of educational work and is not within the ambit of charity.

Having regard to these principles, the four sub-clauses in the trust deed in question have to be considered. It may be noticed that under cls. 14 and 19 of the trust deed the Managing Committee is made the sole judge as to whether any particular object falls within the category of any of the objects and purposes of the trust fund. Bearing that in mind, when cl. 11, sub-cl.

1 [1917] A. C. 406.

2 [1932] 1 Ch. 153.

3 (1939) L. R. 66 I. A. 241,  
s. c. 41 Bom. L. R. 1150.

(a), is looked at, it is clear that the words "national or of national importance for the inhabitants of . . . India" are controlled by the preceding words which state the object of the trust. They are "The advancement of any purpose which might in the uncontrolled opinion of the Managing Committee be." The object of the trust, therefore, is the advancement of a purpose, the selection of which is left to the uncontrolled opinion of the Managing Committee, and the purpose according to that uncontrolled opinion has to be national or of national importance for the inhabitants of British India. It is not possible to hold that the words as used in sub-cl. (a) amount to a gift for an object national or of national importance for the inhabitants of British India *simpliciter*. It is a gift for the advancement of any purpose, and the selection thereof is left to the uncontrolled opinion of the Managing Committee. I do not think under the circumstances it can be properly argued that that clause amounts to a general charitable bequest, and only the manner of application has to be selected by the trustees. Sub-clause (b) clearly is for the political advancement of India, and the goal thereof is only defined. But the object is clearly the political advancement of India. That is pre-eminently a political purpose and falls within the rule stated in the *Tribune* case. Sub-clause (c) whilst containing the words "political education and knowledge" couples the same with "propagandist work both in India as well as in any part of the world outside India" and also falls within the rule stated in the *Tribune* case. The fourth sub-clause, cl. (d), is the general clause dealing with objects subsidiary to the three objects mentioned in the preceding sub-clauses. The construction of the clause shows that the three objects in sub-cl. (a), (b) and (c), have to be separately read, and if any of those objects is not charity, the whole gift must fail, because if the trustees choose to apply the whole of the fund to the particular object, which according to the law of the land is not charitable, then they will not be committing a breach of trust, and the trust could be said to be properly administered. The law does not permit the administration of a trust which can be so used entirely for a non-charitable object and hold it as charitable on construction. Therefore, cl. 11 of this trust deed, which defines the objects of the trust, is not within s. 4(3) (i) of the Indian Income-tax Act charitable, and the answer to the first question must be against the assessee.

As regards the second question, the Court has to administer the law as found in the Act of the Legislature, and hard cases cannot make a different law. The answer to that question must also go against the assessee.

*Answers accordingly.*

Attorney for Commissioner : *D. H. Nanavaty*, Solicitor to Central Government, at Bombay.

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*In re P. E. POLSON.\**

October 1. *Indian Income-tax Act (XI of 1922), Secs. 25(3), 26(2)—“Discontinued”, meaning of—Assessment in case of discontinued business.*

Section 25(3) of the Indian Income-tax Act of 1922, before it was amended in 1939, treated business, profession or vocation as if it was a sort of legal entity. After its amendment, read with s. 26(2) of the Act, it ceased to treat the business as a single unit and split up the tax between the owners for the time being of the business.

Section 25(3), as amended, provides that no tax shall be payable for the period between the end of the previous year and the date of discontinuance of the business. Hence, the income of the previous year, that is the whole of it, shall be deemed to be the income of that period.

The word “discontinued” in s. 25(3) covers a discontinuance either by cessation or by disposal.

The exception in s. 25(3) may cover a case, very unlikely to occur but at the same time possible, in which there has been a succession to which sub-s. (4) applies, and subsequently there has been cessation of business within the year of assessment.

The assessee, who carried on business in coffee, butter etc. was at first assessed to income-tax under the provisions of the Indian Income-tax Act of 1918, on the basis of income made during the year of assessment. In 1922, the new Indian Income-tax Act was passed, under which the tax was assessed on the basis of income made during the previous year. On January 1, 1939, the assessee assigned his business to a limited company. The Act of 1922 was amended on April 1, 1939, by amending, among other sections, s. 25 which dealt with assessment in case of discontinuance of business. During the assessment for the year 1939-40, the assessee contended that in view of the amended s. 25 he should be relieved from the payment of double income-tax in respect of the income made during the year 1938, because his business was discontinued at the end of the year :—

*Held*, (1) that the assessee was entitled to the benefit of s. 25(3) of the Indian Income-tax Act, 1922, as amended in 1939;

(2) that if the income of the year 1938 was to be deemed to be the income of the period between the end of the previous year and the date of discontinuance of the business (which period did not exist in the present case), the assessee was not liable for any tax;

(3) that therefore no tax was payable by him in respect of his income from his business for the year 1938 liable to assessment in respect of the year 1939.

REFERENCE under s. 66(2) of the Indian Income-tax Act, 1922.

One P. E. Polson was the sole proprietor of Polson Manufacturing Co., carrying on business for many years in coffee, butter, flour and casein.

A notice under s. 22 (2) of the Indian Income-tax Act, 1922, was issued by the Income-tax Officer, Companies Circle, Bombay, on the assessee for the financial year 1939-40.

\* Income-tax Reference No. 4 of 1941, made by J. B. Shearer, Commissioner of Income-tax, Bombay

Presidency, Sind and Baluchistan, under s. 66(2) of the Indian Income-tax Act, 1922.



A return of income was submitted by the assessee on August 4, 1939, showing a total income of Rs. 1,00,399, consisting of income of Rs. 3,279 from property, Rs. 1,64,726 from business, loss of Rs. 71,072 in the share business and income of Rs. 3,466 from other sources.

Before the assessment was made on November 29, 1939, a revised return of income showing 'nil' under all items was put in. In the covering letter, sent with the revised return, it was stated that while the actual income was as declared in the original return, the revised return was put in as the assessee was desirous of claiming the benefit of the provisions of s. 25(3) of the amended Income-tax Act, 1939.

The Income-tax Officer came to the conclusion that the claim under s. 25 (3) was inadmissible.

The assessee preferred an appeal to the Appellate Assistant Commissioner, B Division, on January 5, 1940, who confirmed the order of the Income-tax Officer by his order dated March 30, 1940.

The assessee preferred a petition to the Commissioner of Income-tax requesting that certain questions of law arising out of the order of the Appellate Assistant Commissioner be referred to the High Court.

It appeared that P. E. Polson was the sole proprietor of the concern till January 1, 1939, when the business was taken over by a limited company under the name of Polson, Limited. The business in question was assessed to income-tax under the Act of 1918 and was entitled to the benefit of s. 25(3) if there was a discontinuance within the meaning of s. 25(3). The question was whether the business could be said to be discontinued so as to make the provisions of s. 25 (3) applicable. There was no dispute that the business was continued by the successors, viz. Polson, Limited.

The assessee contended that though the discontinuance contemplated by the section might have been of that nature before its amendment, by the addition of the words "Then unless there has been a succession by virtue of which the provisions of sub-s. (4) have been rendered applicable", in the amended s. 25(3), the legislature intended that s. 25 (3) should apply not only to the case of absolute discontinuance and cessation of business but also to cases in which business was discontinued by one party and taken over by another as successor in business.

The Commissioner referred the following questions for the opinion of the High Court :—

(1) Whether on the facts of the case the assessee is entitled to the benefit of s. 25(3) of the Income-tax Act?

(2) Whether in view of the provisions of the said s. 25(3) no tax is payable by the assessee in respect of his income from business of Polson Manufacturing Co. for the calendar year 1938 liable to assessment in respect of the financial year 1939-40?

The opinion of the Commissioner on the questions referred was thus expressed :—

"It is submitted that s. 25(3) as amended, on its true construction, does not apply to the assessee's case. The words introduced by the amendment in that section have only the effect of creating an exception to which the rule laid down in the section is not to apply. That exception is dealt with in s. 25 (4) of the Act. The addition of the words relied on by the assessee cannot and does not affect

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in any manner the meaning to be attached to the words 'is discontinued' in the section. The assessee, it is submitted, is therefore not entitled to any relief under s. 25 (3)".

The reference was heard.

*Sir Jamshedji Kanga*, with *J. R. Vimadala*, for the assessee.

*M. C. Setalvad*, Advocate General, with *G. N. Joshi*, for the Commissioner.

BEAUMONT C. J. This is a reference made by the Commissioner of Income-tax under s. 66(2) of the Indian Income-tax Act, 1922, raising questions arising under s. 25 of the Act as amended in 1939.

The material facts are that the assessee, Mr. Polson, was carrying on a business under the name of Polson Mfg. Co., which dealt in coffee, butter, flour and casein, which business had been in existence whilst the Income-tax Act of 1918 was in force. On January 1, 1939, Mr. Polson assigned his business to a limited company, and the Amended Income-tax Act came into operation on April 1, 1939. Mr. Polson had paid income-tax in respect of his business under the Act of 1918, and under that Act income-tax was assessed in respect of the year of assessment, and not in respect of the previous year. Under the Act of 1922 income-tax was assessed in respect of the previous year's income, and, therefore, it followed that for the income of the year 1921 income-tax was paid twice,—once under the Act of 1918 in respect of the year 1921, and once under the Act of 1922 in respect of the year 1922. So that, eventually it would happen, unless some relief was given, that tax would be payable for one year more than the life of the business. In order to remove that hardship s. 25(3) of the Act of 1922 provided that where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, was discontinued, relief was given. It will be noticed that that sub-section seems to treat business, profession or vocation as if it was a sort of legal entity. It speaks of a business, profession or vocation on which tax was charged. Tax, of course, is not charged on a business; tax is charged on the owner in respect of the business. It is not disputed in this case that Mr. Polson was charged in respect of his business under the Act of 1918, and that such business was the same business as the business assigned on January 1, 1939, though I apprehend that in point of fact the business, as it existed in 1939, was not identical with the business as it existed in 1918.

Then under the Act of 1922, s. 26(2) dealt with the case of assignment of a business, and provided that where, at the time of making an assessment under s. 23, it was found that the person carrying on any business, profession or vocation had been succeeded in such capacity by another person, the assessment should be made on such person succeeding as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year. So that there again the business is taxed as if it was an entity, and the tax is charged against the owner of the business at the time of the assessment, although he may not have been the owner of the business during the accounting year.

Under the old Act, reading those two sections together, it was held that

the word "discontinued" in s. 25(3) referred to discontinuance by cessation, and not to discontinuance by disposal of the business to somebody else. That was so held in *Commissioner of Income-tax, Bombay v. Sanjana & Co. Ltd.*<sup>1</sup> The Advocate General has referred us also to an English case of *Sir H. H. Bartlett v. The Commissioner of Inland Revenue*<sup>2</sup> where Mr. Justice Scrutton, as he then was, said that a business, which was disposed of, and carried on by the successors, is not discontinued. I am not sure that the matter is quite so simple as Mr. Justice Scrutton seemed to think, because there may be cases in which a business is disposed of in such a way that it would be difficult to suggest that the same business was carried on by the successor. For instance, a business on a small scale may be sold to the owner of a big concern, and amalgamated with the big concern. In such a case the business assigned may not altogether cease to exist, but is difficult to identify under its new guise, and, in my view, can fairly be said to have been discontinued. In point of fact, a business carried on by one man is never quite the same as a business carried on by another man; for one thing, the credit of the owner is different, and that may affect methods of business.

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Under the amended Act the scheme as to succession was altered, and s. 26(2) provides that where there has been a succession to business, then the predecessor and the successor are each to be assessed in respect of his actual share of the income, profits and gains of the previous year. So that there you cease to treat the business as a single unit, and split up the tax between the owners for the time being of the business. That alteration in the law required a change to be made in s. 25, because relief had to be given to the predecessor of the business in respect of the double tax with which s. 25 deals. That was dealt with by the addition of a new sub-section, sub-s. (4), to s. 25, which provides that where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, then he is given relief.

Now, sub-s. (4) of s. 25 does not apply here, because at the time when the amended Act came into operation, namely April 1, 1939, Mr. Polson was not carrying on his business, the assignment having been made on January 1. So he cannot get relief under s. 25(4), and the question is whether he can get relief under sub-s. (3) of the amended s. 25. That sub-section provides :

"Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period..."

The sub-section seems to me to be very clumsily worded, and there is diffi-

1 (1925) I. L. R. 50 Bom. 87,  
s. c. 27 Bom. L. R. 1471.

2 (1914) 7 T. C. 229.

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culty in this case, because in point of fact there is no period between the discontinuance of the old business and the end of the previous year. The previous year ended on December 31, 1938, and that is the date when the old business was sold to the company. So that taking the sub-section literally, and assuming its application to this case, it provides that no tax shall be payable for this non-existing period between the end of the previous year and the date of discontinuance, and the assessee may further claim that the income of the previous year, that is the whole year 1938, shall be deemed to be the income of the said period. I suppose that if the income of 1938 is to be deemed to be the income of a period which does not exist, and in respect of which no tax is to be charged, it is correct to say that the assessee is not liable for any tax, and that point has not been disputed by the Commissioner of Income-tax. His contention is that under the new Act, as under the old, "discontinued" refers only to discontinuance by cessation, that the business of the assessee was not discontinued by the assignment, and that consequently the assessee is not entitled to relief under s. 25(3). As I have already indicated, I think the word "discontinued" by itself, and if not controlled by the context, as it was under the Act of 1922, would cover a discontinuance by disposal. Having regard particularly to the fact that s. 26(2) as amended imposes tax, not in respect of a continuing business, but upon the owners of the business for the time being, I think that the word "discontinued" in the new Act covers discontinuance either by cessation or by disposal. I was at first disposed to think that the words which followed "discontinued" in the amended Act, namely, "unless there has been a succession by virtue of which the provisions of sub-s. (4) have been rendered applicable," showed conclusively that "discontinued" in the amended Act was recognised as covering a succession to which sub-s. (4) might apply. But it is, I think, correct to say, as the learned Advocate General does, that the exception might cover a case, very unlikely to occur but at the same time possible, in which there had been a succession to which sub-s. (4) applied, and subsequently there was cessation of business within the year of assessment. For example, suppose the assignment of the business here had taken place on May 1, instead of January 1, and the business had been brought to an end on, say, August 1, in that case undoubtedly the exception would apply. At the same time it is unlikely that a business, acquired during a year, would be brought to an end during the same year, and I think the reference to a succession under s. 25(4) indicates that relief is to be given under sub-s. (3) if the case does not fall under sub-s. (4) and assists the extended meaning which I am disposed to give to the word "discontinued" under the amended Act.

In my opinion, therefore, the questions raised by the Income-tax Commissioner : (1) whether on the facts of the case the assessee is entitled to the benefit of s. 25 (3) of the Indian Income-tax Act ; and (2) whether in view of the provisions of the said s. 25 (3) no tax is payable by the assessee in respect of his income from business of Polson Mfg. Co. for the calendar year 1938 liable to assessment in respect of the financial year 1939-40, must both be answered in the affirmative.

Commissioner to pay costs.

KANIA J. I agree that the questions should be answered as suggested in the judgment just delivered.

The question for consideration rests on the construction of s. 25(3) and s. 26(2) as found in the Act before the amendment of 1939 and as those sub-sections exist now. It appears that before the amendment of 1939 the wording of s. 25(3) read with s. 26(2) made out a scheme where business was considered an entity existing throughout the year of assessment. It made no difference if the business was owned by different persons in the course of the year. The liability to tax was as if of the business, and to be satisfied by the person who was the owner of it at the moment of assessment, that is at the conclusion of the assessment year. When the Act was amended in 1939, a vital change was made by the amendment made in s. 26(2). By that amendment the aspect of the business being charged was abandoned, and it was provided that each person should be assessed in respect of his actual share of the income, profits and gains of the previous year. Therefore, in making the assessment the revenue authorities had not to ascertain what was the profit or income of the business as an entity, but immediately their attention was drawn to the fact that there was a change in the ownership, the process was to ascertain what particular income the individual for the time being earned out of that business. This aspect of the section is very material, because the words used in s. 25(3) are peculiar. They open with words which indicate that it was the business which was charged. Now, the discontinuance may be of a business, or the term may be applicable to an assessee discontinuing his business. When a business is transferred, in certain aspects it may be conceived that although the ownership had changed hands, the business as such continues. In no event, however, when the word is taken as relating to the assessee, it can be properly stated that the business has continued. So far as the assessee is concerned, it has certainly come to an end, although the business as an entity may, as I have pointed out, in certain cases continue. If s. 26(2) has to be read now as authorizing assessment of individuals in respect of a particular share of income or profit earned by the particular party in business, the aspect of assessing a business is gone and s. 25(3) has now to be read in that light.

Section 25(3), as has been pointed out, was inserted to grant relief to avoid a double taxation. If the construction now urged on behalf of the Commissioner is adopted, it will mean that while the assessee cannot get the benefit of s. 25(3), because, according to the Commissioner's contention, the business continues, the transferee also will not get the benefit of it. The learned Advocate General has contended that the words "has been a succession" in the exception inserted by the amendment indicate that there should be a succession before discontinuance. I do not suggest that that construction is wrong. But the further illustration which he gave, in my opinion, is not appropriate at all. It was suggested that if the business was transferred on May 1, 1939, and then discontinued in September, 1939, under s. 25(4) the last owner would come under that sub-section and claim the relief provided by reason of the discontinuance of the business. That overlooks the fact that he has not been assessed at all in respect of the business. This will be more clear by taking the date of transfer in December, 1939, and of dis-

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continuance in July, 1940. The assessment will be under s. 26(2), and for the profits which he actually received during the period between December 1 and March 31. He cannot contend that the business as an entity exists or has been discontinued, because he will be met by the wording of s. 26(2), which does not deal with the business being charged as an entity at all. I, therefore, think that the illustration given by the learned Advocate General is inappropriate. Having considered the matter from different aspects, it appears to me that if there is a case of doubt, and s. 25 (3) having been clearly inserted in the Act to grant a relief, if the legislature wanted to prevent that relief being given in certain exceptional circumstances, it was their duty to provide so in clear words.

In my opinion, as the whole scheme of assessment or charging business as an entity has been changed, and s. 26 (2) has been brought in line with the general scheme of the Act that it is the individual who has to be charged and not an abstract thing like business or profession, the word "discontinuance" is wide enough to include the contingency of a transfer under the amended Act as it exists now. The answers to both questions should, therefore, be in the affirmative.

*Answers accordingly.*

Attorneys for assessee : *Mulla & Mulla.*

Attorney for Commissioner : *D. H. Nanavaty*, Solicitor to Central Government, at Bombay.

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# GENERAL INDEX.

ABKARI ACT (*Bom. V of 1878*), S. 4—*Power to grant licences.*

Section 4 of the Bombay Abkari Act, 1878, relates only to control in reference to establishment, and not to the power to grant licences to tap trees producing toddy.

RATANSHAW *v.* McELHINNY. 43 Bom.L.R. 896.

—S. 14.

Section 14 of the Bombay Abkari Act read in conjunction with the Bombay Toddy Tapping Rules, 1928, made under the Act, contemplates that such licences shall be granted in accordance with the rules to enable the duties imposed to be levied.

The implied power conferred upon the Collector by s. 14(1) of the Bombay Abkari Act to grant or refuse a licence is limited by the rules. If the requirements of the rules are complied with, there is a statutory duty imposed upon the Collector to grant a licence, and this duty is not affected by anything contained in s. 4.

RATANSHAW *v.* McELHINNY. 43 Bom.L.R. 896.

—S. 35.

Sections 35 and 35A of the Bombay Abkari Act contemplate that the powers of the Abkari officers to issue licences are controlled only by rules having the force of law made under these sections, and not by orders issued by Government under s. 4. Such orders do not override the rules.

RATANSHAW *v.* McELHINNY. 43 Bom.L.R. 896.

—S. 35A. *See* ABKARI ACT, S. 35.

43 Bom.L.R. 896.

—S. 45(c). *See* SALE OF GOODS ACT, S. 21.

43 Bom.L.R. 95.

ACKNOWLEDGMENT by pleader. *See* LIMITATION ACT, Art. 248.

43 Bom.L.R. 194.

## ACTS (BOMBAY):

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*See* ABKARI ACT.

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—1920—IX.

*See* VILLAGE PANCHAYATS ACT.

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—1939—XXIV.

*See* BOMBAY SHOPS AND ESTABLISHMENTS ACT.

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—1860—XXI.

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*See* PENAL CODE.

—1870—VII.

*See* COURT-FEES ACT.

—1871—IX.

*See* LIMITATION ACT, 1871.

—1872—I.

*See* EVIDENCE ACT.

—1877—XV.

*See* LIMITATION ACT, 1879.

—1879—XVI.

*See* DEKKHAN AGRICULTURISTS' RELIEF ACT.

—1880—IV.

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—1883—XIX.

*See* LAND IMPROVEMENTS LOAN ACT.

—1890—VIII.

*See* GUARDIANS & WARDS ACT.

—XI.

*See* PREVENTION OF CRUELTY TO ANIMALS ACT.

—1898—V.

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See INSOLVENCY ACT (PRESIDENCY).

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—1930—III.

See SALE OF GOODS ACT.

—1932—IX.

See PARTNERSHIP ACT.

—1936—III.

See PARSİ MARRIAGE AND DIVORCE ACT.

—1939—XXXV.

See DEFENCE OF INDIA ACT.

**ADJOURNMENT** of a case—*Suit against alien enemy—Defendant interned on outbreak of hostilities—Presence of defendant necessary in Court to defend action—Defendant's inability to appear in Court—Adjournment of suit whether permissible.*

When the presence of an alien enemy defendant appears to be essential in a Court in order to give instructions to his attorneys and counsel to cross-examine the plaintiff and his witnesses and such a person is interned and is therefore unable to appear in Court, the Court may adjourn the suit either till the defendant is permitted by law to appear and

## ADJOURNMENT—(Contd.)

defend the action or *sine die* till the termination of the hostilities.

VAIKUNTH v. PRAHLADSHANKAR.

43 Bom.L.R. 827.

—at mid-day not to be reckoned as attendance in Court. See BOMBAY HIGH COURT RULES, O. S, 1936. TABLE OF FEES.

43 Bom.L.R. 655.

**ADMINISTRATION BOND**, *suit on*. See LIMITATION ACT, Art. 68.

43 Bom.L.R. 346 (P.C.).

**ADMINISTRATION SUIT**—*Representation of party.*

In a suit for administration a particular interest may not be represented before decree, but such interest is either provided for by the decree, or is asserted at a later stage under the decree, or is given effect by a party being permitted to attend certain accounts and enquiries so as to be bound by the result.

MAHOMEDALLY v. SAFIABAL.

43 Bom.L.R. 389 (P.C.).

**ADMINISTRATOR**—*Officer of Court.*

An administrator of an intestate is merely the officer of the Court in whom the deceased himself has reposed no trust. On the death of the former the estate of the intestate does not pass to his heirs or representatives and no authority whatever can be transmitted by him, nor has anyone claiming under him any right to interfere with or to complete the administration of the property of the intestate. The office comes to an end on death and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non*, and the person to whom such grant is made will be entitled to take possession of the property.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED v. JANMAHOMED.

43 Bom.L.R. 346 (P.C.).

**ADMISSION** by accused.

The fact that an accused is not willing to admit that he took part in a robbery which is proved against him ought not to prejudice the question whether he committed murder at the same time.

EMPEROR v. BASANGOUDA.

43 Bom.L.R. 144.

—in pleading.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. Where a party is prepared in a particular suit to deal with the case on a particular ground and makes an admission, that admission is not binding on him in any other suit, and certainly not for all time.

RAMABAI v. GOVERNMENT OF BOMBAY.

43 Bom.L.R. 232.

**ADVERSE POSSESSION**—*Tenants-in-common—Joint tenants.*

Possession of immoveable property by one tenant-in-common or joint tenant is possession.



## ADVERSE POSSESSION—(Contd.)

of all, and is not to be regarded as adverse to other tenants-in-common or joint tenants in absence of evidence of ouster.

VISHNU *v.* MAHADEO. 43 Bom.L.R. 971.

AHMEDABAD, custom of pre-emption applies to Hindus residing in the city of, so far as houses are concerned. *See* PRE-EMPTION.

43 Bom.L.R. 581 (F.B.).

ALIEN ENEMY, suit against, adjournment of. *See* ADJOURNMENT.

43 Bom. L.R. 827.

AMENDMENT of plaint. *See* CIVIL PROCEDURE CODE, S. 92.

43 Bom.L.R. 706.

AMOD THAKOR in relation to wanta lands. *See* WANTA LANDS.

43 Bom.L.R. 167.

ARBITRATION ACT (IX of 1899), S.15—"Enforceable as if it were a decree of the Court"—*Interpretation—Award—Filing of award in Court—Execution of award—Period of limitation—Indian Limitation Act (IX of 1908), arts. 183, 181.*

The expression "enforceable as if it were a decree of the Court", used in s. 15 of the Indian Arbitration Act, 1899, includes both the manner of execution and the time within which execution must take place.

An award, filed in the High Court can, by virtue of s. 15 of the Indian Arbitration Act, 1899, be executed as a decree at any time within twelve years from its date, under art. 183 of the Indian Limitation Act, 1908.

NADIRSHAW *v.* GAJRAJ. 43 Bom.L.R. 1006.

ASSIGNMENT of decree, execution by one of the assignees. *See* CIVIL PROCEDURE CODE, O. XXI, r. 15.

43 Bom.L.R. 883.

—by a partner. *See* PARTNERSHIP ACT, S. 19(2)(c).

43 Bom.L.R. 888.

ATTACHMENT coming to an end on non-payment of process-fees on application for execution. *See* CIVIL PROCEDURE CODE, O. XXI, r. 16.

43 Bom.L.R. 747.

ATTACHMENT before judgment. *See* CIVIL PROCEDURE CODE, S. 64.

43 Bom.L.R. 206.

—of salary paid to public servant. *See* CIVIL PROCEDURE CODE, S. 60.

43 Bom.L.R. 758.

ATTORNEY, costs—*Work done in mofussil.*

The Taxing Master of the High Court has power to tax the bill of costs of an attorney on the Original Side scale in relation to work done in the mofussil.

CHITNIS & KANGA *v.* WAMANRAO.

43 Bom.L.R. 76.

—professional misconduct — *Reasonable cause for suspension.*

An attorney of the High Court sent two notices, under s. 80 of the Civil Procedure Code, 1908, to a Judge of the Small Cause Court, Bombay, alleging that the Judge had acted with prejudice, bias, and malice, in the

## ATTORNEY—(Contd.)

course of his judicial duties, that he decided a case in which the attorney figured as a witness not according to his own convictions but to please somebody else, and that the remarks made by him in respect of the evidence of the attorney were false; unjustified, malicious and irrelevant, and that in passing those remarks he did not act honestly, judicially, or in good faith. On a petition presented by the Advocate General for taking disciplinary action against the attorney:—

*Held*, (1) that the fact that the allegations were contained in notices under s. 80, Civil Procedure Code, 1908, did not prevent them from being contempt of Court;

(2) that the Court had to consider the conduct of the attorney as it affected his position as an attorney and his relations to the Court; and

(3) that the conduct of the attorney in writing the notices to the Judge amounted to a reasonable cause for taking disciplinary action against him under cl. 10 of the Letters Patent, 1865.

*In re* TULSIDAS KARANI. 43 Bom.L.R. 250.

AWARD, registration of. *See* REGISTRATION ACT, S. 17(1)(b).

43 Bom.L.R. 382 (P.C.).

BAR COUNCILS ACT (XXXVIII of 1926), S. 10. *See* DISCIPLINARY JURISDICTION, SOLICITORS.

43 Bom.L.R. 250.

BOMBAY CHILDREN'S ACT (Bom. XIII of 1924). *See* POLICE ACT (CITY), S. 27A.

43 Bom.L.R. 834.

BOMBAY HIGH COURT CRIMINAL CIRCULAR 160A—"Papers exhibited in the proceedings"—*Interpretation.*

Whatever meaning be assigned to the expression "papers exhibited in the proceedings", used in Criminal Circular No. 160A issued under s. 554 of the Criminal Procedure Code, it does not deprive the Court of the right which it previously enjoyed of granting inspection of the whole record to a party properly entitled thereto.

SHAMDASANI *v.* SIR HUGH COCKE.

43 Bom.L.R. 961.

BOMBAY HIGH COURT RULES (A.S.), 1936, r. 130.

Where on a preliminary objection taken at the hearing of an appeal, the Court orders payment of additional court-fees on the memorandum of appeal, and the appeal is rejected for non-payment of such fees, the respondent is entitled to payment of his costs of the hearing of the preliminary objection. Such costs should be taxed at Rs. 30 under r. 130 of the Bombay High Court, Appellate Side, Rules. KASHIRAM *v.* RANGLAL. 43 Bom.L.R. 475.

—App. E—*Advocate's fees—Rules for computation—Attorney instructing an appellate side advocate (O. S.)—Scale of fees applies to attorney.*

Where an attorney instructs an advocate (O. S.) to appear on the appellate side of the

# BOMBAY HIGH COURT RULES (A. S.)— (Contd.)

High Court, the costs of the attorney should be taxed by analogy on the scale allowed by Appendix E to the Rules on the Appellate Side, Bombay High Court, 1936.

DOSSABHOY v. EDULJI. 43 Bom.L.R. 336.

**BOMBAY HIGH COURT RULES (O. S.) 1936, r. 534—***Ex parte order for taxation of bill of costs passed by Prothonotary—Order included work done by attorneys on appellate side and in mofussil—Validity of such order—Jurisdiction of Court to pass such order—Power of Taxing Master to tax bills for work done in mofussil.*

Under r. 534 of the Rules of the High Court of Bombay, 1936, an order for taxation on the original side cannot be made in respect of costs incurred on the appellate side of the High Court. A Judge has discretion under that rule to direct attorney's bills to be so taxed in any other case.

The taxation of a bill of costs does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under r. 895 after taxation has taken place.

Since the power of a Judge to direct taxation under r. 534 is discretionary, when an application is made *ex parte* for a common form order for taxation under that rule, the Court may direct the solicitor to issue a summons, and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employment of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit; and in that suit the solicitor's right to recover can be first determined, and the amount to be recovered can be determined subsequently by taxation.

The Taxing Master of the High Court has power to tax the bill of costs of an attorney on the original side scale in relation to work done in the mofussil.

CHITNIS & KANGA v. WAMANRAO MANTRI. 43 Bom.L.R. 76.

—r. 563—*"Matter"—Interpretation.*

Rule 563 of the High Court Rules gives a wide discretion to the Taxing Master to take various factors into consideration in respect of suits as well as other matters, and the word "matter" in the rule cannot be construed as referring only to appeals, arbitrations, accounts and motions, being the four matters expressly mentioned in item 14.

SHAMDASANI v. CENTRAL BANK OF INDIA, LTD. 43 Bom.L.R. 655.

—r. 567—*Refreshers, payment of.*

Rule 567 of the Rules of the High Court of Bombay, 1936, only authorises the payment of refreshers on the hearing of a suit or appeal which extends to more than a day. There is no express power to allow refreshers on a summons adjourned into Court. Refreshers in matters other than suits or appeals do not come within the words "all reasonable dis-

# BOMBAY HIGH COURT RULES (O. S.) r. 567—(Contd.)

bursements" in item 60 of the "Table of Fees to be taken by the Attorneys."

SHAMDASANI v. CENTRAL BANK OF INDIA, LTD. 43 Bom.L.R. 655.

—r. 895. See BOMBAY HIGH COURT RULES (O. S.), r. 534. 43 Bom.L.R. 76.

—TABLE OF FEES, ITEM 14—*Interpretation of "final trial".*

In the Rules of the Bombay High Court, 1936, under items 40 and 41 in the "Table of Fees to be taken by Attorneys," the Taxing Master has to reckon the number of hours of attendance, irrespective of whether they took place on the same day or not. Having completed the first hour, for which a sum of Rs. 15 is allowed, all subsequent hours are to be allowed at the rate of Rs. 10.

In counting hours of attendance of attorneys, under items 40 and 41, referred to above, the time taken up by the midday adjournment of Court is not to be reckoned.

SHAMDASANI v. CENTRAL BANK OF INDIA, LTD. 43 Bom.L.R. 655.

**BOMBAY MUSSALMAN WAKF RULES, r. 26. See MUSSALMAN WAKF ACT, S. 2(c).** 43 Bom.L.R. 152.

**BOMBAY REGULATION V OF 1921, S. 8, Cl. 1. See LIMITATION ACT, Art. 148.** 43 Bom.L.R. 194.

**BOMBAY SALT ACT (Bom. II of 1890), S. 3 (o)—"Possession"—"Removal"—Interpretation.**

The effect of s. 3(o) of the Act, defining the terms "possession" and "removal", is to provide that where it is proved that the person in possession or removing salt is a servant or agent, then the possession or removal shall be deemed to be that of the master or principal, to the exclusion of liability of the servant or agent.

EMPEROR v. LAXMAN. 43 Bom.L.R. 869.

—S. 38. See BOMBAY SALT ACT, S. 47. 43 Bom.L.R. 869.

—S. 47(a)—Salt—"Possession" or "removal of salt" by servant or agent—"Removal", "Transportation", "Possession" of salt—Liability of servant removing contraband salt on behalf of master.

Section 47, sub-s. (c), of the Bombay Salt Act, 1890, deals with possession of contraband salt, and makes knowledge or belief that it is contraband salt necessary to constitute an offence. Under sub-s. (a) to the section, however, it is an offence merely to manufacture, remove or transport salt, not merely contraband salt. The words "removal" and "transportation" in the sub-section are used interchangeably. The word "removal" is not confined to salt removed from the salt-works of Government under s. 28 of the Act.

Where the accused, a cart-driver, is employed by another person to convey con-

**BOMBAY SALT ACT, S. 47(a)—(Contd.)**

traband salt from a customs-station, he is not liable to be punished either under s. 38(1)(a) or s. 47(a) of the Bombay Salt Act, 1890.  
**EMPEROR v. LAXMAN.** 43 Bom.L.R. 869.

**BOMBAY SHOPS AND ESTABLISHMENTS ACT (Bom. XXIV of 1939), S. 4—"Employer" in s. 30, meaning of—One-man shop governed by Act.**

The owner of a shop cannot be said to be a person occupying a position of management as contemplated by s. 4(1)(a) of the Act. One of the incidents of ownership is no doubt the right to manage; but it is difficult to say that the owner is a person occupying a position of management.

**EMPEROR v. MAHOMED.** 43 Bom.L.R. 952.

**—S. 5.**

Section 5 of the Bombay Shops and Establishments Act, 1939, is intended to include a one-man-shop.

Accordingly, where the owner of a one-man shop keeps the shop open for business after 9 p.m., he renders himself liable to punishment under s. 30 read with s. 5 of the Act.

**EMPEROR v. MAHOMED.** 43 Bom.L.R. 952.

**—S. 6.**

The effect of s. 6 of the Act, or one effect at any rate, is to protect an employer, who has been compelled to close his shop at 9 p.m., from competition by sales in a public place after that hour; another object may be to prevent a man who has been compelled to close his shop from reopening his business in the street or other public place.

**EMPEROR v. MAHOMED.** 43 Bom.L.R. 952.

**—S. 14.**

Section 14 of the Act clearly protects the shop which has been compelled to close at 9 o'clock from competition after that hour by a place of public amusement.

**EMPEROR v. MAHOMED.** 43 Bom.L.R. 952.

**—S. 30.**

The word "employer" as used in s. 30 of the Act means a person having charge of or owning the business of a shop.

**EMPEROR v. MAHOMED.** 43 Bom.L.R. 952.

**CERTIFIED COPY**, right to a, presupposes a right of inspection. See **CRIMINAL PROCEDURE CODE**, S. 548. 43 Bom.L.R. 961.

**CHARGE**, statutory. See **TRANSFER OF PROPERTY ACT**, S. 55(4)(b). 43 Bom.L.R. 1014.

**CHARGES**, joinder of. See **CRIMINAL PROCEDURE CODE**, S. 234. 43 Bom.L.R. 110.

**CIRCUMSTANTIAL EVIDENCE—Scope of.**

Circumstantial evidence must be consistent, and consistent only with the guilt of the accused; if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. One of the circumstances which has to be taken into account is the fact that the accused has offered no explana-

**CIRCUMSTANTIAL EVIDENCE—(Contd.)**

tion, or has offered a particular explanation; but it must be borne in mind that the accused cannot go into the witness-box, and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him. Often the accused is an illiterate person, and makes a statement under s. 342, Criminal Procedure Code, which is obviously untrue, or he is not prepared to admit anything.

**EMPEROR v. BASANGOUDA.** 43 Bom.L.R. 144.

**CIVIL PROCEDURE CODE**, S. 10—*Stay of suit—Suit pending in mofussil Court—Suit subsequently filed on Original Side of High Court—Application for stay of suit in High Court made to Appellate Side Bench of High Court—Whether application competent.*

An application under s. 10 of the Civil Procedure Code, 1908, for stay of suit should be made to the Court which is actually seized of the case.

An application under s. 10 of the Civil Procedure Code was made on the Appellate Side of the High Court to stay a suit which was instituted on its Original Side until the decision of a previously instituted suit between the same parties in a Court in the mofussil. On the question whether the application to the Appellate Side Bench of the High Court was competent:—

*Held*, that the application should be made on the Original Side to the Judge trying the suit.

**NAGAPPA v. RAMSING.** 43 Bom.L.R. 236.

**—S. 11—Court declining jurisdiction—Reason for such decision whether binding as res judicata—Indian Registration Act (XVI of 1908), Sec. 17(1)(b)—Award—"Ownership", interpretation of—Compulsory registration of award.**

A Court which declines jurisdiction cannot bind the parties by its reasons for declining jurisdiction: such reasons are not decisions, and are certainly not decisions by a Court of competent jurisdiction. On a dispute as to the jurisdiction of a Court to try an issue, the Court, by its reasons for holding that it had no jurisdiction, cannot, upon the principle of *res judicata*, decide and bind the parties upon the very issue which it was incompetent to try.

Hence, a decision by the High Court that no Court in the province had jurisdiction over the subject-matter of the award within the meaning of para. 20 of sch. II of the Civil Procedure Code of 1908, which applies the test whether it would have had jurisdiction to try the suit in which the relief claimed was the relief granted by the award, and in so doing construes the award, such construction is not *res judicata* between the parties on the question of the true construction of the award.

The respondent advanced in 1912 a sum of Rs. 50,000 to the appellant for the purpose of partially clearing of incumbrances on a village upon the term that he should have the option to acquire a half share in the village in lieu of the repayment of his loan. The option

## CIVIL PROCEDURE CODE, S. 11—(Contd.)

was exercised in 1914 and the respondent thenceforward enjoyed a half-share of the profits of the village, but no conveyance was executed. Differences having arisen between the parties, a reference was made to arbitrators, who awarded payment of Rs. 61,400 by the appellant to the respondent, and directed: "The ownership of the second party [i.e. respondent] in one-half of ... [the] property shall not cease till after the above sum be fully paid up." A question having arisen whether the award was compulsorily registrable under s. 17(1) (b) of the Indian Registration Act, 1908:—

*Held*, (1) that the aforesaid provision was not framed as one which purported to create or confer an interest in immoveable property; but it was framed on the assumption that an interest was already in existence and provided that that existence should not cease until a specified event had happened;

(2) that the mere use of the word "ownership" could not outweigh the consideration that the whole wording of the sentence pointed to the continuance of the *status quo*, and not to the creation of a new condition of affairs;

(3) that the award did not purport or operate to create, declare or assign any right, title or interest in the village, and therefore did not require registration under s. 17(1) (b) of the Indian Registration Act, 1908.

UPENDRA NATH BOSE *v.* LALL.

43 Bom.L.R. 382 (P.C.).

—See POSSESSION. 43 Bom.L.R. 971.

—S. 16—*Court—Jurisdiction—Place where subject-matter situated—Decree—Reversal—Error or irregularity not affecting merits or jurisdiction—Suit to include whole claim—Splitting up of causes of action—Suit for specific performance of contract—Prayer for recovery of possession—Joinder of causes of action—Multiplicity of suits—Res judicata—Leave of Court—Contract—Agreement—Settlement of some conditions between parties—Settlement of other conditions through lawyer—Agreement to be drawn up and signed—Contract not complete until such agreement drawn up and signed—English law—Applicability to India.*

Defendant No. 1, who resided in Bombay, was the liquidator of a joint stock company, which had its registered office in Bombay but which owned a factory at Dhulia in West Khandesh District. Negotiations opened in Bombay between defendant No. 1 and the plaintiff's broker on behalf of the plaintiff for the sale of the factory, some of the terms of sale were settled between the parties, and defendant No. 1 afterwards sent the broker to the company's solicitors for settling other terms, receiving the earnest money, and drawing up a draft agreement and an engrossment of that draft. The further terms were settled, the earnest money was received by the solicitors, and a rough draft of agreement was prepared. The agreement was engrossed in due course, but before it could be signed by the plaintiff, the solicitors of defendant No. 1 declined to proceed in the matter saying that

## CIVIL PROCEDURE CODE, S. 16—(Contd.)

they were instructed to put an end to the negotiations. Defendant No. 1 then sold the factory to defendants Nos. 2 to 5 at a higher price. The plaintiff having sued in the Dhulia Court for specific performance of the agreement and for possession of the factory:—

*Held*, (1) that the suit, in the form in which it was brought, was not *in personam* so as to attract the application of the proviso to s. 16 of the Civil Procedure Code, 1908;

(2) that O. II, r. 2, of the Code, had no application, inasmuch as the cause of action for specific performance, being on the contract, was not the same as the cause of action for possession, which was on the conveyance resulting from the contract;

(3) that the combination of the two suits in one was not repugnant to any provision of the law;

(4) that the Dhulia Court alone had jurisdiction to try the suit against defendants Nos. 2 to 5, and that it also had jurisdiction to try the case as against defendant No. 1 by virtue of the language of s. 16(d) of the Code;

(5) that the cause of action for specific performance, being distinct from that for possession, a subsequent suit for possession was not barred by *res judicata* or O. II, r. 3;

(6) that though a separate suit for possession was not barred the two causes of action could be joined in the same suit for the sake of convenience or to avoid multiplicity of suits;

(7) that the option to join the prayer for possession was not dependent on the leave of the Court under O. II, r. 4;

(8) that even assuming that the leave of the Court was necessary, strictly speaking the case was covered by s. 99 of the Code;

(9) that, however, under the circumstances the agreement arrived at between the parties at the first interview only contemplated execution of the engrossed draft in the solicitors' office and was not a concluded agreement between the parties, which could be enforced;

(10) that the above rule of English law applied also to India;

(11) that therefore the suit failed.

NEW MOFUSSIL CO., LTD. *v.* SHANKERLAL.

43 Bom.L.R. 293.

—S. 47. See POSSESSION. 43 Bom.L.R. 971.

—S. 48.

The warrant issued by a Court passing a sentence, under s. 386, Criminal Procedure Code, to recover fine from an offender is to be deemed as a decree for certain purposes only, and is executed according to the mode laid down in the Civil Procedure Code, 1908, but s. 48, Civil Procedure Code, does not apply to such a warrant.

COLLECTOR OF BROACH *v.* OCHHAVLAL.

43 Bom.L.R. 122.

—S. 53—*Watan property inherited by son from father—Father's debts—Liability of son under decree to extent of inherited property—Execution of decree against property in hands of son whether proper.*

Watan property inherited by a son from his

## CIVIL PROCEDURE CODE, S. 53—(Contd.)

father is not exposed to liability to execution under s. 53 of the Civil Procedure Code, 1908, for the payment of the father's debts. The fact that the son is made liable under the decree to the extent of the property inherited by him does not by itself make the watan property liable to execution under the section.

RAMABAI v. GOVERNMENT OF BOMBAY.

43 Bom.L.R. 232.

—S. 60—Attachment of portion of public servant's salary—Order imposing liability made against Government or public body—Right of Government or public body to move Court to shew illegality of order—Inherent jurisdiction of Court to hear such application—Attachment of salary of public servant which is exempt from attachment under s. 60(i) of Civil Procedure Code—Whether public servant can contract himself out of statutory provision or waive his right—Voluntary transfer of part of salary by public servant—Public policy—Illegality of such transfer—Transfer of Property Act (IV of 1882), Sec. 6(f)—Indian Contract Act (IX of 1872), Sec. 23.

Where an order is made against Government or a public body, and the law imposes liability in case the order is not obeyed, it is open to Government or the public body to move the Court and contend that the order is not justified by the law, and the Court has inherent power to consider such an application.

A public servant, whose salary is exempt from attachment under s. 60 (i) of the Civil Procedure Code, 1908, cannot contract himself out of this statutory provision. Such a contract is opposed to public policy and is void under s. 6(f) of the Transfer of Property Act, 1882, and s. 23 of the Indian Contract Act, 1872.

A decree for Rs. 236 was passed against a peon serving in a Government Post Office and drawing a monthly salary of Rs. 41. The judgment-debtor got him arrested in execution of the decree. In order to escape from arrest he entered into a compromise with the judgment-creditor whereby he agreed that a sum of Rs. 6 per mensem should be deducted from his salary until the decree was satisfied. The Court recorded the compromise and passed an order under O. XXI, r. 48, Civil Procedure Code, directing the Post Master General to send Rs. 6 every month to the Court till the decree was fully satisfied. The Post Master General applied under O. XXI, r. 58, to set aside the order on the ground that it was illegal in virtue of the provisions of s. 60 (i) of the Civil Procedure Code, s. 6(f) of the Transfer of Property Act, 1882, and of s. 23 of the Indian Contract Act, 1872. The lower Court overruled the contention holding that the order was not illegal and that the Post Master General had no *locus standi* to apply under O. XXI, r. 58, and it therefore refused to raise the attachment. On appeal:—

*Held*, reversing the order of the lower Court, (1) that O. XXI, r. 48, was subject to the provisions of s. 60 of the Civil Procedure Code, and the Post Master General was entitled to

## CIVIL PROCEDURE CODE, S. 60—(Contd.)

bring to the notice of the Court the illegality of the order of attachment as Government would be liable for any sum paid in contravention of the section;

(2) that the agreement between the judgment-creditor and the judgment-debtor amounted to a voluntary transfer of a part of the latter's salary and was opposed to the provisions of s. 6(f) of the Transfer of Property Act and s. 60 of the Civil Procedure Code;

(3) that it was not open to the judgment-debtor to contract himself out of those statutory provisions or to waive their benefit; and

(4) that, therefore, the attachment of the salary and the transfer thereof were illegal and opposed to public policy.

POST MASTER GENERAL, BOMBAY v. CHENMAL.

43 Bom.L.R. 758.

—S. 64; O. XXI, r. 54; O. XXXVIII, r. 10—Transfer of Property Act (IV of 1882), Secs. 40, 54, 55(4)(b)—Attachment before judgment by creditor—Agreement to sell property to third party entered into by debtor before attachment—Sale effected after attachment—Attaching creditor whether entitled to sell property in execution of his decree—Right of attaching creditor to purchase-money.

An attachment before judgment of property subject to a contract of sale merely gives the attaching creditor a right to the balance of the unpaid purchase-money and he is not entitled to bring that property to sale in satisfaction of a decree subsequently obtained by him. If the purchase-money or the balance thereof has not been paid, he can attach it in the hands of the purchaser. He would also in that case have the benefit of the vendor's lien under s. 55(4)(b) of the Transfer of Property Act, 1882.

The holder of a money-decree had attached the immovable property of his judgment-debtor before judgment. Before attachment the judgment-debtor had agreed to sell the property to a third party who had paid a certain amount as earnest money and who was put in possession of the property. The sale was completed by a conveyance after the attachment when a further sum was paid to the judgment-debtor and the balance was retained by the purchaser to satisfy certain mortgages on the property. In a suit by the decree-holder for a declaration that the property was liable to be attached and sold in execution of his decree:—

*Held*, that the attaching judgment-creditor was not entitled to sell the property in execution of his decree; but that he could only attach the purchase-money or the balance thereof which has not been paid by the purchaser, or he could also have the benefit of a vendor's lien under s. 55(4)(b) of the Transfer of Property Act, 1882.

RANGO v. GURLINGAPPA.

43 Bom.L.R. 206.

—S. 66—Property purchased at Court sale—Sale certificate solely in name of auction purchaser—Plaintiff claiming property on ground that it was purchased by certified purchaser on

## CIVIL PROCEDURE CODE, S. 66—(Contd.)

*his own behalf and on behalf of plaintiff—Claim whether maintainable.*

Section 66 of the Civil Procedure Code, 1908, excludes any claim of plaintiff based upon an averment that property purchased by the certified purchaser at a Court auction sale was purchased by him on his own behalf and on behalf of the plaintiff or some one through whom he claims. The section is not a bar to a claim based on a title independent of the auction purchase.

BISHUN DAYAL v. KESHO PRASAD.

43 Bom.L.R. 138 (P.C.).

—S. 73—*Rateable distribution—Execution of decree against father and son, members of Hindu joint family—Sale proceeds of property held in Court—Whether judgment creditors of father can ask for rateable distribution—Construction.*

A decree obtained against a father representing a joint Hindu family and a decree obtained against the father and his son constituting the joint family are not decrees obtained against "the same judgment-debtor" for the purpose of rateable distribution under s. 73 of the Civil Procedure Code, 1908.

Applicant obtained a decree against a father and son who were members of a Hindu joint family. The opponents obtained decrees against the father alone as manager of the joint family. In execution of the applicant's decree ancestral property belonging to the father and son was sold and the amount realised was held in Court. The opponents in execution of their decrees asked for rateable distribution of the assets with the applicant :—

*Held*, that the opponents' decrees against the father alone and the applicant's decree against the father and son were not decrees against "the same judgment-debtor" within the meaning of s. 73 of the Civil Procedure Code, and therefore rateable distribution could not be claimed by the opponents.

LAXMAN ANANT v. GOVIND RAMBHAT.

43 Bom.L.R. 695.

—*Rateable distribution—"Same judgment-debtor," meaning of—Decree against judgment-debtors personally and another decree against them in representative capacity—Whether such decrees are against "same judgment-debtors."*

A decree against a person individually and a decree against that person as representative of a deceased person are not decrees against "the same judgment-debtor" within the meaning of s. 73 of the Civil Procedure Code, 1908, so as to entitle the holders of the two decrees to rateable distribution.

The expression "the same judgment-debtors" in s. 73, Civil Procedure Code, 1908, denotes identity of individuality, and identity of character or interest. Decrees obtained against the same individual, but in different capacities may be regarded as not obtained against "the same judgment-debtor."

JAMIYATRAM v. UMIYASHANKAR.

43 Bom.L.R. 699.

CIVIL PROCEDURE CODE, S. 92—*Advocate-General—Counsel.*

Consent of the Advocate General under s. 92 of the Civil Procedure Code, 1908, is not necessary where a trustee sues to recover trust property in the hands of a stranger to the trust.

O. RM. O. M. SP. (FIRM) v. NAGAPPA.

43 Bom.L.R. 440 (P.C.).

—*Plaint, amendment of, in suit under s. 92—Amendment when permissible—Sanction of Advocate General or Collector when necessary—Amendment by Court without such sanction—Procedure under O. 1, r. 8, whether to be followed in suits under s. 92.*

In suits under s. 92 of the Civil Procedure Code, 1908, it is for the Court to decide, as in any other suit, whether an amendment of the plaint is permissible, and the consent of the Advocate General or the Collector, as the case may be, is really evidence which has to be taken into consideration before deciding whether the amendment should be allowed. Amendments which do not substantially change the character of the suit or enlarge the scope of it may be made by the Court itself without the sanction of the Advocate General or the Collector. Amendments which enlarge the scope of the suit, for instance by allowing further reliefs, without substantially changing its character, may be made with the sanction of the Advocate General or the Collector, such sanction being evidence that the suit after amendment is to all intents and purposes the same suit and not a different one. Amendments which substantially change the character of the suit are not permissible even with the sanction of the Advocate General or the Collector.

The procedure laid down in O. 1, r. 8, of the Civil Procedure Code, 1908, is not applicable to suits under s. 92 of the Code.

Proof of breach of trust or mismanagement is not essential for removal of a trustee of a charitable institution. The Court has a wide discretion under s. 92, Civil Procedure Code, to take such action as it thinks necessary or desirable for the good of the charity.

BAFUGOUDA v. VINAYAK.

43 Bom.L.R. 706.

—S. 99. See CIVIL PROCEDURE CODE, S. 16.  
43 Bom.L.R. 293.

—S. 100—*Second appeal—Findings of fact.*

The findings of fact though not the conclusions as to their effect in law, are prima facie conclusive in second appeal in view of ss. 100 and 101 of the Civil Procedure Code, 1908.

SHANKARRAO v. SHAMBHU.

43 Bom.L.R. 1 (P.C.).

—S. 101. See CIVIL PROCEDURE CODE, S. 100.  
43 Bom.L.R. 1 (P.C.).

—S. 104(2)—*Second appeal—Order.*

Order XXII, r. 10, of the Civil Procedure Code, 1908, applies to execution proceedings. An order made under that rule is appealable under the provisions of O. XLIII, r. 1, sub-cl. (1), but no second appeal lies from an order

CIVIL PROCEDURE CODE, S. 104(2)—  
(*Contd.*)

passed in appeal in virtue of s. 104, cl. (2), of the Civil Procedure Code.

KRISHNAJI RAMCHANDRA v. BEIKCHAND,  
43 Bom.L.R. 719.

—S. 115—*Revision—Order passed by Magistrate—Persona designata—Bombay District Municipal Act (Bom. III of 1901), Sec. 86.*

A Magistrate hearing an appeal under s. 86 of the Bombay District Municipal Act, 1901, acts as a *persona designata*; and therefore an order passed by him under the section is not open to revision by the High Court under s. 115 of the Civil Procedure Code, 1908.

VITA MUNICIPALITY v. GANGARAM.  
43 Bom.L.R. 333.

—*Application by auction-purchaser for possession of property—Application rejected by lower Court on ground of limitation—Whether application in revision to High Court against order of lower Court competent.*

An application under O. XXI, r. 95, of the Civil Procedure Code, 1908, made by an auction-purchaser to get possession of the property of the judgment-debtor, was rejected by the trial Court on the ground that it was barred by limitation. The auction-purchaser applied in revision to the High Court under s. 115 of the Code against the order of the lower Court. On the question whether the application came within the terms of s. 115:—

*Held*, that the finding of the lower Court on a question of limitation, whether right or wrong, was a finding on a point of law which the Court had jurisdiction to decide and therefore it did not come within the ambit of s. 115.

MITHALAL RANCHHODAS v. MANEKLAL.  
43 Bom.L.R. 480.

—S. 141. See CIVIL PROCEDURE CODE, O. XXIII, r. 1.  
43 Bom.L.R. 976.

—S. 151—*High Court—Inherent jurisdiction—Injunction in personam against party restraining him from proceeding with criminal complaint in Court outside High Court's jurisdiction.*

The High Court has jurisdiction, under s. 151 of the Civil Procedure Code, 1908, to grant an injunction *in personam* against a person who has submitted to its jurisdiction to restrain him from proceeding with a criminal complaint in a Court which is not subject to the jurisdiction of the High Court; but the jurisdiction should be exercised with extreme caution.

Accordingly, the High Court of Bombay refused to grant an injunction *in personam* against a defendant, who had submitted to its jurisdiction, restraining him from proceeding with the complaint filed by him against the plaintiff in the Court of the City Magistrate at Benares, praying in effect that the defendant had no cause of action against him as regards the subject-matter of the complaint.

KANHAIYALAL v. MOHANLAL. 43 Bom.L.R. 287.

—O. I, r. 8.

The procedure laid down in O. I, r. 8, of the R. 132.

CIVIL PROCEDURE CODE, O. I, r. 8—  
(*Contd.*)

Civil Procedure Code, 1908, is not applicable to suits under s. 92 of the Code.

BAPUGOUDA v. VINAYAK.\* 43 Bom.L.R. 706.

—O. I, r. 10—*Discretion of Court to add party.*

Under O. I, r. 10, Civil Procedure Code, 1908, the Court has discretion to add as a party to a suit the representative of a person against whom the suit has abated for the purpose of giving effect to the rights of the parties. Where a Mahomedan brings a suit against his co-heirs for administering the property that has come to their hands, and one of the defendants, who has the same interest and is in the same position as that of the plaintiff, dies, but no application is made by the plaintiff to bring his heir on record, the suit does not come to an end by reason of abatement as against the deceased defendant.

MAHOMEDALLY v. SAFIABAI.  
43 Bom.L.R. 389 (P.C.).

—*Partnership suit—Death of plaintiff—Application by defendant to make him plaintiff and the heirs of plaintiff as defendants—Jurisdiction—Practice.*

Where in a suit for dissolution of partnership and partnership accounts, the plaintiff dies, the Court has jurisdiction, under O. I, r. 10, Civil Procedure Code, 1908, on an application by the defendant, to transpose him as plaintiff in the suit and to make the heirs of the original plaintiff as defendants.

DEVSEY v. HIRJI. 43 Bom.L.R. 993.

—O. II, r. 2. See CIVIL PROCEDURE CODE, S. 16.  
43 Bom.L.R. 293.

—O. II, r. 3. See CIVIL PROCEDURE CODE, S. 16.  
43 Bom.L.R. 293.

—O. II, r. 4. See CIVIL PROCEDURE CODE, S. 16.  
43 Bom.L.R. 293.

—O. XXI, r. 2—*Decree—Assignment of decree—Application for execution by assignee—Judgment-debtor pleading payment—Payment not certified or recorded by Court—Whether Court to which application for execution is made could recognise such payment.*

Where an assignee of a decree makes an application under O. XXI, rr. 11 and 16, of the Civil Procedure Code, 1908, to the Court passing the decree for executing it, the Court is hearing the application as an executing Court and is bound in virtue of O. XXI, r. 2(3), not to recognise payment or adjustment which has not been certified or recorded as required by r. 2(1)(2).

A person after obtaining a decree for maintenance assigned certain arrears of maintenance under that decree to the applicant. The applicant applied, under O. XXI, rr. 11 and 16, of the Civil Procedure Code, to the Court passing the decree to execute it. The judgment-debtor contended that the arrears of maintenance purported to have been assigned

**CIVIL PROCEDURE CODE, O. XXI, r. 2—**  
(*Contd.*)

to the applicant had in fact been paid, and, therefore, there was no effective assignment. The alleged payment was, however, not certified or recorded as required by O. XXI, r. 2(1)(2):—

*Held*, that the Court was bound by O. XXI, r. 2(3), not to recognise the payment.

KRISHNA GOVIND *v.* MOOLCHAND.

43 Bom.L.R. 751(F.B.).

—*Indian Limitation Act (IX of 1908), arts. 181, 182(5)—Application to record part payment of decretal debt—Whether such application a step-in-aid of execution.*

An application made to the Court to record an adjustment or a part payment of a decretal debt under O. XXI, r. 2, of the Civil Procedure Code, 1908, cannot be regarded as an application within the meaning of art. 181 of the Indian Limitation Act, 1908, and it does not, therefore, amount to a step-in-aid of execution under art. 182(5) of the Act so as to save limitation.

The plaintiff obtained a decree on July 11, 1932. On June 30, 1935, a part payment was made by the defendants of the amount due under the decree. On September 16, 1935, the plaintiff applied to the Court under O. XXI, r. 2(1), of the Civil Procedure Code, 1908, to certify the part payment, and the Court acceded to the application. On November 8, 1935, the plaintiff filed a dakhast against the defendants in execution of his decree. On the question whether the application of September 16, 1935, was a step-in-aid of execution under art. 182(5) of the Indian Limitation Act, 1908:—

*Held*, that the application could not be regarded as an application within the meaning of art. 181 of the Indian Limitation Act, 1908, and that, therefore, it did not amount to a step-in-aid of execution under art. 182(5) of the Act so as to save limitation.

ATMARAM NEMCHAND *v.* MALLAPPA APPAYYA.

43 Bom.L.R. 880.

—“*Or*,” interpretation of—*Mortgage decree—Application by decree-holder to record adjustment—Minor judgment-debtors—Dismissal of application for want of prosecution—Execution of decree by decree-holder whether permissible.*

In O. XXI, r. 2, sub-r. (3), of the Civil Procedure Code, 1908, the disjunctive “or” must be read as the conjunctive “and”.

Where some of the judgment-debtors are minors, the Court, before recording an adjustment under O. XXI, r. 2(1), of the Civil Procedure Code, is bound, under O. XXXII, r. 7, of the Code, to satisfy itself that the compromise is for the benefit of the minors.

Under O. XXI, r. 2, of the Civil Procedure Code, although the Court is not concerned to consider the merits of the adjustment, it is concerned to consider whether the arrangement to be recorded is an adjustment, that is to say, a legal adjustment. The Court is not a mere recording machine under the rule.

**CIVIL PROCEDURE CODE, O. XXI, r. 2—**  
(*Contd.*)

There is nothing in O. XXI, r. 2(1), of the Civil Procedure Code, to prevent the decree-holder withdrawing his application before it is recorded. There is nothing in the sub-rule which says that the moment a certificate is presented it becomes binding for all time and that the parties cannot change their minds and withdraw from the compromise.

DATTATRAYA *v.* VITHALDAS. 43 Bom.L.R. 1022.

—O. XXI, r. 11. See CIVIL PROCEDURE CODE, O. XXI, r. 16. 43 Bom.L.R. 266.

—See CIVIL PROCEDURE CODE, O. XXI, r. 2. 43 Bom.L.R. 751 (F.B.).

—O. XXI, r. 15—*Decree assigned to two persons jointly—Whether one co-assignee alone can apply to execute decree.*

Where a decree has been assigned to two persons jointly, any one of the co-assignees can validly present an application for execution of the decree under O. XXI, r. 15, of the Civil Procedure Code, 1908.

SHANKAR *v.* DAMODAR. 43 Bom.L.R. 883.

—O. XXI, r. 16—*Decree—Assignment of decree—Application by transferee for execution of decree—Establishment of title—Right acquired by transferee to execute decree—Stage at which objections of judgment-debtor to decree may be considered—Revival of decree—Notice—Procedure.*

Where an application for execution of a decree is made by a transferee of the decree, he has to establish his title, and he has therefore to make an application under O. XXI, r. 16, Civil Procedure Code, 1908, to the Court that passed the decree. On a notice being issued on this application, the Court has to decide whether the applicant is the person entitled to execute the decree. The extent of his right and the conditions on which the assignee may proceed with the execution are not touched by this decision; nor does the Court decide how far the decree can be executed or the objections, if any, to the decree being executed. If the notice under O. XXI, r. 16, is made absolute the transferee acquires a right to execute the decree in the same manner and subject to the same conditions as the decree-holder himself had. Any objections raised by the judgment-debtor as to the execution of the decree cannot be considered at that stage. The transferee has then to apply for execution of the decree under O. XXI, r. 11, Civil Procedure Code, when the objections, if any, of the judgment-debtor will be considered.

BANK OF MORVI, LIMITED *v.* R. P. WAGLE & CO.

43 Bom.L.R. 266.

—*Mortgage decree—Decree-holder declared insolvent by foreign Court—Receiver appointed by foreign Court—Whether such receiver can execute decree in British India.*

The expression “by operation of law” in O. XXI, r. 16, of the Civil Procedure Code, 1908, means by operation of the appropriate law and does not include the law in force in an Indian State.



CIVIL PROCEDURE CODE, O. XXI, r. 16—  
(*Contd.*)

A mortgage decree was passed by a Court in British India in favour of the plaintiff which directed that the plaintiff could get the defendant's properties sold if he was not paid certain instalments. The plaintiff was afterwards declared an insolvent by a Court of an Indian State and a receiver was appointed. The receiver then applied in his own name, to the Court in British India, to execute the mortgage decree by sale of the mortgaged property, as there was default in payment. On the question whether the "receiver" was entitled to execute the decree:—

*Held*, that the title of the receiver, appointed by the Court of the Indian State, to execute the decree could not be recognized by the Court in British India; and that therefore, without a proper assignment of the decree in his favour, he was not entitled to execute the decree.

HIRALAL v. VISHNU. 43 Bom.L.R. 724.

—See CIVIL PROCEDURE CODE, O. XXI, r. 2. 43 Bom.L.R. 751 (F.B.).

—See PARTNERSHIP ACT, S. 19(2)(c). 43 Bom.L.R. 888.

—O. XXI, r. 22—*Decree—Revival.*

Where the decree has to be revived under O. XXI, r. 22, Civil Procedure Code, the objections of the judgment-debtor to the execution of the decree will be considered when notice under that rule is issued and comes for decision.

BANK OF MORVI, LIMITED v. R. P. WAGLE & CO. 43 Bom.L.R. 266.

—O. XXI, r. 48. See CIVIL PROCEDURE CODE, S. 60. 43 Bom.L.R. 758.

—O. XXI, r. 52—*Decree—Execution—Immoveable property—Custody of Court receiver—Mode of execution against property in custody of receiver—Practice and procedure.*

Order XXI, r. 52, of the Civil Procedure Code, 1908, is only a mode of attachment of property in the custody of the Court. It does not deal with the leave necessary to be obtained for proceeding under it. The rule is not limited so as to exclude immoveable property.

The words used in r. 52 are not permissive but are imperative for the judgment-creditor. The judgment-creditor has to apply for attaching the property in the hands of the receiver. He may, while making the application, put before the Court sufficient grounds to prevent the Court from making the ordinary order prescribed by the rule or limit the operation of such order to a named property or a named period. At the time of considering the judgment-creditor's application and making an order under the rule, the Court has jurisdiction to vary the terms and directions given to its officer.

The rule does not permit the judgment-creditor to proceed under O. XXI, r. 54, merely after he obtains leave to proceed to execute the

CIVIL PROCEDURE CODE, O. XXI, r. 52—  
(*Contd.*)

decree on the ground that the property is in possession of a Court officer.

CENTRAL BANK OF INDIA v. PRABHAKAR. 43 Bom.L.R. 995.

—O. XXI, r. 54. See CIVIL PROCEDURE CODE, S. 64. 43 Bom.L.R. 206.

—See CIVIL PROCEDURE CODE, O. XXI, r. 52. 43 Bom.L.R. 995.

—O. XXI, r. 57—*Decree—Execution—Attachment—Determination of attachment.*

On July 11, 1932, the defendant obtained a money decree under which the decretal amount was payable at any time within six months of its date. On August 9, 1932, while the decree was still unexecutable, the defendant applied for an order of attachment of the judgment-debtor's immoveable property, and obtained the order on August 31. Thereafter the Court passed an order directing the attached property to be sold and issued notice under O. XXI, r. 66, of the Civil Procedure Code, 1908. The process fee not having been paid, the Court dismissed the application, but allowed the attachment to continue. While the attachment was thus in force, the judgment-debtor sold a portion of the attached property to the plaintiff. The defendant having subsequently obtained an order for attachment and sale of the attached property including the property sold, the plaintiff filed a suit to obtain a declaration that the property sold to him was not liable to be attached and sold in execution of the decree:—

*Held*, decreeing the suit, (1) that the order of dismissal of defendant's application on the score of non-payment of process-fees as well as of non-prosecution should be deemed to be an order passed under O. XXI, r. 57, with the result that as soon as the application was dismissed the attachment came to an end;

(2) that there having been no review or appeal from the order of dismissal the order, though passed by the Court under a misapprehension, was still a binding order and should be taken to be an order under O. XXI, r. 57;

(3) that on the principle of constructive *res judicata*, which applied to execution proceedings, the order should be regarded as binding on the defendant in the second application;

(4) that therefore, in spite of the order of the Court continuing the attachment, there was no legal and valid attachment after the date of the order, and the plaintiff purchased the property free from any attachment;

(5) that the defendant should have applied to the executing Court and filed an application for an order of attachment even before the decree became executable, but he having allowed the dismissal of his application had to abide by the consequences of it.

VIJAYADAS HANUMANTAS v. SHEKHARAPPA. 43 Bom.L.R. 727.

—O. XXI, r. 58; Secs. 47, 146—*Execution—Property assigned by judgment-debtor—Attachment of property in execution of decree ob-*

CIVIL PROCEDURE CODE, O. XXI, r. 58—  
(Contd.)

*tained subsequent to assignment—Application by assignee under r. 58—Assignee undertaking under compromise petition to pay decretal amount by instalments—Sale of property in execution for non-payment—Application by assignee under r. 90 to set aside sale—Whether such application competent—Procedure in execution.*

A, being in debt, assigned his immovables to his brother, B, in 1923, by a deed, reserving only a maintenance allowance to himself. In 1928 an execution application was made in respect of a money decree passed in 1926 in favour of C against A. B was added to the application as a "judgment-debtor" although no judgment had ever been obtained by C against him. Part of the estate having been attached in execution of C's decree, B applied for releasing the properties from attachment both under O. XXI, r. 58, and s. 47 of the Civil Procedure Code, 1908, on the ground that he was no party to the decree and that there was no charge on the attached properties for the decretal debt. The trial Judge held that B was a representative of A within the meaning of s. 47 of the Code, and that by virtue of s. 146 the decree could be executed against him as representing A. He eventually dismissed both the applications. However, on the day of the Judge's order a compromise petition was filed in the Court, by which B undertook to pay C the sum due by way of an immediate cash payment and the balance by fixed annual instalments. The instalments not having been paid as agreed, C applied for execution, B again being cited as judgment-debtor. Part of the estate was again attached and then sold. A month after the sale B applied under O. XXI, r. 90, of the Civil Procedure Code, to have the sale set aside, alleging irregularities as to notice in connection with the sale. The trial Judge held that the sale was without jurisdiction because the compromise deed was unenforceable in execution against B in the absence of any decree against him. The High Court on appeal confirmed the sale and held that the trial Judge's decision in the first execution application that B was a representative of A, the judgment-debtor, concluded the case against B on the principle of *res judicata*. On appeal to the Privy Council:—

*Held*, confirming the sale, that the application of B under O. XXI, r. 90, of the Civil Procedure Code, was misconceived, since an application based on the allegation that the properties had been wrongfully sold in execution must be made under O. XXI, r. 58, of the Code, and not under O. XXI, r. 90, of the Code, which was concerned with irregularities in publishing or conducting the sale.

*Quare*. Whether an application under O. XXI, r. 58, of the Civil Procedure Code, 1908, made one month after the sale would be in time.

JAGAT NARAIN v. KHARTAR SAH.

43 Bom.L.R. 860 (P.C.).

CIVIL PROCEDURE CODE, O. XXI, r. 90.  
See CIVIL PROCEDURE CODE, O. XXI, r. 58.  
43 Bom.L.R. 860 (P.C.).

—O. XXI, r. 95. See CIVIL PROCEDURE CODE, S. 115.  
43 Bom.L.R. 480.

—O. XXII, r. 8—"Might maintain"—  
*Interpretation.*

The appellant was declared insolvent after he had filed an appeal against a money decree passed against him. The respondent applied for an order dismissing the appeal under O. XXII, r. 8, Civil Procedure Code, 1908, contending that by reason of the insolvency of the appellant the appeal abated:—

*Held*, that the words "might maintain" in O. XXII, r. 8, Civil Procedure Code, meant that the Official Assignee had the power or was entitled to maintain the appeal; and that as in the present case the Official Assignee could not maintain such an appeal, the appeal did not abate.

CHANDRAKANT DEVJI v. NAROTTAMDAS.

43 Bom.L.R. 644.

—O. XXII, r. 10—*Application in execution proceedings—Application to join party to dakhast—Whether application falls under O. XXII, r. 10—Whether second appeal lies from an order refusing such application.*

Order XXII, r. 10, of the Civil Procedure Code, 1908, applies to execution proceedings. An order made under that rule is appealable under the provisions of O. XLIII, r. 1, sub-cl. (1), but no second appeal lies from an order passed in appeal in virtue of s. 104, cl. (2), of the Civil Procedure Code.

KRISHNAJI v. BHIKCHAND. 43 Bom.L.R. 719.

—O. XXIII, r. 1—*Suit—Withdrawal—Permission to file fresh suit—Such permission terminates the suit—Procedure when permission asked for.*

Where the plaintiff, under O. XXIII, r. 1, of the Civil Procedure Code, 1908, simply wishes to withdraw from a suit, he can do so without asking for any permission from the Court. Where, however, he wishes to withdraw it with liberty to institute a fresh suit in respect of the same subject-matter, he should ask for permission from the Court, which could be given on such terms as it thinks fit. The permission relates not to the withdrawal from the suit but to the filing of another suit.

When once an order is made permitting the withdrawal of a suit on certain conditions, it is not open to the plaintiff to ask the Court to modify or annul those conditions, because the suit has already ended when the order is made.

In applying for withdrawal of a suit, the plaintiff should request the Court to acquaint him with the terms which it wishes to impose, before the final order is made. It is also open to the Court without any such request to indicate such terms to the plaintiff, and after hearing the plaintiff it may modify them or even allow him to withdraw his application for withdrawal and proceed with the suit. All

CIVIL PROCEDURE CODE, O. XXIII, r. 1—  
(Contd.)

this, however, must be done before the order of withdrawal is formally made.

JALJIBHAI v. BHIKHIBAI. 43 Bom.L.R. 646.

—Second Schedule, para. 20; Sec. 141—  
Award—Application to file award—Withdrawal  
of application without obtaining permission to  
file suit—Whether such withdrawal bars suit to  
enforce award—Application to file award and  
suit to enforce award whether amount to pro-  
ceedings in same subject-matter.

Defendant executed a promissory note in favour of the plaintiff on June 12, 1933. There was a reference to arbitration in 1935 without the intervention of Court and an award was made. The plaintiff made an application to the Court to file the award under para. 20 of the second schedule of the Civil Procedure Code, 1908. The application was registered as a suit. Subsequently he applied for permission to withdraw his application which was granted. He filed a fresh suit on October 28, 1936, against the defendant to enforce the award or in the alternative to recover the amount due on the promissory note. The defendant contended that the application to file the award was a suit under para. 20, second schedule, of the Civil Procedure Code, and as no permission to file a fresh suit was obtained from the Court when the application was withdrawn, the suit was barred under O. XXIII, r. 1:—

*Held*, that the plaintiff's failure to obtain the leave of the Court to bring a suit was not fatal to his suit;

that it was not material whether the application to file the award was to be regarded as a suit within the meaning of O. XXIII, r. 1, or not, because the rule was essentially a rule of procedure and was applicable under s. 141, Civil Procedure Code;

that if the word 'suit' in O. XXIII, r. 1, means an application to file an award, it must have that meaning wherever it occurs in that rule;

that O. XXIII, r. 1, could not be construed to mean that the withdrawal of the application to file the award without liberty reserved was a bar to the institution of the suit;

that, even if the withdrawal of the application to file the award without liberty to apply barred the suit, it would only be a suit on the same subject-matter, but the application to file the award and the suit to enforce the award were proceedings not in respect of the same subject-matter;

that the plaintiff's claim for relief on the promissory note apart from the award was not on the same subject-matter and could be enforced.

GANPAT v. VITHAL. 43 Bom.L.R. 976.

—O. XXXII, r. 7. See CIVIL PROCEDURE CODE, O. XXI, r. 2. 43 Bom.L.R. 1022.

—O. XXXII, r. 10. See LIMITATION ACT, S. 15. 43 Bom.L.R. 329.

—O. XXXIV. See DECREE, CHARGE. 43 Bom.L.R. 26 (F.B.).

CIVIL PROCEDURE CODE, O. XXXIV, r. 6  
—Personal decree—Mortgagee of leasehold—  
Whether privity of estate or privity of contract  
between such mortgagee and lessor.

In the case of mortgage of leasehold interest, as between the lessor and the mortgagee of the leasehold interest from the lessee, there is neither a privity of estate such as to render the latter liable for the burdens of the lease, nor is there a privity of contract between them in respect of the rent and lessee's covenants, irrespective of the fact that the mortgagee has entered into possession of the mortgaged property.

Where, therefore, the lease creates a charge on the lessee's interest in the leasehold property for payment of rent or other obligations and in pursuance of such charge the leasehold property is sold and the sale proceeds are not sufficient to satisfy the claim of the lessor, the lessor cannot apply for a personal decree against such a mortgagee for any deficit under O. XXXIV, r. 6, of the Civil Procedure Code, 1908.

JAGADAMBA LOAN COMPANY, LIMITED v. SHIBA PRASAD. 43 Bom.L.R. 789 (P.C.).

—O. XXXVIII, r. 10. See CIVIL PROCEDURE CODE, S. 64. 43 Bom.L.R. 206.

—O. XLI, r. 22. See COURT-FEES ACT, S. 7(iv)(f). 43 Bom.L.R. 475.

—O. XLIII, r. 1(1)—Appeal—Order.

Order XXII, r. 10, of the Civil Procedure Code, 1919, applies to execution proceedings. An order made under that rule is appealable under the provisions of O. XLIII, r. 1, sub-cl. (1), but no second appeal lies from an order passed in appeal in virtue of s. 104, cl. (2), of the Civil Procedure Code.

KRISHNAJI RAMCHANDRA v. BHIKHAND. 43 Bom.L.R. 719.

—O. XLVI, r. 1—"Not subject to appeal"  
—"Any such decree"—Interpretation—Sub-  
ordinate Judge—Reference to High Court.

The words "not subject to appeal" in O. XLVI, r. 1, of the Civil Procedure Code, 1908, mean that the law provides no appeal in any circumstances. They include a case in which it can be said that there might have been an appeal from the decree passed by the High Court, although it was extremely unlikely that there should have been one.

The words "any such decree" in the rule mean either (a) a decree in a suit where no appeal is provided against the decree, or (b) a decree in an appeal where no further appeal is provided.

CHHOTUBHAI BHIMBHAI v. BAI KASHI. 43 Bom.L.R. 733.

—SCH. II, P. 20. See CIVIL PROCEDURE CODE, S. 11. 43 Bom.L.R. 382 (P.C.).

—See CIVIL PROCEDURE CODE, O. XXIII, r. 1. 43 Bom.L.R. 976.

—SCH. III, P. 11—Execution proceedings  
—Mortgage—Collector's permission.

A deed of mortgage effected in the course of

CIVIL PROCEDURE CODE, SCH. III, P. 11—  
(*Contd.*)

execution proceedings before a Collector without his permission, as required by Sch. III, para. 11, of the Civil Procedure Code, 1908, is null and void.

NISAR AHMAD KHAN v. MOHAN.  
43 Bom.L.R. 465 (P.C.).

COMMON EMPLOYMENT—*Whether the doctrine applies to India.*

The basis of the doctrine of common employment is the implied contract by the servant to accept the risk of his fellow servants' negligence; and if that contract is to be implied, the servants must be engaged in common work, that is work which necessarily and naturally or in the normal course involves juxtaposition, local or causal, of the fellow employees, and exposure to the risk of the negligence of the one affecting the other. Difference in grade and responsibility does not exclude the doctrine so long as the nexus exists.

*Quere.* Whether the doctrine of common employment is part of the law of India.

Questions have been raised whether a doctrine so unsatisfactory, both as to its policy and as to its practical results ought to be followed at all or at any rate without qualifications by the Indian Courts as a part of the law of India, particularly when in England it has been qualified and largely abrogated by legislation which has no counterpart in India.

BROCKLEBANK, LTD. v. NOOR AHMDE.  
43 Bom.L.R. 450 (P.C.).

COMPANIES ACT (VII of 1913), S. 73—  
*Company—Name-board of company—Business premises or office of company—Place where name-board can be affixed.*

The words "outside the office or place where the business is carried on" in s. 73(a) of the Indian Companies Act, 1913, do not mean outside the premises. The section has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. The requirements of the section will be satisfied if a company affixes a board of the necessary conspicuousness and legibility outside the office room though it be inside the building.

Hence, where the office of a company is situated in a building within a compound, it is not necessary that the name of the company should be painted or affixed outside the compound as well as the building. It is sufficient for the requirements of s. 73(a) if the board of the company is affixed outside the office in the building.

EMPEROR v. BATLIWALA SONS & Co., LTD.  
43 Bom.L.R. 105.

CONSOLIDATION of criminal cases. See  
CRIMINAL PROCEDURE CODE, S. 234.

43 Bom.L.R. 110.

CONSTRUCTION OF STATUTES, absolute enactment.

An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory

CONSTRUCTION OF STATUTES—(*Contd.*)

enactment be obeyed or fulfilled substantially. It is sufficient if the plain object of the directory provision is carried out.

PUNJAB CO-OPERATIVE BANK, LD. v. COMMISSIONER OF INCOME-TAX, LAHORE.

43 Bom.L.R. 372 (P.C.).

—English law.

To construe an Indian Act in the light of cases decided under the English Act differently worded is much more likely to cause confusion than to render assistance. There is no justification for incorporating into the administration of the Indian Act difficulties which arise on the construction of the English Act.

BAI KOKILABAI v. KESHAVLAL.

43 Bom.L.R. 986 (F.B.).

—Injustice.

Where the language of a statute is sufficiently clear, the Court can only give effect to it, however inequitable or unjust the result of such a construction may seem to the Court to be. But if the Court can avoid construing a statute so as to cause what the Court regards as injustice, it would do so.

JAMIYATRAM v. UMIYASHANKAR.

43 Bom.L.R. 699.

CONTRACT, construction—*Literal and grammatical construction of two provisions lead to inconsistencies—One provision susceptible of possible construction different from its literal meaning—Possible construction removes inconsistency—Adoption of such construction—Court not to speculate as to reasons why particular language was used in contract.*

Where in a document there is an apparent inconsistency according to the literal construction of the words used, if by any other reasonably possible construction the apparent inconsistencies can be reconciled, that construction should be adopted.

It is not for a Court to speculate as to the reasons which may have dictated the employment of the language used in a contract.

A clause in an agreement contained two provisions which, if construed according to their literal and grammatical meaning, were inconsistent with each other. But of the two inconsistent provisions one was susceptible of a possible construction different from its literal meaning, while the other was not; and if the possible construction was applied all inconsistency disappeared:—

*Held*, on the true construction of the clause, that the possible construction should be adopted.

RANEEGUNJ COAL ASSOCIATION, LTD. v. TATA IRON AND STEEL CO., LTD.

43 Bom.L.R. 403 (P.C.).

—Guarantee—*Liability of guarantor—Construction of guarantee—Proof of debt against principal debtor—Nature of proof.*

A guarantor is entitled to have the debt of the principal debtor proved as against him, before he is made liable for the debt. The fact that the principal debtor has admitted the debt, or that a judgment or award has

## CONTRACT—(Contd.)

been given against him for the debt, does not bind the guarantor, unless he was a party to the admission of the principal debtor, or was party to the proceedings in which the judgment or the award was given.

The liability of a guarantor must depend on the true construction of the guarantee which he has given. If the guarantor merely guarantees payment of the debt of the principal debtor, then he is entitled to require the debt to be proved as against him in accordance with the ordinary law. If, on the other hand, the principal debtor has agreed that as against him the debt shall be proved in a particular way, and the guarantor has guaranteed the debt so to be proved, then there can be no doubt that the guarantor would be bound by the particular method of proof agreed to by the principal debtor and accepted by himself. *SREE MEENAKSHI MILLS, LD. v. RATILAL TRIBHUVANDAS.* 43 Bom.L.R. 53.

CONTRACT ACT (IX of 1872), S. 23. See CIVIL PROCEDURE CODE, S. 60.

43 Bom.L.R. 758.

—S. 65—*Agreement discovered to be void.*

A deed of mortgage effected in the course of execution proceedings before a Collector without his permission, as required by Sch. III, para. 11, of the Civil Procedure Code, 1908, is null and void. Such a deed falls within the words "discovered to be void" in s. 65 of the Indian Contract Act, 1872.

*NISAR AHMAD KHAN v. MOHAN.*

43 Bom.L.R. 465 (P.C.).

—*Farming contract—Right to collect taxes.*

A village panchayat is entitled to recover the money due to it under a contract farming out its right to collect taxes from persons occupying village sites, under s. 65 of the Indian Contract Act, 1872.

*GOVIND v. YESHWANT.*

43 Bom.L.R. 800.

—S. 69. See TRANSFER OF PROPERTY ACT, S. 92.

43 Bom.L.R. 225.

CONTRADICTIONARY STATEMENTS, perjury arising out of. See CRIMINAL PROCEDURE CODE, S. 476.

43 Bom.L.R. 864.

COSTS, attorney—*Work done in mofussil.*

The Taxing Master of the High Court has power to tax the bill of costs of an attorney on the original side scale in relation to work done in the mofussil.

*CHITNIS & KANGA v. WAMANRAO.*

43 Bom.L.R. 76.

—*Rules of the High Court of Bombay, 1936, rr. 563 and 567, and items 14, 40 and 41 in the Table of Fees to be taken by Attorneys—Whether fees for instructions for brief on chamber summons adjourned into Court are allowable—"Matter", meaning of, in r. 563—"Final trial"—Meaning of, in item 14—Discretion of Taxing Master as to quantum of costs when interfered with by Court—Length of time occupied in hearing matter—Whether it can be taken into account in assessing fee for instructions for brief—Mode of reckoning fees for hours of attendance—Whether mid-day adjournment to be reckoned as attendance in Court—Refreshers in chamber summons adjourned into Court—Discretion of Taxing Master to allow additional brief fee—Taxing Master not asked to increase brief fee—Whether Court has power to do so.*

## COSTS—(Contd.)

*tions for brief—Mode of reckoning fees for hours of attendance—Whether mid-day adjournment to be reckoned as attendance in Court—Refreshers in chamber summons adjourned into Court—Discretion of Taxing Master to allow additional brief fee—Taxing Master not asked to increase brief fee—Whether Court has power to do so.*

In the Rules of the High Court of Bombay, 1936, item 14 of the "Table of Fees to be taken by the Attorneys", which relates to "instructions for brief", is not confined either to suits or to matters in Court. The wording of the item does not draw a distinction between chamber matters and matters heard in Court. The essential thing is that there should be a final trial of a suit or matter. The words "final trial" are not confined to a final trial of a suit. The Taxing Master has, therefore, jurisdiction to allow a sum as an item of instructions for brief on a chamber summons which originated in chambers but was adjourned to be heard in Court.

The Court normally does not interfere with the discretion of the Taxing Master as to the quantum of costs allowed, unless he has misdirected himself or not properly exercised the discretion vested in him. If the Taxing Master takes into account merely the length of time occupied by the hearing in assessing fee for "instructions for brief", or attaches undue importance to it, he misdirects himself. The words "instructions for brief" do not mean the same thing as "instructions for counsel." Instructions given orally to counsel in the course of hearing cannot be included in "instructions for brief."

It is open to the Taxing Master in his discretion to allow an additional brief fee, if he thinks that for some reason or another the solicitor has not been able to calculate and has not, in fact, correctly calculated, the length of time the case was likely to last.

On a review of taxation no increase of charges are allowed over those charged in a bill of costs.

Where the Taxing Master has not been asked to allow additional brief fee, having regard to the unexpected length of time the case has taken, and where no application is made to the chamber Judge to have the matter sent down to the Taxing Master to consider whether an extra allowance should not be made, the Appeal Court will not increase the fee or ask the Taxing Master to do so.

*SHAMDASANI v. CENTRAL BANK OF INDIA, LTD.*

43 Bom.L.R. 655.

—*Matrimonial suit—Wife.*

Observations as to the principles upon which costs are awarded to a wife in matrimonial suits.

*ROZARIO v. ROZARIO.*

43 Bom.L.R. 830.

—*Security for—Appellant—Poverty.*

A Court of Appeal will not direct an appellant to give further security for the costs of the appeal merely on the ground of his poverty.

*CHANDRAKANT DEVJI v. NAROTTAMPAS.*

43 Bom.L.R. 644.

**COURT-FEES ACT (VII of 1870), S. 7(iv)(f)**  
*Suit for account—Valuation of claim of arbitrary figure for purposes of court-fees—Decree for specific amount—Appeal from decree—Valuation of claims in appeal at decretal amount—Rejection of appeal for non-payment of additional court-fees—Preliminary objection—Payment of costs to respondent on preliminary objection—Scale of costs—Bombay High Court Rules, Appellate Side, r. 130—Cross-objections fail on such rejection of appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 22.*

Where a suit for account, in which the claim is valued at an arbitrary figure, results in a decree for a sum of money, the party appealing from the decree should value the claim in appeal at the amount of the decree, and not at the arbitrary figure, for purposes of paying the court-fees.

Where on a preliminary objection taken at the hearing of an appeal, the Court orders payment of additional court-fees on the memorandum of appeal, and the appeal is rejected for non-payment of such fees, the respondent is entitled to payment of his costs of the hearing of the preliminary objection. Such costs should be taxed at Rs. 30 under r. 130 of the Bombay High Court, Appellate Side, Rules.

Where a memorandum of appeal is rejected for non-payment of court-fees, the cross-objections filed in the appeal fail with the appeal.  
**KASHIRAM v. RANGLAL.** 43 Bom.L.R. 475.

#### **CRIMINAL OFFENCE, imputation of.**

An imputation of a criminal offence in order to be actionable *per se* must be a distinct charge and must not be a mere statement of suspicion. It may be made in so many words, or it may be made in words from which the charge could be inferred, but the inference must be clear and unequivocal.

**MITHA v. NUSSERWANJI.** 43 Bom.L.R. 631.

**CRIMINAL PROCEDURE CODE (Act V of 1898), S. 1(2)—Indian Evidence Act (I of 1872), Sec. 27—Statement made by accused after arrest to police-officer leading to discovery of fact—Whether s. 162 of Criminal Procedure Code a bar to admissibility of such statement—“Specific provision to the contrary”, meaning of.**

Information leading to the discovery of a fact made to the police and admissible under s. 27 of the Indian Evidence Act, 1872, is not rendered inadmissible under s. 162 of the Criminal Procedure Code, 1898.

The words “specific provision to the contrary” in s. 1(2) of the Criminal Procedure Code mean a specific provision that the Code is to override the special law, and s. 162 of the Criminal Procedure Code does not contain a specific provision that s. 27 of the Indian Evidence Act is not to prevail over it.  
**EMPEROR v. BIRAM SARDAR.** 43 Bom.L.R. 157.

—S. 94—*Summons to produce books of account—Inspection of such books by prosecution—Power of Court to control inspection.*

When an application is made to a Court, or to a police-officer in the mofussil, under s. 94 of the Criminal Procedure Code, 1898, the Court is bound to consider whether there is a

#### **CRIMINAL PROCEDURE CODE, S. 94—(Contd.)**

prima facie case for supposing that the documents are relevant, i.e. whether books of a particular type are likely to have a bearing on the case. If the Court thinks they are, then it can order production. But, such an order for production does not involve an obligation on the Court to give inspection of all the books produced to the complainant, though the Court has power to order such inspection. The Court should consider that question at a later stage of the proceeding, either at the trial or inquiry or on a special application, at which it could hear the accused as well as the complainant, and it should order inspection of only those books which the complainant satisfies it are really relevant.

Judgment of Broomfield and N. J. Wadia JJ., on the point in *Central Bank of India, Limited v. Shamdasani* (39 Bom. L. R. 1187), overruled.

**HUSSENBHOY v. RASHID.**

43 Bom.L.R. 523 (F.B.).

—S. 162—*Information leading to discovery of fact given to police.*

Information leading to the discovery of a fact made to the police and admissible under s. 27 of the Indian Evidence Act, 1872, is not rendered inadmissible under s. 162 of the Criminal Procedure Code, 1898.

The words “specific provision to the contrary” in s. 1(2) of the Criminal Procedure Code mean a specific provision that the Code is to override the special law, and s. 162 of the Criminal Procedure Code does not contain a specific provision that s. 27 of the Indian Evidence Act is not to prevail over it.

**EMPEROR v. BIRAM SARDAR.** 43 Bom.L.R. 157.

—S. 164. *See CRIMINAL PROCEDURE CODE, S. 476.*

43 Bom.L.R. 864.

—S. 195(b)—*Complaint, lodging of, by Magistrate—Taking cognizance of case by Magistrate—Indian Penal Code (Act XLV of 1860), Secs. 211, 420.*

The applicant made a complaint to the police against the opponent for an offence under s. 420 of the Indian Penal Code, 1860, on which the police started investigation, arrested the opponent, and released him on bail. Subsequently, the police applied to a Magistrate to have the bail enlarged, which was done. After further investigation into the matter the police reported to the Magistrate that no offence was disclosed against the opponent, whereupon the Magistrate discharged the opponent and cancelled his bail-bond. The opponent then filed a case against the applicant for an offence under s. 211 of the Indian Penal Code:—

*Held*, that in doing what he had done the Magistrate had taken cognizance of the case under s. 420 of the Indian Penal Code, and that, therefore, under the provisions of s. 195 (b) of the Criminal Procedure Code, 1898, it was that Magistrate alone who could lodge the complaint for an offence punishable under s. 211 of the Indian Penal Code.

**BOYWALLA v. SORAB.** 43 Bom.L.R. 529.

CRIMINAL PROCEDURE CODE, S. 234—*Joinder of charges—Irregularity—Consent of pleader—Practice—Consolidation of criminal cases.*

Criminal cases cannot like civil suits be consolidated and tried together on the same evidence except within the limits as to joinder of charges laid down in the Criminal Procedure Code. Such illegality is not cured by the fact that the accused's pleader has consented to the procedure adopted.

EMPEROR *v.* CHAMPAKLAL. 43 Bom.L.R. 110.

—S. 289—*Trial by jury—No evidence against accused—Direction by Judge to jury—Acquittal of accused.*

In a case tried by a jury if the Judge comes to the conclusion that there is no evidence to go to the jury, it is the duty of the Judge to direct the jury that in law they must acquit.

It is the function of the jury to determine whether the evidence is true, and if the Judge thinks that the prosecution evidence, if true, will lead to a conviction, then he is bound to leave the case to the jury. He may think that the prosecution story is inherently improbable, that the evidence is discrepant, and that it is of a class which is generally unreliable; but if he thinks that though weak the evidence if true will justify a conviction, he must leave the case to the jury, cautioning them about the weak points in the evidence.

If, however, the Judge, after the prosecution case is closed, comes to the conclusion that, assuming that the jury believe every word of the prosecution evidence, nevertheless they will not be justified in convicting, then he is bound in law to say so and to direct the jury that in law they must bring in a verdict of not guilty, and he ought not in such a case to leave the matter to the jury.

EMPEROR *v.* TOKARSI NARSI.

43 Bom.L.R. 238 (F.B.).

—*Trial by jury—No evidence against accused—Duty of Judge—Withdrawal of case from jury.*

Section 289 of the Criminal Procedure Code, 1898, provides that if the Court considers that there is no evidence that the accused committed the offence, it may, in a case tried by a jury, direct the jury to return a verdict of not guilty. It confers in terms a discretion on the Judge—a discretion which must be exercised judicially. Where the Judge is satisfied that there is no evidence to go to the jury, he must in his discretion withdraw the case from the jury, or, in other words, direct them to return a verdict of not guilty. The question whether there is any evidence to go before the jury is a question of law.

If the Judge is of opinion that the evidence led for the prosecution is very weak, that there are discrepancies in it, that it is of a type usually found to be unreliable, and that the story is inherently improbable, he is bound to bring such defects to the attention of the jury.

Where, however, the evidence is such that if it is believed by the jury, it must lead to a conviction, the Judge is bound to leave the question to the jury, because it is for them to

R. 133.

CRIMINAL PROCEDURE CODE, S. 289—*(Contd.)*

decide whether the evidence is to be believed or not. If the Judge comes to the conclusion that, assuming that the jury believes the whole of the evidence placed before them, in law they cannot convict the accused, then he is bound to hold that there is no evidence to be placed before the jury, and he is bound to direct them in law to return a verdict of not guilty.

EMPEROR *v.* DAWOOD HASHAM.

43 Bom.L.R. 245 (F.B.).

—S. 342. See CIRCUMSTANTIAL EVIDENCE. 43 Bom. L.R. 144.

—S. 386—*Fine—Recovery—Sale of immoveable property.*

Section 70 of the Indian Penal Code, 1860, is not controlled by s. 386, sub-ss. (1) (b) and (3), of the Criminal Procedure Code, 1898. Section 386 of the Criminal Procedure Code deals only with procedure for levying fine imposed under the Indian Penal Code.

The warrant issued by a Court passing a sentence, under s. 386, Criminal Procedure Code, to recover fine from an offender is to be deemed as a decree for certain purposes only, and is executed according to the mode laid down in the Civil Procedure Code, 1908, but s. 48, Civil Procedure Code, does not apply to such a warrant.

COLLECTOR OF BROACH *v.* OCCHAVLAL.

43 Bom.L.R. 122.

—S. 435—*High Court—Revision—Police Commissioner—Extermment order—Police Act (City), (Bom. IV of 1902), Sec. 27.*

An application for revision of an externment order under s. 27 of the City of Bombay Police Act, 1902, does not lie direct to the High Court.

EMPEROR *v.* ALLADITTA. 43 Bom.L.R. 702.

—S. 439—*Revision—Private party—Order of acquittal.*

The High Court will not as a rule interfere with orders of acquittal in revision at the instance of a private party, except where such interference is urgently demanded in the interest of justice. Cases of defamation, however, form an exception to the above general rule, as in such cases, which from their very nature affect private parties and not the public, Government would usually be unwilling to interfere.

VINAYAK *v.* SHANTARAM. 43 Bom.L.R. 737.

—S. 476—*Sanction to prosecute—Statement made under s. 164—Contrary statement made before committing Magistrate—Alternative charge—Magistrate should be satisfied that the latter statement was untrue.*

For the purposes of s. 476 of the Criminal Procedure Code, 1898, before the Court can sanction a prosecution of a person for perjury for making a statement under s. 164 of the Code and a contrary statement subsequently before the committing Magistrate,

CRIMINAL PROCEDURE CODE, S. 476—  
(Contd.)

it is absolutely essential that the Court should be satisfied that the latter statement was untrue. There can be no prosecution if the former statement is untrue; and *a fortiori* there can be no prosecution if the Court is not in a position to find out which of the two statements is false.

EMPEROR *v.* NINGAPPA. 43 Bom.L.R. 864.

—S. 488—*Maintenance—Wife and husband living apart—Children living with wife—Refusal by husband to maintain children when living with wife—Whether Magistrate competent to make order for maintenance of children—Practice.*

The object of s. 488 of the Criminal Procedure Code, 1898, is to avoid vagrancy by providing that a Magistrate may up to a limited extent see that a wife and children are maintained by a husband or father able to maintain them.

Where a Magistrate finds that the husband and wife are living apart and the children are living with the wife and the father refuses or neglects to maintain the children where they are living, the Magistrate has jurisdiction to make an order for the maintenance of the children under s. 488 of the Criminal Procedure Code, 1898. If the father's case is that the children ought not to be living with the wife, but ought to be living with him or under his direction, then he must take proper proceedings in a civil Court to get the children removed from the custody of the mother, and although such proceedings may sometimes involve expense which a father is unable or unwilling to bear, that cannot deprive the Magistrate of the right to exercise his powers under s. 488. If the civil Court makes an order under which the children cease to reside with the mother, and if the father is then willing to provide for their maintenance, he can then apply to the Magistrate, under s. 489 of the Criminal Procedure Code, to modify his previous order.

EBRAHIM *v.* KHURSHEDBAI. 43 Bom.L.R. 515.

—S. 489. See CRIMINAL PROCEDURE CODE, S. 488. 43 Bom.L.R. 515.

—S. 516A—*Order for custody of property—Commission of offence—Property produced before Court—Pendency of inquiry or trial—Ex parte orders for custody of property.*

On a complaint for an offence of criminal breach of trust, the Magistrate referred it to police for investigation under s. 202 of the Criminal Procedure Code, 1898, and, on an application made by the complainant, passed an *ex parte* order under s. 516-A of the Code directing possession of the property to be handed over to the complainant on his executing a surety bond. Shortly afterwards, the accused applied to have possession of the property, but the Magistrate did not pass any order and awaited the police report. Upon receipt of the report the Magistrate ordered process to issue against the accused, and later refused to disturb the order, that he had made entrusting the proper-

CRIMINAL PROCEDURE CODE, S. 516A—  
(Contd.)

ty to the complainant. The accused having applied in revision against the order:—

*Held*, setting aside the order, (1) that it was not justified under s. 516A of the Code, inasmuch as the Magistrate having referred the complaint to the police for investigation, it could hardly be said that an offence appeared to the Magistrate to have been committed at the date of the order;

(2) that the order went outside the scope of the section, for the power of the Magistrate to make an order was limited to property which was produced before him;

(3) that the order was bad for the reason that at its date there was no inquiry or trial pending before the Magistrate.

Circumstances of urgency may necessitate the passing of *ex parte* orders under s. 516A, but orders passed in that way can only be interim orders subject to vacation, variation or confirmation, after hearing the parties concerned.

RAMCHESTSING *v.* DEOJI. 43 Bom.L.R. 967.

—S. 517. See DEFENCE OF INDIA RULES, r. 90B. 43 Bom.L.R. 872.

—S. 526—*Transfer of case—Sanction of prosecution by District Magistrate—Trial off case by City Magistrate.*

A High Court will not transfer a case from the Court of a Magistrate to the Court of Sessions merely because the Magistrate trying the case is subordinate to the District Magistrate who had sanctioned the prosecution. If, however, there are reasons for thinking that in fact a particular Magistrate was likely to be influenced by the opinion of the District Magistrate, the High Court will not hesitate to transfer the case to the Sessions Court.

EMPEROR *v.* SORABJI. 43 Bom.L.R. 518.

—S. 548—*Copies of proceedings—Right of party to inspect whole record—Right to take copies of any part of such record—High Court Criminal Circular No. 160A—"Papers exhibited in the proceedings," interpretation of—Indian Evidence Act (I of 1872), Sec. 76.*

There is a common law right of a person to take inspection of a document in which that person is interested, for the protection of such interest.

Except as controlled by any rule made by the High Court under s. 554 of the Criminal Procedure Code, 1898, a Magistrate or a Judge of a subordinate Court has a discretion to allow inspection of the record of his Court. Such discretion must be exercised judicially. In exercising his discretion the Magistrate or the Judge will be bound to have regard to the terms of s. 548, and it will generally be improper for him to refuse inspection of any document of which a party is entitled to a certified copy under the section.

The right to a certified copy pre-supposes a right of inspection, because a party cannot be expected to make up his mind whether he wants to have a copy of a document, if he is



**CRIMINAL PROCEDURE CODE, S. 548—**  
(*Contd.*)

not entitled in the first place to read it, and see what it is about. Therefore, under s. 548 of the Code a party has *prima facie* an implied right to ask the presiding Magistrate or Judge to allow him inspection of the record referred to in the section.

Whatever meaning be assigned to the expression "papers exhibited in the proceedings" used in Criminal Circular No. 160A issued by the High Court under s. 554 of the Criminal Procedure Code, it does not deprive the Court of the right which it previously enjoyed of granting inspection of the whole record to a party properly entitled thereto.  
**SHAMDASANI v. SIR HUGH COCKE.**

43 Bom.L.R. 961.

**CROSS-EXAMINATION**, tendering witnesses for, practice as to. See **EVIDENCE ACT, S. 138.**

43 Bom.L.R. 946.

**CROSS-OBJECTIONS**, *failure of.*

Where a memorandum of appeal is rejected for non-payment of court-fees the cross-objections filed in the appeal fail with the appeal.  
**KASHIRAM v. RANGLAL.**

43 Bom.L.R. 475.

**CUSTOM**, antiquity of—*Mahomedan—Succession—Customary law applicable to Tulla clan in the Punjab—Non-ancestral estate—Married daughters whether take precedence over collaterals of tenth degree.*

Under the customary law applicable to the Mahomedan Tulla clan resident in the Shahpur district in the Punjab, collaterals of the tenth degree of a deceased landowner do not take precedence over his married daughters in succession to his non-ancestral estate.

The English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" does not apply to conditions in India. A custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.

**SUBHANI v. NAWAB.**

43 Bom.L.R. 432 (P.C.).

**DEATH** of plaintiff in partnership suit, one of the defendants can be transposed as plaintiff. See **CIVIL PROCEDURE CODE, O. I, r. 10.**

43 Bom.L.R. 993.

**DECREE**, assignment of, execution by one of the assignees. See **CIVIL PROCEDURE CODE, O. XXI, r. 15.**

43 Bom.L.R. 883.

**DECREE** by a partner, for a sum less than decretal amount. See **PARTNERSHIP ACT, S. 19(2)(c).**

43 Bom.L.R. 888.

—*Charge created by decree—Failure to pay instalments under decree—Sale of charged property—Balance remaining due after such sale—Execution of decree—Attachment and sale of judgment-debtor's other property—Personal decree not necessary—Civil Procedure Code (Act V of 1908), O. XXXIV.*

A money decree passed by consent directed the defendant to pay to the plaintiff the amount of Rs. 9,000 by yearly instalments of Rs. 2,000 each, and made the whole amount payable on default of payment of two instalments. It further gave a charge in favour of the plaintiff for the decretal amount on certain shares belonging to the defendant, and provided: "If defendant fails to pay money in time, the same should be recovered by sale of the said shares." The defendant having failed to pay two instalments on their due dates, the plaintiff had the shares sold and realised Rs. 4,350. The plaintiff next applied to execute the decree for the balance by attachment and sale of a house belonging to the defendant. The defendant contended, first, that the plaintiff having taken a charge on specific shares, had abandoned his right to recover the money by any other means, and alternatively, that even if he had such right, he should first of all proceed to get a personal decree for payment:—

*Held*, in construing the decree, that the plaintiff having failed to realise the whole amount of his debt by sale of the charged shares could proceed under the decree to attach any other property of the judgment-debtor which might be available.

**GURAPPA v. AMARANGJI.**

43 Bom. L.R. 26 (F.B.).

**DEED OF SEPARATION.** See **SEPARATION DEED.**

**DEFAMATION**, libel by newspaper—*Publication of disparaging statement in newspaper regarding profession and work of a person—Criticism by journalist—Criticism must be fair—Publication of matter of public interest—How far privileged—Imputation of criminal offence—Distinct charge of offence necessary—Mere suspicion not sufficient.*

A statement which, being published of another in the way of his lawful trade, business, calling, or office, conveys a reflection on him calculated to disparage or injure him therein, is a defamatory statement, even though it may not be calculated to hold him up to hatred, contempt, or ridicule.

To publish in a newspaper of a woman, who is an instructress in physical culture and dancing, and who also runs an industrial institution for poor Parsi girls, that she is unfit to carry on her profession or work, and that by carrying it on she would be in a position to ruin the future of the girls taking their training in her classes, is a gross libel.

Newspapers are subject to the same rules as other critics, and have no special right or privilege, and in spite of the latitude allowed

## DEFAMATION—(Contd.)

to them, they have no special right to make unfair comments, or to make imputations upon a person's character, or imputations upon or in respect of a person's profession or calling.

The range of a Journalist's criticisms or comments is as wide as that of any other subject, and no wider.

Even if in a sense newspapers owe a duty to their readers to publish any and every item of news that may interest them, this is not such a duty as makes every communication in the paper relating to a matter of public interest a privileged one.

Any person, whether he is a private individual or a public journalist, has a right to hold any views he pleases on any subject of public interest and to express the same. It is immaterial whether the opinion or the comment is correct or not correct, whether it is just or unjust, or whether it is couched in language which may not err on the side of moderation. What is material and important is that the comment must not go beyond the limits which the law calls "fair."

An imputation of a criminal offence in order to be actionable *per se* must be a distinct charge and must not be a mere statement of suspicion. It may be made in so many words, or it may be made in words from which the charge could be inferred, but the inference must be clear and unequivocal.

MITHA v. NUSSERWANJI. 43 Bom.L.R. 631.

DEFENCE OF INDIA ACT (XXXV of 1939), S. 3. See DEFENCE OF INDIA RULES, r. 90B.

43 Bom.L.R. 872.

DEFENCE OF INDIA RULES, 1939, R. 6(5) —Sentence—Gravity of offence to be taken into consideration in awarding sentence—Practice.

Offences under the Defence of India Rules, 1939, r. 6, differ very much in their gravity and they should not be dealt with by any rule-of-thumb sentence. If there is any reason for supposing that a man has entered a prohibited area with a view to obtaining information which might be useful to an enemy, he would deserve a severe sentence. Similarly if a man has entered a prohibited area knowing full well that it is prohibited, having climbed over a fence or eluded a sentry or done something of that sort, he would deserve a more severe sentence; but a man who has entered a prohibited area without appreciating that it is such an area should not be dealt with so severely.

EMPEROR v. JOSEPH ABDULLAH.

43 Bom.L.R. 839.

—R. 90B—Defence of India Act (XXXV of 1939), Sec. 3—Criminal Procedure Code (Act V of 1898), Sec. 517—"Order," meaning of—Search of traveller—Money found on his person—Disposal of such money—Conviction of traveller.

The accused, a date merchant and an inhabitant of Kuwait, a port in the Persian Gulf, sold dates in Aden, for which he got a draft on a bank in Bombay for Rs. 8,956. He came

## DEFENCE OF INDIA RULES, R. 90B—(Contd.)

to Bombay and cashed the draft. While boarding a steamer bound for the Persian Gulf but which was to stay for a day at Karachi, the accused, who did not know English or any Indian language, was searched by a Preventive Officer and a sum of Rs. 8,900 in currency notes was found on his person. On these facts the accused was charged and convicted under r. 90B(7) of the Defence of India Rules, 1939, for contravening the provisions of r. 90B(3) (a) and the Magistrate on conviction ordered the sum of Rs. 8,900 "to be confiscated and held subject to the orders of the Government of India." On appeal:—

*Held*, (1) that the conviction of the accused was improper, for it was a condition precedent to liability under sub-r. (3) (a) of r. 90B, that the Officer of Customs should "order" a traveller to declare with full details the money and gold which he had with him, and there was no evidence of such a request, much less of an order;

(2) that the Customs Officer was entitled only to seize the currency notes in excess of Rs. 1,000, which amount, under the order made by the Reserve Bank of India under sub-r. (2) of r. 90B, the accused could take or send out of British India;

(3) that as by virtue of s. 3 of the Defence of India Act, 1939, r. 90B(6) prevailed over s. 517 of the Criminal Procedure Code, 1898, the balance of the money, viz., Rs. 7,900, was properly seized by the customs authority and under that sub-rule became subject to the orders of the Government of India; and that that sum never became subject to the jurisdiction of the Court, either of the trying Magistrate or of the High Court on appeal, to make any order as to the disposal of that sum.

EMPEROR v. GULAMALLI HUSAIN.

43 Bom. L.R. 872.

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII of 1879), S. 2—Suit for redemption—Plaintiff not agriculturist at date of suit—Predecessor of plaintiff an agriculturist at date of transaction—Suit under s. 10A whether competent—Status of agriculturist, how determined.

A plaintiff who invokes the Court's jurisdiction under s. 10A of the Dekkhan Agriculturists' Relief Act, 1879, must be an agriculturist within the meaning of s. 2 of the Act at the date when the suit is instituted.

In order to claim the status of an agriculturist the plaintiff must prove that he ordinarily engages personally in agricultural labour, that is, he is regularly and habitually cultivating his fields. Mere initiation into the ways of husbandry is not enough.

GANGADHAR v. DATTATRAYA. 43 Bom.L.R. 341.

—S. 10A.

In a suit for redemption under the Dekkhan Agriculturists' Relief Act, 1879, it is necessary for the plaintiff when claiming the benefit of s. 10A of the Act to prove that he was an agriculturist at the date of the suit and not merely that the person through whom he

**DEKKHAN AGRICULTURISTS' RELIEF ACT, S. 10A—(Contd.)**

claims was an agriculturist at the date of the transaction.

GANGADHAR v. DATTATRAYA. 43 Bom.L.R. 341.

—S. 22—Decree—Execution—Immoveable property—Attachment and sale—Status of agriculturist—When can such status be pleaded—Civil Procedure Code (Act V of 1908), Sec. 51.

Under s. 22 of the Dekkhan Agriculturists' Relief Act, 1879, in cases where there is not a single order for attachment and sale in execution of a decree, but there is an order for attachment alone intended to be followed by an order for sale, it is open to the judgment-debtor to set up his status of an agriculturist both when an order for attachment is sought, and also subsequently on the application for an order for sale.

The expression "belonging to", used in the section, not being a term of art refers to the beneficial title, and the question which has to be determined under the section is whether at the critical moment the party to whom the property belongs beneficially is an agriculturist. VISHVANATH v. BALARAM. 43 Bom.L.R. 325.

**DISCIPLINARY JURISDICTION**, as to solicitor—Letters Patent of Bombay High Court, 1865, cl. 10—Attorney—Scandalous notices under Civil Procedure Code (Act V of 1908), Sec. 80, sent to Judge of subordinate Court—Contempt of Court—Power of High Court to remove or suspend practising attorney—Reasonable cause for suspension—"Reasonable cause" meaning of—"Misconduct" meaning of—"Moral delinquency in private character, whether punishable"—Bar Councils Act (XXXVIII of 1926), Sec. 10.

Under cl. 10 of the Letters Patent, 1865, the High Court is empowered to remove or suspend from practice an advocate or attorney on "reasonable cause". A wide discretion is given to the High Court in regard to the exercise of disciplinary jurisdiction by the use of the words "reasonable cause".

"Reasonable cause" means professional or other misconduct under s. 10 of the Bar Councils Act, 1926. "Misconduct" is a wide expression and it is not necessary that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or is likely to hamper or embarrass the administration of justice by the High Court, or any of the Courts subordinate thereto, amounts to "misconduct".

The High Court has power to remove an advocate or attorney if he is unfit to be entrusted with a professional status and character. If an attorney is found guilty of moral delinquency in his private character, he is liable to be struck off the roll.

An attorney of the High Court sent two notices, under s. 80 of the Civil Procedure Code, 1908, to a Judge of the Small Cause Court, Bombay, alleging that the Judge had acted with prejudice, bias, and malice, in the course of his judicial duties, that he decided a case in which the attorney figured as a witness not accord-

**DISCIPLINARY JURISDICTION—(Contd.)**

ing to his own convictions but to please somebody else, and that the remarks made by him in respect of the evidence of the attorney were false, unjustified, malicious and irrelevant, and that in passing those remarks he did not act honestly, judicially, or in good faith. On a petition presented by the Advocate General for taking disciplinary action against the attorney:—

Held, (1) that the fact that the allegations were contained in notices under s. 80, Civil Procedure Code, 1908, did not prevent them from being contempt of Court;

(2) that the Court had to consider the conduct of the attorney as it affected his position as an attorney and his relations to the Court; and

(3) that the conduct of the attorney in writing the notices to the Judge amounted to a reasonable cause for taking disciplinary action against him under cl. 10 of the Letters Patent, 1865.

In re TULSIDAS KARANI. 43 Bom.L.R. 250.

**DISTRESS—Suit to recover damages for abuse of legal process—Essentials for such suit—Termination of proceedings in plaintiff's favour—Presidency Small Cause Courts Act (XV of 1882), Secs. 53, 60—Distress warrant—Distraint of tenant's property—Release of distraint on payment of rent—Termination of proceedings, not in tenant's favour.**

To succeed in an action to recover damages for the abuse of civil proceedings e.g. the wrongful issue of a distress warrant, the plaintiff has to allege and prove that the defendant acted without reasonable and probable cause and maliciously. In certain classes of cases the plaintiff has also to prove that the proceedings have come to a proper or legal end, that is, terminated in his favour. This is not necessary if from the nature of the proceedings they are incapable of so terminating.

Hence where a landlord distrains property belonging to his tenant for non-payment of rent due under a distress warrant duly issued under the provisions of the Presidency Small Cause Courts Act, 1882, and afterwards releases the distrained property on payment of the rent due, but the tenant has taken no steps to have the warrant discharged by the Court from which it issued, the proceedings cannot be regarded as having terminated in his favour so as to sustain an action for damages against the landlord.

Under s. 53 of the Presidency Small Cause Courts Act, 1882, it is competent to the landlord to apply for the issue of a distress warrant even if the rent in arrears is for one month only.

An application to discharge or suspend a distress warrant, under s. 60 of the Act, is generally made on the ground, (1) that the debtor is not justly indebted for the rent claimed from him, or (2) that the rent claimed is excessive, or (3) that it has not become due or payable, or (4) that it is not due and payable for the period for which it is claimed.

There can be no cause of action in respect of the doing of a legal act even if it is done

**DISTRESS—(Contd.)**

with malice and without reasonable and probable cause.

NASIRUDDIN *v.* UMAJI ADAM & Co.

43 Bom.L.R. 546.

**DIVORCE—Pakhali caste—Custom.**

The custom of granting divorce exists among Hindus of the Pakhali caste of Ahmedabad, and a divorce obtained according to it would not be contrary to Hindu law if the party against whom the divorce is sought has given his or her consent to the divorce in the presence of the caste panch.

JINA MAGAN *v.* BAI JETHI. 43 Bom.L.R. 651.

**ELECTRICITY ACT (IX of 1910), S. 2(n).**  
See **ELECTRICITY RULES, r. 48.** 43 Bom.L.R. 99.

**ELECTRICITY RULES, 1937, r. 48—Indian Electricity Rules, 1922, r. 40A—Supersession of old rule by new one—Old rule not remaining in operation during interval—General Clauses Act (X of 1897), Sec. 24—Act or regulation, repeal and re-enactment of—Notification under rules—"Their own works"—"Works"—Interpretation—Indian Electricity Act (IX of 1910), Sec. 2(n).**

Rule 40A of the Indian Electricity Rules, 1922, provided that no electrical installation should be carried out upon the premises of a consumer or owner except by an electrical contractor licensed by the Provincial Government and under the direct supervision of a person holding a certificate of competency issued by the Provincial Government, but reserved to the Provincial Government power to exempt any work or specified class of consumers or owners from the operation of the rule. Accordingly by a notification issued on November 15, 1934, the Provincial Government exempted from the operation of the rule all electric supply companies in so far as "their own works" were concerned. Rule 40A was superseded by the Indian Electricity Rules, 1937, on March 27, 1937, but the corresponding new r. 48 did not come into force till March 22, 1938.

The accused, who was a licensee and proprietor of an electric supply company at Ilkal, and who held a certificate of competency issued by the Provincial Government but not an electrical contractor's license, carried out, in February and early in March, 1938, small installation works on the premises of half a dozen inhabitants of Ilkal, at the expense of the supply company, the light points, switches etc. remaining the property of the company, for which he was charged with a breach of r. 48 of the Indian Electricity Rules, 1937:—

*Held*, acquitting the accused, (1) that he had committed no breach of r. 48 of the Indian Electricity Rules of 1937, for it was not in force at the time the offences were alleged to have been committed;

(2) that the old r. 40A could not be deemed to have remained in force till the new r. 48 was promulgated under s. 24 of the General Clauses Act, 1897, because the notification by

**ELECTRICITY RULES, 1937, r. 48—(Contd.)**

which the new rules of 1937 were introduced expressly stated that they were in supersession of the rules of 1922;

(3) that s. 24 of the General Clauses Act came into operation only where a Central Act or Regulation had been repealed and re-enacted, and neither the Act or Regulation included a rule made under an Act;

(4) that, even assuming that r. 40A applied, the accused was protected by the notification of 1934, inasmuch as he was one of the "Electric Supply Companies" doing "their own works";

(5) that the words "their own works" in the notification did not mean "such works when carried out on their own premises";

(6) that by the word "works" was meant the kind of works referred to in the rule and not the kind of works referred to in the definition of the term as given in s. 2(n) of the Indian Electricity Act, 1910;

(7) that the words "their own works" meant works carried out by the exempted bodies themselves, or perhaps works belonging to them;

(8) that since the notification applied to installation works the works carried out by the accused were fairly included in the expression "their own works."

It is usually a sound rule of construction to give the same meaning to words used in rules made under an Act as the words have in the Act itself.

EMPEROR *v.* RAGHUNATH RAMCHANDRA.

43 Bom.L.R. 99.

**ENDOWMENT of ghat.** See **HINDU LAW, ENDOWMENT.**

43 Bom.L.R. 777.

**ENEMY SUBJECT**, suit against, adjournment of. See **ADJOURNMENT.**

43 Bom.L.R. 827.

**ENGLISH LAW**, common employment.

*Quæz*, Whether the doctrine of common employment is part of the law of India.

BROCKLEBANK LTD. *v.* NOOR AHMED.

43 Bom.L.R. 450 (P.C.).

—concluded agreement—*Rule applies in India.*

The rule of English law that an agreement which only contemplates execution of the engrossed draft in the solicitors' office is not a concluded agreement capable of being enforced, applies to India.

NEW MOFUSSIL CO. LTD. *v.* SHANKERLAL.

43 Bom.L.R. 293.

—construction of Act.

To construe an Indian Act in the light of cases decided under an English Act differently worded is much more likely to cause confusion than to render assistance. There is no justification for incorporating into the administration of the Indian Act difficulties which arise on the construction of the English Act.

BAI KOKILABAI *v.* KESHAVLAL.

43 Bom.L.R. 986 (F.B.).

—custom.

The English rule that "a custom, in order

## ENGLISH LAW—(Contd.)

that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" does not apply to conditions in India. A custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.

SUBHANI *v.* NAWAB. 43 Bom.L.R. 432 (P.C.).

## —Inspection of record.

There is a common law right of a person to take inspection of a document in which that person is interested for the protection of such interest.

SHAMDASANI *v.* SIR HUGH COCKE.

43 Bom.L.R. 961.

## —Parsis.

The Parsis in the mofussil are, in the absence of any statutory provision, governed in the first place by usages and, secondly, by the rules of equity and good conscience, i.e. by the general principles of English law applicable to a similar set of circumstances.

KUBERDAS *v.* JERKISH.

43 Bom.L.R. 981.

## EVIDENCE, admission by accused.

The fact that an accused is not willing to admit that he took part in a robbery which is proved against him ought not to prejudice the question whether he committed murder at the same time.

EMPEROR *v.* BASANGOUDA. 43 Bom.L.R. 144.

—circumstantial. See CIRCUMSTANTIAL EVIDENCE.

43 Bom.L.R. 144.

## EVIDENCE ACT (I of 1872)—Rules of evidence—Strict application by Court—Rules not to be waived at Judge's will.

The Indian Evidence Act, 1872, being a statute which purports to contain the whole law of evidence applicable in India, is imperative. It is, therefore, not open to a Judge to exercise a dispensing power to admit evidence inadmissible by virtue of the Act because it appears to him that the irregular evidence will throw light upon an issue being determined. The principles of exclusion of evidence adopted by the Act must be applied strictly and cannot be relaxed at the discretion of the Court.

SRIS CHANDRA NANDY *v.* RAKHALANAND THAKUR.

43 Bom.L.R. 794 (P.C.).

—S. 10—"Common intention"—Interpretation—Anything said, done or written by conspirator during pendency of conspiracy—Relevancy of—Statement made by one conspirator

## EVIDENCE ACT, S. 10—(Contd.)

against another not relevant if made after termination of conspiracy.

The evidence of a conspirator is admissible against his co-conspirator on the principle that the thing done, written or spoken was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy; or the words written or spoken may in themselves be acts done in the course of the conspiracy.

The words of s. 10 of the Indian Evidence Act, 1872, must be construed in accordance with the above principle, and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past.

The words "common intention" in s. 10 signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. Hence, any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is not admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference.

There is a distinction between communications between conspirators while the conspiracy was going on with reference to the carrying out of the conspiracy and statements made after arrest or after the conspiracy has ended, by way of description of events then past.

MIRZA AKBAR *v.* EMPEROR.

43 Bom.L.R. 20 (P.C.).

## —S. 13—Kulkarni—Statement—Admissibility.

A statement by the kulkarni of a village as to the character of a tenancy right in the village is admissible in evidence under s. 13 of the Indian Evidence Act, 1872.

SHANKARRAO *v.* SHAMBHU.

43 Bom.L.R. 1 (P.C.).

## —S. 27—Information leading to discovery of fact.

Information leading to the discovery of a fact made to the police and admissible under s. 27 of the Indian Evidence Act, 1872, is not rendered inadmissible under s. 162 of the Criminal Procedure Code, 1898.

EMPEROR *v.* BIRAM SARDAR. 43 Bom.L.R. 157.

—S. 76. See CRIMINAL PROCEDURE CODE, S. 548.

43 Bom.L.R. 961.

—S. 105—Burden of proof—Exception contained in body of statute—Person relying upon such exception must prove it—Bombay Muni-

## EVIDENCE ACT, S. 105—(Contd.)

*icipal Boroughs Act (Bom. XVIII of 1925), Sec. 123, sub-ss. (5) and (7).*

Section 105 of the Indian Evidence Act, 1872, is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception; and there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included.

Hence, the accused who relies upon the permission given to him by sub-s. (5) of s. 123 of the Bombay Municipal Boroughs Act, 1925, has the burden cast upon him to prove that he comes within the terms of the sub-section and is thereby relieved of the liability which is otherwise upon him under sub-s. (7) of the section.

EMPEROR *v.* DAHYABHAI. 43 Bom.L.R. 519.

—S. 114, ill. (a)—*Theft—Stolen property found in possession of accused "soon after" theft—"Soon after", interpretation of—Indian Penal Code (Act XLV of 1860), Sec. 411—Practice—Prosecution to prove their case—Conviction cannot be based on statement of accused.*

Illustration (a) to s. 114 of the Indian Evidence Act, 1872, directs that the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The question, what period is covered by the expression "soon after", depends upon the circumstances of each case. The Court is not bound to draw this presumption, and it must always ask itself whether in the circumstances of the particular case the presumption is one which in fairness to the accused can be drawn. When one is dealing with property of some value, and it is very unlikely that the man, from whom the accused got it, had come by it honestly, or when one is dealing with property stolen in a village where there are not likely to be many dealings in it, the presumption may be drawn more readily than in the case of a theft in a big city.

Hence where an old brass bell stolen in the city of Bombay was found in the possession of an old iron dealer in the city thirteen days after the theft, the presumption under s. 114, ill. (a), was not drawn.

It is not open to a Magistrate to convict an accused who pleads not guilty on his own statement. It is for the prosecution to prove their own case.

EMPEROR *v.* MAVJI. 43 Bom.L.R. 629.

—S. 138—*Cross-examination of witness—Tendering witness for cross-examination—Whether eye-witnesses can be so tendered—Practice and procedure.*

The practice of tendering witnesses for cross-examination in Sessions Court is inconsistent with s. 138 of the Indian Evidence Act, 1872. It may, however, be adopted only in cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence

## EVIDENCE ACT, S. 138—(Contd.)

on a particular point and do not want to waste the time of the Court by examining-in-chief a witness who was examined in the lower Court, they may tender him for cross-examination. But before doing that the witness ought to be asked by the prosecution, with the consent of the pleader for the accused and the leave of the Judge, whether his evidence in the lower Court is true. If he gives a general answer as to the truth of his evidence in the lower Court, he can be cross-examined on that. But he must in some way be examined-in-chief before he can be cross-examined. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eye-witness.

EMPEROR *v.* SADEPPA. 43 Bom.L.R. 946.

EXTERMENT ORDER passed by Commissioner of Police, Bombay, cannot be revised by High Court. See POLICE ACT (CITY), S. 27.

43 Bom.L.R. 511, 702.

EYE-WITNESS, practice as to tendering as for cross-examination. See EVIDENCE ACT, S. 138.

43 Bom.L.R. 946.

FIDUCIARY RELATIONSHIP, client effecting mortgage of his property in favour of his lawyer. See MORTGAGE, LAWYER.

43 Bom.L.R. 465 (P.C.).

FOREIGN COURT, receiver appointed by a, cannot execute decree in British India. See CIVIL PROCEDURE CODE, O XXI, r. 16.

43 Bom.L.R. 724.

FRAUD, cause of action—*Right to sue.*

Where relief is sought against defendant on the ground of fraud, misconduct, or mistake, the right to sue is deemed to accrue from the time when the fraud, misconduct or mistake becomes known to the plaintiff.

O. RM. O. M. SP. (FIRM) *v.* NAGAPPA.

23 Bom.L.R. 440 (P.C.).

—*fraudulent conveyance of lands to defeat creditor—Benami transaction—Suit by benamidar for possession of lands—Whether defendant can set up and prove joint fraud of himself and plaintiff—Applicability of maxim ex turpi causa non oritur actio.*

A Court will not allow itself to be used as an instrument of fraud, and by the application of rules of evidence or procedure it will not allow its eyes to be closed to the fact that it is being used as an instrument of fraud. Once the Court finds that the plaintiff is seeking its assistance to enable him to get the benefit of what is a fraud, it refuses to assist him. If, as a result of such refusal, the defendant is left in possession of some advantage derived from the common fraud of the plaintiff as well as the defendant, that is not due to any action on the part of the Court, but on the principle that the Court will not assist either party to the fraud.

Where a plaintiff is relying upon a deed, the defendant is entitled to give evidence of the circumstances under which it came into exist-

## FRAUD—(Contd.)

tence. When those circumstances include an allegation of a joint fraud by both the plaintiff and the defendant, the particulars of that fraud must be pleaded. The duty of the Court then is to look into the matter, and if it comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff and that of the defendant, it will not assist either party. It is the Court's duty to dismiss the plaintiff's claim because it knows that it has before it two persons equally guilty of fraud and it will not assist either of them.

*Per Divatia J.*—The law on the subject of fraud by plaintiff and by defendant can be summarized as follows:—

I. In all cases of unilateral or bilateral fraud which has not been successfully effected, either party can repudiate the fraudulent transaction and can recover or maintain his possession by proving his real title.

II. In cases where fraud is accomplished—

(1) Where only one party acts fraudulently, he cannot be allowed, either as plaintiff or as defendant, to plead his fraud, on the principle that no man shall be heard to plead his own fraud;

(2) Where both parties are equally fraudulent, the Court will refuse to enforce the fraudulent transaction on the principles that where each party is equal in fault, the law favours him who is actually in possession, and will give relief to neither, and that a right of action cannot arise out of fraud, with the result that—

(a) where the plaintiff seeks relief on the allegation and on the basis of joint fraud, his suit will be dismissed; and

(b) where he seeks relief by suppressing the fraud, the defendant can plead and prove the common fraud to defeat the plaintiff's claim.

Plaintiff sued to recover possession of certain lands from the defendants alleging that he had purchased them from the defendants and had leased them for cultivation to the defendants who refused to deliver possession. The defendants contended that the sale-deed was passed without consideration, that the transaction was part of a fraudulent attempt to defeat their creditor who sought to attach the lands in execution of his decree, that the plaintiff was a benamidar and party to the fraud perpetrated on the creditor, and that he could not take advantage of it:—

*Held*, dismissing the suit, that it was a fraud for the plaintiff to claim beneficial title under a deed in respect of which he was a mere benamidar, and that the defendants were entitled to prove the benami nature of the transaction, even though in doing so they might have to rely on their own fraud.

GUDDAPPA v. BALAJI. 43 Bom.L.R. 681 (F.B.).

## FULL BENCH—Convening of—Practice.

The practice of convening of a full bench to reconsider the decision of a previous full

R. 134.

## FULL BENCH—(Contd.)

bench discussed.

EMPEROR v. NINGAPPA. 43 Bom.L.R. 864.

GENERAL CLAUSES ACT (X of 1897), S. 24. See ELECTRICITY RULES, r. 48. 43 Bom.L.R. 99.

GHAT, endowment of. See HINDU LAW, ENDOWMENT. 43 Bom.L.R. 777.

GHATIYAS of Benares, suit by. See HINDU LAW, ENDOWMENT. 43 Bom.L.R. 777.

GOVERNMENT OF INDIA ACT, 1919, S. 65.

A tax on income accruing or received in British India by a person resident outside British India is legislation relating to something, i.e., certain income in British India and it falls within the words of s. 65 of the Government of India Act, 1919.

*In re PATIALA STATE BANK.* 43 Bom.L.R. 84.

GOVERNMENT OF INDIA ACT, 1935, S. 205

—Object of—Construction of—Whether High Court has to consider question of certificate in every case or only in cases where question of interpretation of the Act or any Order in Council arises—Direct appeal to Privy Council from High Court decree whether barred where question of certificate not considered by High Court and no certificate given—Question of certificate preferably to be considered by same bench that gave decision—Indian Income-tax Act (XI of 1922), Sec. 10—Profits made by sale of securities at enhanced value, whether taxable—Profits on sale of securities by bank to meet withdrawals by depositors whether taxable—Proof of separate business in buying and selling securities whether essential.

The object of s. 205, Government of India Act, 1935, is to ensure that in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder, the appeal, if any, that is the direct appeal, shall lie to the Federal Court. The word 'direct' is used because s. 208 makes provision for an appeal in such a case on certain conditions from a decision of the Federal Court to His Majesty in Council. The section does not provide for a case where no such certificate is given, however plain it may be that it ought to have been given. There is no provision, express or implied, taking away from His Majesty in Council the right to entertain a 'direct appeal' in such case, and *a fortiori* there is nothing taking away the right of direct appeal to His Majesty in Council in a case where no substantial question of law of the character specified in the section could by any reasonable possibility arise.

The language in the latter part of sub-s. (1) of s. 205 is of a very comprehensive kind and is directory. It imposes duty on the Judges of the High Court for the purpose of ensuring that, if the case involves a substantial question of law as to the interpretation of the Government of India Act or any Order in

GOVERNMENT OF INDIA ACT, 1935,  
S. 205—(Contd.)

Council, the High Court will carry out the intention of the section by giving a certificate which will ensure that the appeal, if any, shall be to the Federal Court; but there is no condition precedent imposed on an appeal to His Majesty in Council in the absence of a certificate. The duty imposed on the Judges by words of a directory character is one which arises only in a case where there is some reasonable ground for thinking that a substantial question of law as to the interpretation of the Government of India Act or any Order in Council may be involved.

In construing s. 205, first, no question of the jurisdiction of His Majesty in Council can arise unless there is a certificate, in which case the direct appeal lies to the Federal Court; secondly, if in the absence of a certificate it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court and that they ought to have given or to have withheld a certificate, the Board ought to decline to hear the appeal until the High Court have had an opportunity of doing one or the other; thirdly, the cases dealt with by the section are cases where there is a reasonable possibility that a substantial question of law as to the interpretation of the Government of India Act or any Order in Council may arise, and the duty is imposed on the Judges of the High Court only in those cases.

Where s. 205 is applicable, it is the duty of the High Court to record a determination to withhold a certificate if it thinks that that is the right course. Preferably that should be done by the Judges who have heard the case, but it is not essential in every case and may sometimes be impossible.

PANJAB CO-OPERATIVE BANK, LD. v. COMMISSIONER OF INCOME-TAX, LAHORE.

43 Bom.L.R. 372 (P.C.).

—Appeal—Federal Court—Certificate to appeal—"Judgment, decree or final order"—"Substantial question of law"—Such question must arise directly—Remote possibility of question arising not enough—Opinion of High Court obiter—Reference to High Court—Criminal Procedure Code (Act V of 1898), Sec. 432.

An order made by the High Court, under s. 432 of the Criminal Procedure Code, 1898, merely answering a question raised by a Presidency Magistrate and expressing an opinion on a question of law, is not a final order within the meaning of s. 205 of the Government of India Act, 1935.

A mere possibility of "a substantial question of law as to the interpretation of" the Government of India Act, 1935, arising in a remote contingency is not enough to justify the granting of a certificate under s. 205 of the Act.

On a reference made by a Presidency Magistrate, under s. 432 of the Criminal Procedure Code, 1898, two questions arose, first, whether the Bombay Abkari Amendment Act, 1939, was *ultra vires* the Bombay Legislature, as being beyond its scope by virtue of the provi-

GOVERNMENT OF INDIA ACT, 1935,  
S. 205—(Contd.)

sions of the Government of India Act, 1935; and, secondly, whether a certain notification issued under the Bombay Abkari Act, 1878, was revived by the Amending Act of 1939. The High Court disposed of the reference by answering the second question; but only expressed an opinion *obiter* on the first question. The Magistrate following the answer returned by the High Court on the second question acquitted the accused. The Government of Bombay appealed and the acquittal was upheld by the High Court. The Government of Bombay then applied for a certificate to appeal to the Federal Court of India under s. 205 of the Government of India Act, 1935, on the ground that the case involved a substantial question of law on the interpretation of that Act:—

*Held*, (1) that the answer given by the High Court on the second question in the reference was not a "final order" for the purpose of s. 205 of the Act;

(2) that the order passed by the High Court in appeal from the order of acquittal was the only final order, and it did not involve directly any question under the Act;

(3) that the accused having secured acquittal in two Courts, the High Court should have, to justify the grant of certificate to appeal against the acquittal to a third Court, a clear indication in the statute that it was its duty to give the certificate;

(4) that the wording of s. 205(2) indicated that the Legislature did not contemplate an appeal against a decision not based on a point of law, arising under the Government of India Act;

(5) that therefore no question of law under the Act was involved in the case and no certificate should be granted under s. 205.

EMPEROR v. DANTES. 43 Bom.L.R. 496 (F.B.).

GOVERNMENT TRADING TAXATION ACT (III of 1926)—Government of India Act, 1919 (9 & 10 Geo. V, c. 101), Sec. 65—Act III of 1926 whether *ultra vires* legislature—Patiala State—Banking business of Indian State—Business carried on only in Indian State—Income derived from securities in British India—Whether such income liable to tax in British India—Applicability of Act III of 1926—Definition of "company" whether includes Dominion Government—Indian Income-tax Act (XI of 1922).

The Government Trading Taxation Act, 1926, is *intra vires* the Government of India.

A tax on income accruing or arising or received in British India by a person resident outside British India is legislation relating to something i.e. certain income in British India and it falls within the words of s. 65 of the Government of India Act, 1919.

The Government Trading Taxation Act, 1926, applies wherever a Government of the nature specified in the Act carries on a business anywhere, and is not confined to business carried on in British India.

Where a Dominion Government, as specified in the Government Trading Taxation Act, 1926, is carrying on a business anywhere, it



# GOVERNMENT TRADING TAXATION ACT—(Contd.)

is liable to British Indian income-tax in respect of the income, profits and gains of that business which accrue or arise or are received in British India, as though such Government were a company.

The definition of "company" in s. 2(6) of the Indian Income-tax Act, 1922, includes a Dominion Government deemed to be a company under the Government Trading Taxation Act, 1926.

The income derived by an Indian State Bank from its investments of surplus funds in the Government of India securities in British India are profits from the business of the bank received in British India, and as such liable to be assessed to income-tax, by the combined operation of s. 2 of the Government Trading Taxation Act, 1926, and the Indian Income-tax Act, 1922.

A property, situate within British India, taken over by an Indian State Bank from its debtor, a subject of the Indian State, in part satisfaction of the loan advanced to him, is not property occupied in British India for the purposes of the business, but the income derived from such business is income arising in connection with such business and is liable to be assessed to income-tax under the Indian Income-tax Act, 1922.

The profits made by an Indian State Bank on the sale of investments made by it in the Government of India securities—such profits being the excess realised over the cost price of the investments, if not appropriated as accretions to capital, are assessable to income-tax under the Indian Income-tax Act, 1922.

*In re PATIALA STATE BANK.* 43 Bom.L.R. 84.

# GUARDIANS AND WARDS ACT (VIII of 1890), S. 3. See MINOR, GUARDIANSHIP.

43 Bom.L.R. 926.

—S. 7—*Minor in custody of aunt since birth—Application by father for custody of minor—Applicability of s. 25.*

Under s. 7 of the Guardians and Wards Act, 1890, the Court, before making an order, should insist on evidence showing that the order was in the best interests of the child. It cannot pass such an order in advance. It is bound to consider, at the time when the order is to take effect, whether the applicant is the proper person to have the custody of the child.

*SHIVAWWA v. CHENBASAPPAGOWDA.*

43 Bom.L.R. 615.

—S. 17—*Minor—Custody—Child of tender years—Natural mother preferable to father as guardian—Interest of minor.*

In the matter of the custody of a minor child, the paramount consideration is the interest of the child rather than the rights of the parents. In the case of a minor child of tender years, the proper person to whom the custody of the child should be given is the natural mother and she should be preferred to the father, as it is impossible to find any adequate substitute for the love and care of the natural mother.

# GUARDIANS AND WARDS ACT, S. 17—(Contd.)

All orders made as to the custody of a child are of a temporary nature, and those interested in the minor are always at liberty to apply to the Court for a change in the custody.

*SARASWATIBAI SHRIPAD VED v. SHRIPAD VASANJI VED.* 43 Bom.L.R. 79.

—S. 19. See GUARDIANS AND WARDS ACT, S. 7. 43 Bom.L.R. 615.

—S. 25.

In s. 25 of the Act custody means actual, and not constructive, custody. The section therefore does not apply where a ward has never been in the custody of his legal guardian.

*SHIVAWWA v. CHENBASAPPAGOWDA.* 43 Bom.L.R. 615.

# GUARANTEE—Liability of guarantor—Construction of guarantee—Proof of debt against principal debtor—Nature of proof.

A guarantor is entitled to have the debt of the principal debtor proved as against him, before he is made liable for the debt. The fact that the principal debtor has admitted the debt, or that a judgment or award has been given against him for the debt, does not bind the guarantor, unless he was a party to the admission of the principal debtor, or was party to the proceedings in which the judgment or the award was given.

The liability of a guarantor must depend on the true construction of the guarantee which he has given. If the guarantor merely guarantees payment of the debt of the principal debtor, then he is entitled to require the debt to be proved as against him in accordance with the ordinary law. If, on the other hand, the principal debtor has agreed that as against him the debt shall be proved in a particular way, and the guarantor has guaranteed the debt so to be proved, then there can be no doubt that the guarantor would be bound by the particular method of proof agreed to by the principal debtor and accepted by himself.

*SREE MEENAKSHI MILLS, LTD. v. RATILAL.*

43 Bom.L.R. 53.

# HIGHWAY—Private ownership of land.

The existence of a highway or a public road is consistent with the ownership of a private person in the soil.

There is a presumption that a highway, or waste lands adjoining thereto, belong to the owners of the soil of the adjoining lands. The site of the road must be presumed to belong to the adjoining proprietors half to one and half to the other up to the middle of the road. Where the property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or the river as the case may be.

Hence, the use of the road by the public for passage as of right is not inconsistent with the proprietorship of a private individual to the soil of the road. A road, therefore, cannot be

**HIGHWAY—(Contd.)**

said to be the property of Government merely because it is used by the public.

NARHARSINGJI v. SECRETARY OF STATE.

43 Bom.L.R. 167.

**HINDU LAW, ADOPTION, conditional adoption—Joint Hindu family—Sole surviving coparcener—Widow of predeceased coparceners—Arrangement under which adoptive widow of sole coparcener takes life interest—Consent of adopted son's natural father to such arrangement—Son subsequently adopted by widow of another coparcener—Whether such arrangement affects rights of subsequently adopted son.**

Under Hindu law an arrangement which regulates the rights of the adoptive mother *vis-à-vis* the adopted son cannot affect the rights or claims of a person who is subsequently adopted in the undivided family and who is not a party to the arrangement.

One V was left the sole surviving coparcener in a joint Hindu family after the death of his two brothers who died childless leaving their widows surviving them. On July 17, 1928, V executed a document in the nature of a testamentary deed of his estate by which he authorised his widow L to adopt M who was the son of his daughter by his predeceased wife. L was authorised to manage V's "property in her independent right till her death." Soon after this V adopted M and executed a registered deed of adoption under which L was authorised to manage the property in the terms of the previous deed. This arrangement was agreed to by the natural father of M. V then died and on February 26, 1935, the widow of one of V's brothers adopted the plaintiff. The plaintiff filed a suit against L and M for partition claiming a half share in the joint family property. L contended that the arrangement evidenced by the adoption deed was binding on the plaintiff and governed the relationship between him and L as well as M :—

*Held*, (1) that inasmuch as the family continued to be joint so long as any widow remained in it with a power to adopt, the adoption of the plaintiff was valid and affected the family property ;

(2) that the arrangement evidenced by the deed of adoption, validated on the ground of custom, was binding in so far as it regulated the right of L as against M ;

(3) that it could not be supported on the basis of a supposed alienation by a sole surviving coparcener prior to the adoption of the plaintiff, because the deed was to come into operation after V's death ;

(4) that the rights or claims of persons subsequently adopted in the family who were not parties to the arrangement were not affected by it ; and

(5) that the plaintiff was therefore entitled to half a share in the family property.

LAXMIBAI v. KESHAVRAO. 43 Bom.L.R. 214.

**—Prohibition to adopt—Power to adopt—Construction of will—Prohibition to adopt.**

The testator, who was joint with his brother, made, shortly before his death, a will, addressed to his brother, in which he said : " You are

**HINDU LAW, ADOPTION—(Contd.)**

the only heir of the property ... After their death [i.e. death of the testator's two widows] they [i.e. ornaments] are yours only. Excepting maintenance, they have no other right whatsoever ... In order that my name should remain after my death, Rs. 100 per annum should be spent on religious acts &c. You should do this, and you and your descendants, heirs and legatees should enjoy the ownership of the entire estate from generation to generation. On the strength of this will, you should get the khata transferred to your name in respect of the above lands. In regard to that my wives and anybody else whatever have no sort of right at all... Consequently, all the rights go to you only and are with you." Shortly after the testator's death, one of his widows adopted a son. After the death of that son, she adopted the plaintiff, who was a son-in-law of the surviving brother. Thereafter the surviving brother gifted away portions of the family property to his two daughters. After the death of the brother, the plaintiff sued to recover possession of the properties, when it was contended by the daughters that the will contained an implied prohibition to the widows to adopt and the plaintiff's adoption was therefore invalid :—

*Held*, (1) that inasmuch as the testator had said nothing about an adoption one way or the other and the prohibition of adoption was sought to be inferred from statements about other matters or from conduct, it stood to reason that the inference suggested, if it was to be acted upon, should be a necessary inference ;

(2) that the Court should be able to say with confidence that what the testator had said or done showed that he would have prohibited an adoption, either in any circumstances or in the circumstances existing at the material time, if he could have foreseen them ;

(3) that if the Court could say no more than that he might have, or even that he probably would have, prohibited adoption in any circumstances or in those particular circumstances, it could not be said that his statements or his actions were equivalent to a prohibition ;

(4) that in his will the testator was obviously anxious that the family should continue to be regarded as what it was in fact, a joint family, and that the fact that some lands were in his separate name should not give rise to any claim of separate ownership ;

(5) that though he emphasised the rights of his brother as the sole surviving coparcener, it did not follow from that that he was opposed to one of the ordinary incidents of a joint family or that he would have objected to an adoption by his widow if his brother himself did not object ;

(6) that the plaintiff having been at the date of adoption the brother's son-in-law, it could not be said with any confidence that the testator would have prohibited the adoption if he had foreseen it ;

(7) that from the terms of the will the Court could not spell out any implied prohibition to adopt ; and

## HINDU LAW, ADOPTION—(Contd.)

(8) that therefore the plaintiff's adoption was valid.

KRISHNAWA *v.* RAMAGOUDA. 43 Bom.L.R. 483.

—Unchaste widow—*Widow of a regenerate class unchaste at time of adoption—Adopted son of same gotra as adoptive father—Delegation by widow of ceremonies of adoption—Validity of adoption.*

A Hindu widow of a regenerate class made an adoption while she was living in unchastity. The adopted son was of the same gotra as his adoptive father. The performance of the ceremonies of adoption was delegated by the widow to others who performed the ceremonies including the ceremony of *datta homam*. On the question whether the unchastity of the widow rendered the adoption invalid—

*Held*, that in the circumstances of the case the widow was competent to make the adoption.

RAMU BALA *v.* JANA DALA. 43 Bom.L.R. 920.

HINDU LAW, ALIENATION, manager—*Property inalienable.*

The manager of a joint Hindu family cannot bind other members of the family by an alienation of coparcenary land which is not alienable.

KRISHNAJI *v.* PARAPPA. 43 Bom.L.R. 539.

HINDU LAW, CUSTOM—*Divorce whether recognised among Pakhali caste of Ahmedabad—Consent of party against whom divorce sought—Consent given in presence of caste panch—Whether such divorce permissible under Hindu law.*

The custom of granting divorce exists among Hindus of the Pakhali caste of Ahmedabad, and a divorce obtained according to it would not be contrary to Hindu law if the party against whom the divorce is sought has given his or her consent to the divorce in the presence of the caste panch.

JINA MAGAN *v.* BAI JETHI. 43 Bom.L.R. 651.

HINDU LAW, DEBT, manager—*Joint family—Debts—Bombay Co-operative Societies Act (Bom. VII of 1925), Sec. 54—Awards against manager how far binding on coparceners—Disclosure of status in pleadings whether necessary—Presumption that suit against manager is in representative capacity—Auction sale of joint-family property—"Right, title and interest"—Price paid at auction not less than valuation of property—Whether this is evidence that entire interest of coparceners was sold—Effect of sale under Bombay Land Revenue Code (Bom. V of 1879)—Partition suit by next friend of minors—Severance of status.*

A decree against the manager of a joint Hindu family representing the family in respect of a debt contracted for family purposes is binding on all the members of the family and may be executed against the whole coparcenary property. A decree against the manager personally, even though in respect of a family debt, cannot be executed against the whole coparcenary property but only affects the manager's own interest.

## HINDU LAW, DEBT—(Contd.)

In order that a decree against the manager of a joint Hindu family should bind coparceners not parties to the litigation it is not essential that the pleadings should expressly state that he was suing or being sued as manager.

Where the manager of a joint Hindu family has contracted debts for family purposes and is sued in respect of those debts, there is a presumption that he is sued in his representative capacity, so that a decree against him will be binding on all the coparceners.

It is not necessary that the plaintiff should state in distinct terms that the defendant is being sued as manager.

The expression "right, title and interest" is an ambiguous one; it is quite consistent with the sale of every interest which the judgment-debtor may have sold, and it is a question of fact in each case what has in fact been sold.

Where joint family property is sold at an auction sale and the price paid is not less than the valuation of the property made independently, it is good evidence that what was put to auction and sold was the entire interest of all the members of the joint family and not merely the individual interest of the manager who incurred debts in respect of which the property was sold.

MULGUND CO-OPERATIVE SOCIETY *v.* SHIDLINGAPPA. 43 Bom.L.R. 807.

HINDU LAW, DIVORCE—*Pakhali caste—Custom.*

The custom of granting divorce exists among Hindus of the Pakhali caste of Ahmedabad, and a divorce obtained according to it would not be contrary to Hindu law if the party against whom the divorce is sought has given his or her consent to the divorce in the presence of the caste panch.

JINA MAGAN *v.* BAI JETHI. 43 Bom.L.R. 651.

HINDU LAW, ENDOWMENT—*Dedication—Complete or partial dedication—Relinquishment of property by donor—Ghat on the Ganges at Benares—Ghatias of Benares—Right of ghatias over the ghat—Practice—Suit decreed as prayed, not a proper form of order.*

Under Hindu law, the dedication of property to religious or charitable uses may be complete or partial. In the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object, but also where the owner retains the property in himself and grants the community or part of the community an easement over it for certain specified purposes.

Under Hindu law in the usual case of complete dedication made to an idol the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is by no means the only

## HINDU LAW, ENDOWMENT—(Contd.)

form of dedication known to the law and is very different from anything that can ordinarily be inferred from the public user of a highway. From the standpoint of the Hindu law it is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated.

Whether the property be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it descends and is alienable in the ordinary way, the only difference being that it passes with the charge upon it.

The land or other property of a bathing ghat on the banks of the Ganges at Benares dedicated to such a purpose, is dedicated to an object both religious and of public utility, notwithstanding that it is not dedicated to any particular deity; but from such dedication it cannot be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object.

The river bank at Benares is a sacred and historical spot with a powerful claim to the regard of a pious Hindu; but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication; rather does it begin by acts of user which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety.

The ghatias of Benares as members of a class have no customary right to claim exclusive possession of portions of a public bathing ghat by placing platforms or canopies over them in order to carry on their profession. No individual ghatia can have any right by custom to exclusive possession of any parts of the ghat either by prescription or lost grant.

A right to stand, sit or squat on a ghat for the purposes of exercising the profession of ghatias may be acquired by consent of the owner of the ghat.

There was a ghat on the bank of the river Ganges as it flowed past the city of Benares, which the plaintiff's predecessor had purchased and rebuilt in the year 1814. No express dedication of the ghat to the public was proved by the production of a deed of endowment or otherwise. No manager was ever appointed, nor was it shown that the plaintiff or her predecessor had purported to act as superintendent, sebaite or mutawalli. They were treated as owners whenever there was disrepair of the ghat, which they repaired at their own expense. They closed it to bathers

## HINDU LAW, ENDOWMENT—(Contd.)

on proper occasions and levied tolls on the keepers of shops at festivals. Their expenditure on the ghat often exceeded their receipts and they never wished to make a profit from the tolls. There was evidence as to agreements taken from ghatias upon nearby ghats:—

*Held*, that the above evidence pieced together showed that the plaintiff had a proprietary right in the ghat and the soil underneath it.

HEMANTA KUMARI DEBI *v.* GAURI SHANKAR.  
43 Bom.L.R. 777 (P.C.).

—Illegitimate son—*Mother whether competent to give him in adoption.*

Under Hindu law, even among Shudras, a woman is incompetent to give in adoption her son born of adulterous intercourse.

APPA *v.* RAMMAKKA. 43 Bom.L.R. 314.

HINDU LAW, JOINT FAMILY—*Possession of joint property—Presumption.*

In the case of a joint Hindu family there is no presumption that it possesses joint property or any property at all. There must be affirmative evidence to show that the family has property.

NISAR AHMAD KHAN *v.* MOHAN MANUCHA.  
43 Bom.L.R. 465 (P.C.).

—Widow of gotraja sapinda inheriting immovable property—*Adoption by widow—Whether right to sue in respect of property vests in adopted son.*

Under Hindu law the widow of a gotraja sapinda cannot by adoption alter the order of inheritance of the property inherited by her as such and divest the reversioner, although such property consists of a right to sue for possession of immovable property.

SUBRAO *v.* DADA. 43 Bom.L.R. 492.

—*Sham sale deed between coparceners—References in deed of definite share of each coparcener—Whether such references effect severance of status of members of coparcenery.*

Under the Mitakshara system of Hindu law coparceners who intend to remain joint and undivided do not become divided contrary to their intention because in a document for purposes of pretence they refer to their interests as represented by a fractional share.

A member of a Mitakshara family may sometimes be forgiven for speaking of his "one-third share" instead of using the more accurate but more elaborate expression "the share which if a partition were to take place to-day would be one-third". Where, however, a third party has been induced to act upon such a document, very different questions may arise by reason of estoppel or otherwise, but if the case is limited to the parties themselves then propriety or impropriety of language matters little, since the document does not warrant any inference of a previous or independent agreement to hold in divided shares.

RAMANNA *v.* JAGANNADHA RAO.  
43 Bom.L.R. 850 (P.C.).

**HINDU LAW, MAINTENANCE, widow—**  
*Income by personal exertions—Whether such income justifies reduction of maintenance—Reduction when permissible.*

Under Hindu law personal income obtained by a widow by her own exertions cannot be regarded as a sufficient change in the circumstances to justify the Court in reducing the amount of maintenance fixed under a decree. It is only the permanent reduction in the income of the family property which affords a valid reason for reducing the amount of maintenance.

BAI JAYA v. GANPATRAM KALIDAS.

43 Bom.L.R. 618.

*Joint family—Claim for arrears of maintenance during husband's life-time—Right attaches to property in which her husband has interest—Liability of person in possession of such property—Suit brought against coparcener for arrears of maintenance after husband's death—Right of widow for maintenance not similar to right of creditor.*

Under the Hindu law the right of a wife or a widow for maintenance against the husband as well as the members of her husband's joint family is not the same as the right of a mere creditor against the estate arising out of contract, but is a right which attaches to her status as a member of the joint undivided family. In the case of a widow this right attaches to the undivided share in the property which her husband would have got by partition if he had been alive and she is entitled to follow the property in the hands of the coparcener taking it. The property is liable as much for arrears of past maintenance as for future maintenance. The right to demand the arrears exists against the husband or the surviving coparcener or any person who has inherited his separate property.

The rule that a creditor cannot follow the property in the hands of a surviving coparcener, unless it has been previously attached during the life-time of the deceased coparcener, does not apply to the case of a Hindu widow both for arrears of maintenance as well as for future maintenance.

The claim of a Hindu widow for arrears of maintenance, which have accrued due during the lifetime of her husband, is not a personal cause of action which dies with his death, but it exists against the husband's property which comes to the hands of either his heir or his surviving coparcener.

RAGHUNATH v. DWARKABAI. 43 Bom.L.R. 772.

**HINDU LAW, MARRIAGE—Contract of marriage—Betrothal—Agreement of betrothal entered into by mother of minor girl—Father entering into agreement on behalf of his major boy—Breach of contract—Right of minor girl to sue for damages—Contract of marriage conditional—Sustainability of spouse.**

Amongst Hindus a contract of marriage entered into on behalf of a minor by the minor's legal guardian and shown to be for the minor's benefit is enforceable at the instance of the minor.

Where a contract of marriage was entered

**HINDU LAW, MARRIAGE—(Contd.)**

into between the mother of the plaintiff, who was a minor Hindu girl, acting as her guardian and on her behalf, the father of the defendant on behalf of the defendant who was a Hindu and a major :—

*Held*, on consideration of the habits and customs prevailing amongst Hindus, that the contract being for the benefit of the minor girl could be enforced by her, and she could maintain a suit for damages for breach thereof by the defendant.

Under the Hindu law the contract of marriage is conditional on the husband being a suitable spouse at the time when the marriage is to be performed, and there being no more suitable husband available.

KHIMJI v. LALJI.

43 Bom.L.R. 35.

**HINDU LAW, PARTITION—Suit by minor coparcener—Severance of interest.**

When a partition suit is brought on behalf of minor coparceners by their next friend, there is no severance of status unless and until a decree is made in the suit.

MULGUND CO-OPERATIVE SOCIETY v. SHIDLING-APPA.

43 Bom.L.R. 807.

*Paternal grandmother, when entitled to share.*

Under the Mitakshara school of Hindu law a paternal grandmother is not entitled to a share in the family estate upon a partition between her grandson and the collaterals or cousins of his deceased father; but the grandson's share on such partition is subject to her right of maintenance. The grandmother, however, is entitled to a share when partition takes place between the direct descendants *inter se* of her deceased husband provided that the dividing parties are not related to one another as father and son.

JOTIRAM v. RAMCHANDRA.

43 Bom.L.R. 843.

**HINDU LAW, REVERSIONERS—Widow—Daughters—Reference by widow of reversioners' rights to arbitration—Whether such reference binds reversioners.**

Under Hindu law a reversioner has no right or interest *in presenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*. His guardian, if the reversioner happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

A Hindu left, by his will, his divided property one of which was mentioned as ancestral, to his wife in the first instance, and on her death to his daughters. A dispute about the ancestral property having arisen between the widow and her husband's collaterals, the widow in her own right as well as the mother and guardian on behalf of her minor daughter referred it to arbitrators, who decided that the property should be enjoyed by the widow

## HINDU LAW, REVERSIONERS—(Contd.)

during her lifetime, and that after her death it should be divided among the collaterals. After the widow's death, the only surviving daughter, who was a minor at the date of arbitration, sued to recover possession of the ancestral property alleging that the award was not binding on her:—

*Held*, that the plaintiff was entitled to succeed and the award was not binding on the plaintiff, because the widow in making the agreement to refer in no way purported to bind the estate or to act as representing the estate of her husband.

HAR NARAINI KUNWAR *v.* SAJJAN PAL SINGH.  
43 Bom.L.R. 141 (P.C.).

HINDU LAW, WIDOW—Unchastity—Widow of gotraja sapinda inheriting property of husband's nephew—Unchastity of widow whether a bar to such inheritance—Hindu Women's Rights to Property Act (XVIII of 1937).

Under Hindu law an unchaste widow is not incompetent to inherit property of her husband's kinsmen.

AKORA *v.* SAI. 43 Bom.L.R. 338.

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II of 1929)—Applicability of Act to Hindus and Jains, as also to Mitakshara and Mayukha systems of law—Succession—Sister's son—Father's sister—Priority between.

The Hindu Law of Inheritance (Amendment) Act, 1929, applies to Hindus including Jains, and to all persons governed by the Mitakshara law, including those governed by the Mitakshara law as modified by the Mayukha.

Hence, among the Jains who have migrated from Gujarat and settled in the Belgaum district, a sister's son is entitled to succeed in preference to the father's sister of the propo-situs.

The rise and growth of the Mitakshara and the Mayukha systems of law discussed.

AMBABAI *v.* KESHAV. 43 Bom.L.R. 114.

HINDU WIDOW'S RIGHTS TO PROPERTY ACT (XVIII of 1937). See HINDU LAW, WIDOW. 43 Bom.L.R. 338.

INCOME-TAX ACT (XI of 1922)—Indian State Bank.

A property, situate within British India, taken over by an Indian State Bank from its debtor, a subject of the Indian State, in part satisfaction of the loan advanced to him, is not property occupied in British India for the purposes of the business, but the income derived from such business is income arising in connection with such business and is liable to be assessed to income-tax under the Indian Income-tax Act, 1922.

The profits made by an Indian State Bank on the sale of investments made by it in the Government of India securities—such profits being the excess realised over the cost price of the investments, if not appropriated as accretions to capital, are assessable to income-tax under the Indian Income-tax Act, 1922.

*In re* PATIALA STATE BANK. 43 Bom.L.R. 84.

## INCOME-TAX ACT—(Contd.)

—S. 2(6)—“Company”—Dominion Government.

The definition of “company” in s. 2(6) of the Indian Income-tax Act, 1922, includes a Dominion Government deemed to be a company under the Government Trading Taxation Act, 1926.

*In re* PATIALA STATE BANK. 43 Bom.L.R. 84.

—S. 4(3)(i)—Exemption from liability to income-tax—Trust of property for “charitable purposes” essential—Assessment of income of property—Property must be held under trust or other legal obligation—Association for relief of poor agriculturists—Whether object of association is charitable—Whether charitable object ceases to be charitable because such association is organised by political body.

In order to avoid liability to income-tax under s. 4(3) (i) of the Indian Income-tax Act, 1922, the assessee has to establish that the income assessed is derived from property held under trust or other legal obligation wholly for religious or charitable purposes.

If the object of an association is relief of the poor, it is none the less charitable, because some political body may consider that it affords the best method of relieving the poor, and may, therefore, adopt the scheme.

An unregistered Association consisting only of persons who had become its members was created for the following objects:—“To raise loans, to collect subscriptions, to hold immoveable property, to invest funds under proper security, to give and take mortgage for the furtherance of hand-spinning and khaddar, to give financial assistance to khaddar organisation by way of loans, gifts or bounties, to help or establish schools or institutions where hand-spinning is taught, to help or open khaddar stores, to establish a khaddar service, to act as agency on behalf of the Congress to receive self-spun yarn as subscription to the Congress and to issue certificates and to do all the things that may be considered necessary for the furtherance of its objects, with power to make regulations for the conduct of affairs of the Association or the Council and to make such amendments in the present constitution, as may be considered necessary from time to time.” The Income-tax Officer assessed the association to income-tax and super-tax on the total income of Rs. 88,601 for the year 1936-37, overruling its contention that it was not assessable to income-tax by reason of the exemption contained in s. 4(3) (i) of the Indian Income-tax Act. This was confirmed on appeal to the Assistant Commissioner. The assessee then applied to the Commissioner either to revise the order or to state a case to the High Court; but the latter refused to do so. The association then applied to the High Court under s. 66(3) of the Act and the High Court directed the Commissioner to state a case. The Commissioner thereupon referred the following question to the High Court:—“Whether having regard to the objects of the Association and the manner in which they are carried out and the

## INCOME-TAX ACT, S. 4(3)(i)—(Contd.)

purpose for which its funds are applied the income of the Association is liable to income-tax and/or super-tax." The Commissioner was of opinion that the objects of the Association were not charitable and therefore the Association was properly assessed:—

*Held*, that the document specifying the objects of the Association was not couched in the language of obligation but of permission, and there was nothing therein which limited in any way the purposes for which any profits derived by the Association could be applied;

that the Association had failed to show that the property from which the profits were derived was property held under trust or other legal obligation for charitable purposes and that there was a binding legal obligation to devote its profits to charitable purposes; and

that, therefore, the Association had not brought itself within the exemption in s. 4(3)(i) of the Indian Income-tax Act and was rightly assessed to income-tax and super-tax.

*In re THE ALL-INDIA SPINNERS' ASSOCIATION.*  
43 Bom.L.R. 742.

—"Charitable purposes"—Trust wholly for religious and charitable purposes—Exemption from income-tax—Rate of assessment.

A trust fund was created having for its objects (a) the advancement of any purpose which might in the uncontrolled opinion of the managing committee be national or of national importance for the inhabitants of British India, (b) the political advancement of India having for its goal the acquisition of complete national autonomy or "swarajya", (c) the diffusion of political education and knowledge as to the political affairs of India and propagandist work both in India as well as in any part of the world, (d) any object which might conduce to any of the aforesaid objects. A question having arisen whether the income of the fund was exempt from payment of income-tax under s. 4(3)(i) of the Indian Income-tax Act, 1922, as being a trust wholly for charitable purposes, and if not so exempt, what was the rate of assessment:—

*Held*, (1) that the four sub-clauses setting out the objects of the fund were distributive;

(2) that sub-cl. (a) went beyond the definition of "charitable purposes" contained in s. 4 of the Act, inasmuch as the selection of the purpose rested in the uncontrolled opinion of the managing committee;

(3) that sub-cl. (b) also went too far, because it was really a gift for political purposes;

(4) that therefore the income of the trust fund did not fall within the purview of s. 4(3)(i) of the act and was assessable to income-tax;

(5) that the case fell within the first proviso to s. 41(f) of the Act, and the tax should be assessed at the maximum rate.

*Held*, further, by Kania J., that sub-cl. (c) which contained the words "political education and knowledge" coupled with "propagandist work both in India as well as in any part of the world" fell within the rule stated

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## INCOME-TAX ACT, S. 4(3)(i)—(Contd.)

in *Tribune Press Trustees, Lahore v. Income-tax Commissioner* (41 Bom. L. R. 1150), and that sub-cl. (d), being the general clause dealing with objects subsidiary to the three objects mentioned in the preceding sub-clauses shared the same infirmity.

*Per Beaumont C. J.* Trusts for the benefit of the inhabitants of a particular locality are regarded as charitable; but trusts for the benefit of a particular political party, or for the advancement of particular political opinions, are not regarded as charitable.

The definition of "charitable purposes" as contained in s. 4(3) of the Indian Income-tax Act goes further than the definition of charity to be derived from the English cases, because it embraces purposes of general public utility.

There is no authority for the proposition that a gift for such purposes as a particular individual or individuals may consider to be charitable is good.

*Per Kania J.* When there is a general charitable intention, the Court will uphold it, and if within that limit discretion is given to the trustees to select an object, the trust will not fail because of the discretion so given. If the dominant purpose of a trust is political, it is not a charitable object within the meaning of the Indian Income-tax Act.

*In re TILAK JUBILEE FUND.* 43 Bom.L.R. 1027.

—S. 5(2)—Transfer of income-tax cases by Central Board of Revenue—Completed assessments not affected by transfer—Further proceedings by assessee covered by transfer—Hearing of appeal under order of transfer—Hearing valid—Power to state case to High Court.

On March 31, 1939, the assessee was assessed to income-tax by the Income-tax Officer, Special Circle, Bombay, who was subordinate to the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan. On April 1, 1939, the Income-tax Act, 1922, was amended, one of the effects of which was that the Commissioner of Income-tax (Central) was appointed. On April 15, 1939, a demand for payment was made on the assessee. The assessee applied under s. 27 of the Act to get the assessment set aside, but his application was rejected. On April 18, 1939, the Central Board of Revenue, acting under s. 5(2) of the Act, as amended, transferred among others the case of the assessee by name to the Commissioner of Income-tax (Central). On May 10, 1939, the assessee appealed against his assessment, and the appeal was disposed of by the Appellate Assistant Commissioner, Sa. I to VI, A-Range, Bombay, who was appointed, under the amended Act, to hear appeals against assessments made by the Income-tax Officer, Special Circle, Bombay, which appeals were pending on June 3, 1939. The assessee then applied to the Commissioner of Income-tax (Central) asking him to state a case to the High Court, under s. 66(2) of the Act, in the matter of his assessment; but the Commissioner refused to do so on the ground that he had no jurisdiction to deal with the

## INCOME-TAX ACT, S. 5(2)—(Contd.)

matter. On application to the High Court :—

*Held*, (1) that the order of transfer of cases, under s. 5(2) of the amended Act, did not include assessments already completed on March 31, 1939, though it did operate on any further proceedings relating to the assessee;

(2) that the Appellate Assistant Commissioner, Ss. I to VI, A-Range, Bombay, was the proper tribunal to hear the appeal filed by the assessee, whether the transfer made on April 18, 1939, embraced the assessment in question or not;

(3) that inasmuch as the assessment made on March 31, 1939, had not been validly transferred to the Commissioner of Income-tax (Central), that Officer had no jurisdiction to entertain the application and to state a case under s. 66(2) of the Act;

(4) that that Officer could not therefore be ordered to state a case and that the application failed.

*In re* GOVINDRAM GORDHANDAS.

43 Bom.L.R. 1009.

## —S. 10.

Enhanced values obtained from realisation or conversion of securities may be assessable to income-tax where what is done is not merely a realisation or change of investment but an act done in what is truly the carrying on, or carrying out, of a business.

Where some of the securities of a bank are realised in order to meet withdrawals by depositors, it is a normal step in carrying on the banking business and the profits accrued therefrom are assessable for the purposes of income-tax.

In order to render taxable profits realised on sales of investments by an assessee it is not necessary to establish that the tax-payer has been carrying on a separate business either of buying or selling investments or of merely realising them.

PUNJAB CO-OPERATIVE BANK, LD. *v.* COMMISSIONER OF INCOME-TAX, LAHORE.

43 Bom.L.R. 372 (P.C.).

## —S. 16(3). See INCOME-TAX ACT, S. 26A.

43 Bom.L.R. 258.

## —S. 25(3)—“Discontinued”, meaning of—Assessment in case of discontinued business.

Section 25(3) of the Indian Income-tax Act of 1922, before it was amended in 1939, treated business, profession or vocation as if it was a sort of legal entity. After its amendment, read with s. 26(2) of the Act, it ceased to treat the business as a single unit and split up the tax between the owners for the time being of the business.

Section 25(3), as amended, provides that no tax shall be payable for the period between the end of the previous year and the date of discontinuance of the business. Hence, the income of the previous year, that is the whole of it, shall be deemed to be the income of that period.

The word “discontinued” in s. 25(3) covers

## INCOME-TAX ACT, S. 25(3)—(Contd.)

a discontinuance either by cessation or by disposal.

The exception in s. 25(3) may cover a case, very unlikely to occur but at the same time possible, in which there has been a succession to which sub-s. (4) applies, and subsequently there has been cessation of business within the year of assessment.

The assessee, who carried on business in coffee, butter etc. was at first assessed to income-tax under the provisions of the Indian Income-tax Act of 1918, on the basis of income made during the year of assessment. In 1922, the new Indian Income-tax Act was passed, under which the tax was assessed on the basis of income made during the previous year. On January 1, 1939, the assessee assigned his business to a limited company. The Act of 1922 was amended on April 1, 1939, by amending, among other sections, s. 25 which dealt with assessment in case of discontinuance of business. During the assessment for the year 1939-40, the assessee contended that in view of the amended s. 25 he should be relieved from the payment of double income-tax in respect of the income made during the year 1938, because his business was discontinued at the end of the year :—

*Held*, (1) that the assessee was entitled to the benefit of s. 25(3) of the Indian Income-tax Act, 1932, as amended in 1939;

(2) that if the income of the year 1938 was to be deemed to be the income of the period between the end of the previous year and the date of discontinuance of the business (which period did not exist in the present case), the assessee was not liable for any tax;

(3) that therefore no tax was payable by him in respect of his income from his business for the year 1938 liable to assessment in respect of the year 1939.

*In re* POLSON.

43 Bom.L.R. 1034.

## —S. 26(2). See INCOME-TAX ACT, S. 25(3).

43 Bom.L.R. 1034.

—S. 26A—Income-tax Rules 2, 4—Partnership consisting of assessee, his wife and minor son—Formation of new partnership—Mother of assessee substituted for wife and minor son—Alteration effected to avoid incidence of taxation—Whether such alteration by itself sufficient ground to refuse registration under Act—Shares of partners specified in deed of partnership—One partner a nominee of share for another partner—Deed whether registrable.

On an application, under s. 26-A of the Indian Income-tax Act, 1922, to register a firm, it is open to the Income-tax Officer to say that the shares which appear in the deed of partnership presented to him for registration are not the true shares of the partners and therefore there is no proper application by the requisite firm under that section. If it were shown that one of the partners was only a nominee of a share allotted to him or her for another partner, the deed would not then specify correctly the individual shares and registration would be refused.



## INCOME-TAX ACT, S. 26A—(Contd.)

But the fact that the object of the alteration in a partnership, which is otherwise genuine, is to avoid the effect of s. 16(3) of the Indian Income-tax Act, 1922, is no ground for refusing to register the partnership under s. 26-A of the Act.

*In re CENTRAL TALKIES CIRCUIT, MATUNGA.*

43 Bom.L.R. 258.

—S. 41. See INCOME-TAX ACT, S. 4.

43 Bom.L.R. 1027.

—S. 42—'Agents,' meaning of—*Bank in Indian State having business connection with bank in British India—Income on loans advanced to bank in British India by bank in Indian State, whether liable to income-tax—Principle of fiscal legislation.*

A large money lending business with many branches was being carried on by A and his three sons. They formed a bank at a town K in British India and another at P in an Indian State out of British India. Their business was transferred to these two banks as well as to a limited company registered in the Indian State. All the shares of the two banks were held by A and the members of his family and the banks were controlled by them. The P bank advanced several loans through one of its branches to a branch of the K bank. Six of these loans were used in the Rangoon business of the K bank. The income arising from those loans was assessed for the purpose of income-tax. The K bank objecting to the assessment, the Commissioner made a reference to the High Court of Madras under s. 66 (2) of the Indian Income-tax Act, 1922, in which he stated that in substance those loans represented money lent by the P bank to the K bank, but the transactions had been unnecessarily complicated by resorting to a series of entries which were as superfluous as they were confusing. He submitted that the income from those loans accrued and arose to the P bank directly or indirectly through or from a business connection in British India, within the meaning of s. 42(1) of the Indian Income-tax Act, between the K bank and the P bank. The High Court decided that the submission of the Commissioner was right. On appeal to His Majesty in Council:—

*Held*, (1) that the suggestion that in revenue cases the substance of the matter might be regarded as distinguished from the strict legal position was wrong;

(2) that the terms of s. 42 of the Indian Income-tax Act were wide enough to cover profits or gains which could be said to accrue or arise to the P bank directly or indirectly through or from any business connection which might exist between the P bank and the K bank in British India;

(3) that the income-tax authorities were acting within the power conferred upon them by s. 43 of the Income-tax Act in treating the K bank as the agent of the P bank for the purposes of the Act; and

(4) that the income from the loans was chargeable to income-tax in the name of K bank.

## INCOME-TAX ACT, S. 42—(Contd.)

In taxation cases the subject is not to be taxed merely because, in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. He is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. The principle of all fiscal legislation is that if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

*BANK OF CHETTINAD v. COMMISSIONER OF INCOME-TAX, MADRAS.* 43 Bom.L.R. 132 (P.C.).

—S. 43. See INCOME-TAX ACT, S. 42.

43 Bom.L.R. 132 (P.C.).

—S. 66(2). See INCOME-TAX ACT, S. 5(2).

43 Bom.L.R. 1009.

INDIAN STATE, law of an, is not included in the expression "by operation of law" as used in the Civil Procedure Code, 1908, O. XXI, r. 16. See CIVIL PROCEDURE CODE, O. XXI, r. 16. 43 Bom.L.R. 724.

## INHERENT POWER—Court.

Where an order is made against Government or a public body, and the law imposes liability in case the order is not obeyed, it is open to Government or the public body to move the Court and contend that the order is not justified by the law, and the Court has inherent power to consider such an application.

*POST MASTER GENERAL, BOMBAY v. CHENMAL.* 43 Bom.L.R. 758.

## INJUNCTION, grant of.

The relief by way of injunction is always discretionary. The Court will always be slow to grant such a relief to a party who admits that he has committed a breach of the contract and at the same time wants to prevent the opposite party from enforcing his rights under the contract. The more so, in a case where the contract between the parties gives rise to a claim for damages in case the power of sale under the contract is exercised improperly or irregularly.

*MULRAJ VIRJI v. NAINMAL PRATAPCHAND.*

43 Bom.L.R. 890.

—in personam. See CIVIL PROCEDURE CODE, S. 151.

43 Bom.L.R. 287.

INSOLVENCY ACT (PRESIDENCY) (III of 1909), S. 68(1)(d)—"Suit relating to property of the insolvent"—Meaning of—Money-decree passed against appellant—Appellant becoming insolvent subsequently—Whether Official Assignee could continue appeal—Civil Procedure Code (Act V of 1908), O. XXII, r. 8—"Might maintain," meaning of—Appeal whether abates

## INSOLVENCY ACT (PRESIDENCY),

S. 68(1)(d)—(Contd.)

where Official Assignee has no power to maintain it—Poverty of appellant whether ground for passing order for further security.

A suit "relating to the property of the insolvent", within the meaning of s. 68(1)(d) of the Presidency-towns Insolvency Act, 1909, means a suit which, if successful, will increase the assets distributable amongst the creditors or the defence of which may prevent the assets being diminished. A right to institute an appeal, which merely relates to a money claim against an insolvent, is not a legal proceeding relating to the property of the insolvent and does not fall within the powers given by s. 68 to the Official Assignee.

A Court of Appeal will not direct an appellant to give further security for the costs of the appeal merely on the ground of his poverty.

The appellant was declared insolvent after he had filed an appeal against a money decree passed against him. The respondent applied for an order dismissing the appeal under O. XXII, r. 8, Civil Procedure Code, 1908, contending that by reason of the insolvency of the appellant the appeal abated:—

Held, that the words "might maintain" in O. XXII, r. 8, Civil Procedure Code, meant that the Official Assignee had the power or was entitled to maintain the appeal; and that as in the present case the Official Assignee could not maintain such an appeal, the appeal did not abate.

CHANDRAKANT DEVJI v. NAROTTAMDAS.

43 Bom.L.R. 644.

INSOLVENCY ACT (PROVINCIAL) (V of 1920), S. 53—*Fraudulent transfer—Good faith.*

Where the agent of a creditor, taking advantage of the dominating position he holds, seizes the title-deeds of the debtor, with the view of taking hold of as much property as he can get, regardless of the solvency of the debtor or the claims of other creditors, whom he puts off by a false assurance that their money is safe, the transaction is entirely devoid of the element of good faith, which is a necessary ingredient of the provisions of s. 53 of the Provincial Insolvency Act, 1920, and is liable to be avoided under the section.

CHETTYAR FIRM v. U ON MAUNG.

43 Bom.L.R. 459 (P.C.).

—S. 68—*Insolvent—Receiver—Sale of property by receiver—Insolvent's right to impeach the sale—"Person aggrieved"—Interpretation.*

An insolvent has no *locus standi*, under s. 68 of the Provincial Insolvency Act, 1920, to impeach a sale effected by the receiver in insolvency.

The expression "person aggrieved", as used in the section, means a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.

SIDRAM v. MAHALYA.

43 Bom.L.R. 805.

## INSOLVENCY ACT (PROVINCIAL), S. 70.

A creditor who is refused leave, by a Subordinate Judge, to prosecute an insolvent, under s. 70 of the Provincial Insolvency Act, for fraudulent suppression of assets, is not entitled to appeal to the District Judge, as he cannot be said to be aggrieved by the order.

LALCHAND v. TULJARAM. 43 Bom.L.R. 961.

—S. 75(1)—*"Aggrieved by a decision"—Interpretation—Prosecution of insolvent—Application by creditor—Refusal of application—Appeal from order of refusal—District Court—Jurisdiction to hear appeal.*

The words "aggrieved by a decision come to in the exercise of insolvency jurisdiction", as used in s. 75(1) of the Provincial Insolvency Act, 1920, qualify not only "any other person", but also "the debtor, any creditor, [and] the receiver" appearing in the sub-section.

Hence, a creditor who is refused leave, by a Subordinate Judge, to prosecute the insolvent, under s. 70 of the Act, for fraudulent suppression of assets, is not entitled to appeal to the District Judge, as he cannot be said to be aggrieved by the order.

LALCHAND v. TULJARAM. 43 Bom.L.R. 961.

INSPECTION of record in a criminal case, right to. See CRIMINAL PROCEDURE CODE, S. 548.

43 Bom.L.R. 961.

INSTRUCTIONS FOR BRIEF, costs to be taxed as. See COSTS, ATTORNEY. 43 Bom.L.R. 655.

JAINS, succession—*Sister's son—Father's sister—Priority.*

The Hindu Law of Inheritance (Amendment) Act, 1929, applies to Hindus, including Jains, and to all persons governed by the Mitakshara law, including those governed by the Mitakshara law as modified by the Mayukha.

Hence, among the Jains who have migrated from Gujarat and settled in the Belgaum district, a sister's son is entitled to succeed in preference to the father's sister of the propositus.

The rise and growth of the Mitakshara and the Mayukha systems of law discussed.

AMBABAI BHATCHAND v. KESHAV.

43 Bom.L.R. 114.

JOINDER of charges. See CRIMINAL PROCEDURE CODE, S. 234.

43 Bom.L.R. 110.

JOINT TENANTS, adverse possession—*Ouster.*

Possession of immoveable property by one tenant-in-common or joint tenant is possession of all, and is not to be regarded as adverse to other tenants-in-common or joint tenants in absence of evidence of ouster.

VISHNU v. MAHADEV. 43 Bom.L.R. 971.

JOSHI watan—*Inalienability of watan land.*

Joshi service watan land, held under, a sanad in the ordinary form used for grants of land given in return for services to be rendered to a village community, are inalienable and not liable to be sold in execution of a decree against the holder of the lands.

KRISHNAJI v. PARAPPA.

43 Bom.L.R. 539.

JOURNALIST, limits to fair criticism by. See DEFAMATION, LIBEL BY NEWSPAPER.

43 Bom.L.R. 631.

LAND IMPROVEMENT LOANS ACT (XIX of 1883), S. 7. See TRANSFER OF PROPERTY ACT, S. 92.

43 Bom.L.R. 225.

—S. 7, proviso—“Mortgagees of that interest”—*Interpretation*—Mortgage by owner of land—Subsequent tagai loan by owner—Sale of land for non-payment of tagai—Such sale extinguishes prior mortgage.

The effect of the proviso to s. 7 of the Land Improvement Loans Act, 1883, is that, on the sale by Government of the land (for the improvement of which tagai loan is borrowed) for non-payment of the loan, while the interest of third parties (e.g. the right of an occupancy tenant) is protected, the interest of the borrower and that of the mortgagee or chargeholder from such borrower with regard to the property sold is extinguished.

MAHALINGAPPA CHANMALLAPPA v. SHANKARAYYA.

43 Bom.L.R. 600.

LAND REVENUE CODE (Bom. V of 1879)—Sale—Sale by civil Court.

A sale under the Bombay Land Revenue Code, 1879, in enforcing the provisions of the Bombay Co-operative Societies Act, 1925, has the same effect as a sale by a civil Court.

MULGUND CO-OPERATIVE SOCIETY v. SHIDLINGAPPA.

43 Bom.L.R. 807.

—S. 37—“Which are not the property of individuals”—“Are hereby declared to be the property of Government”—*Interpretation*.

The words “which are not the property of individuals” in s. 37 of the Bombay Land Revenue Code, 1879, are not confined in their application to “all lands wherever situated” but also apply to roads, bridges, beds of the sea, lakes, tanks, etc. Similarly, the words “except in so far as any right of such persons may be established” govern all the previous expressions and not merely lands.

The words “are hereby declared to be the property of Government” in s. 37 of the Code do not take away rights which existed when the section became law, e.g., wanta lands.

NARHARSINGJI v. SECRETARY OF STATE.

43 Bom.L.R. 167.

—S. 83—Permanent tenancy—Presumption—Antiquity of tenancy—Proof of origin of tenancy—Enhancement of rent paid by permanent tenant—Tenancy for agricultural purposes—Presumption as to permanency of tenancy—Record of Rights, entry in—Presumption as to its truth—Indian Evidence Act (I of 1872), Sec. 13—Kulkarni, statement by, as to character of tenancy—Relevancy of statement—Civil Procedure Code (Act V of 1908), Secs. 100, 101—Second appeal—Findings of fact.

The particular presumption mentioned in s. 83 of the Bombay Land Revenue Code, 1879, is not directed to be made save upon two conditions (among others): first, that there is no satisfactory evidence of the date of the commencement of the tenancy, and, secondly, that this lack is due to the antiquity of the

LAND REVENUE CODE, S. 83—(Contd.) •

tenancy. The first condition is not excluded by showing that the tenancy had its origin at some date within a period of twenty years which cannot be more precisely ascertained. This is not satisfactory evidence of the date of its commencement. By a tenancy's antiquity the section does not intend any reference to remote ages in the past or to “time immemorial” in the sense of the English law. It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted.

Hence, where lands are held under tenancies which are not proved to have been in existence before 1892, the presumption under s. 83 cannot properly be applied to them, notwithstanding that the evidence by no means excludes the possibility of an earlier origin.

Section 83 of the Code shows that a right on the part of the landlord to enhance a rent payable is not unknown in the Province of Bombay.

The fact that a tenancy is for agricultural purposes does not *prima facie* indicate that it is permanent or indeed that it is more than an annual tenancy. The inference of permanence is an inference which it is difficult to make and which requires the presence of circumstances explicable when taken as a whole only on the hypothesis of permanence.

A statement by the kulkarni of a village as to the character of a tenancy right in the village is admissible in evidence under s. 13 of the Indian Evidence Act, 1872.

*Held*, also, that there were circumstances in the case sufficient to show that the presumption in favour of the truth of the Record of Rights derived support from a number of independent considerations the cumulative effect of which should be regarded as strong.

The fact that the tenancies were granted for the purpose of agriculture could not be regarded as sufficient either in fact or in law to negative the conclusion indicated by so many strong circumstances that the tenancies were of a permanent character.

SHANKARRAO v. SHAMBHU.

43 Bom.L.R. 1 (P.C.).

—S. 135J—Record of rights—Entry—Presumption.

An entry in the Record of Rights that a tenant has permanent interest in the land is presumed to be true by virtue of s. 135J of the Bombay Land Revenue Code of 1879. Proper effect should be given to such a statutory presumption. The presumption is not weakened by the mere consideration that when the record was made the landlord was a minor and his property was being managed by the Collector on his behalf, nor does the fact that at the time of the preparation of the record the permanency of the interest of the tenants was not disputed in any way detract from the force of the presumption.

Where the existence of a Record of Right does not appear from the judgment of the first appellate Court to have been appreciated by it and no effect whatever has been given to the

## LAND REVENUE CODE, S. 135J—(Contd.) LEASE—(Contd.)

statutory presumption under s. 135J of the Bombay Land Revenue Code, the questions of fact as well as of law are open to the High Court on second appeal and can be considered by the Privy Council on appeal.  
SHANKARRAO v. SHAMBHU.

43 Bom.L.R. 1 (P.C.).

**LEASE, construction—“Rates taxes or dues of whatsoever kind,” meaning of—Whether Urban Immoveable Property Tax comes within these words—“Dues,” meaning of.**

The terms of a clause in a lease were—“That the lessees shall pay the following Municipal taxes, viz., general tax, halalkhore tax and License Fees, the water tax by meter . . . and riot taxes and all other existing and future rates taxes or dues of whatsoever kind or nature for the time being payable either by the landlord or tenant in respect of the demised premises or any part thereof and the lessees shall pay to the lessors the amount of such taxes or dues when demanded.” On a question having arisen whether the lessees were bound to pay to the lessor the Urban Immoveable Property Tax imposed subsequent to the date of the lease, the lessees contended that under the above clause the only taxes payable by them were municipal taxes:—

*Held*, that on the true construction of the clause the lessees were bound to pay the Urban Immoveable Property Tax which was both a tax and a due in respect of the demised premises and that the liability of the lessees was not confined to municipal taxes.

As the word “dues” follows the words “riot taxes”, it is not restricted to municipal taxes, and has a wider import than the word “rates” or “taxes”.

MANCHERJI v. DINBAL.

43 Bom.L.R. 543.

—**Determination of tenancy—Permission to lessees to erect temporary structures on land leased—Lessees given right to remove structures on determination of tenancy—Lessees vacating premises without removing structures—Attachment of lessees’ interest in land and structures—Sale of structures mentioned in proclamation of sale—Whether lessees’ interest in structures continued after determination of tenancy—Application by lessor to raise attachment—Transfer of Property Act (IV of 1882), Sec. 108—Contract to exclude provisions of this section.**

A clause in a lease required the lessees to deliver over possession of the demised premises at the determination of the tenancy in the same good condition as it was at the time the lessees entered into possession subject to wear and tear. Another clause provided that “on the determination of the tenancy the lessees shall be entitled to remove the structure or shed which they might have erected during the continuance of the tenancy.” The lease came to an end on August 31, 1939, and the lessees vacated the premises without removing certain structures. On September 13, 1939, a creditor of the lessees attached their right, title and interest in the land and the structures. On an application by the lessor to raise the attachment:—

*Held*, that, as the first clause made it obligatory upon the lessees to deliver over possession at the determination of the tenancy, the lessees were given no right to remain in possession after the determination of the tenancy;

that the second clause amounted to a contract between the parties which excluded the provisions of s. 108 of the Transfer of Property Act, 1882;

that having regard to the words “on the determination of the tenancy” in the second clause, if the lessees wished to remove the structures they were obliged to make provision for their removal by severing them from the soil, or by taking any steps which might be necessary so that they could remove them on the determination of the tenancy;

that as the lessees had not done so, they lost all their rights to remove the structures or to demand possession of them from the lessor;

that even if the lessees had the right to remove the structures after the determination of the tenancy and after they had gone out of possession, they would only have had the right to remove them within a reasonable time of the determination of the tenancy, forty-eight hours being enough in this case.

KHIMJI v. PIONEER FIBRE CO., LTD.

43 Bom.L.R. 576.

**LEASE, wakf property—Mutawalli—Long term lease—Permission of Court.**

A long term lease of the wakf property by its mutawalli is valid, provided permission of the Court is obtained for it. Such permission can be granted even after a suit is brought to set aside the lease, and it can be granted by any civil Court.

ZAFARBHAI GULJARBHAI v. CHHAGANLAL.

43 Bom.L.R. 854.

**LEASEHOLD properties in city of Ahmedabad not affected by the custom of pre-emption. See PRE-EMPTION.**

43 Bom.L.R. 581 (F.B.).

**LETTERS OF ADMINISTRATION, joint grant. See SUCCESSION ACT, S. 219.**

43 Bom.L.R. 770.

**LETTERS PATENT, CL. 10—Disciplinary jurisdiction—Attorney—“Reasonable cause”—“Misconduct”—Interpretation.**

Under cl. 10 of the Letters Patent, 1865, the High Court is empowered to remove or suspend from practice an advocate or attorney on “reasonable cause”. A wide discretion is given to the High Court in regard to the exercise of disciplinary jurisdiction by the use of the words “reasonable cause”.

“Reasonable cause” means professional or other misconduct under s. 10 of the Bar Councils Act, 1926. “Misconduct” is a wide expression and it is not necessary that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or is likely to hamper or embarrass the administration of justice by the High Court, or any of the Courts subordinate thereto, amounts to “misconduct.”

## LETTERS PATENT, CL. 10—(Contd.)

The High Court has power to remove an advocate or attorney if he is unfit to be entrusted with a professional status and character. If an attorney is found guilty of moral delinquency in his private character, he is liable to be struck off the roll.

*In re TULSIDAS KARANI.* 43 Bom.L.R. 250.

—CL. 12—*Bill of exchange—Drawn in Bombay—Acceptance of bill by drawee outside Bombay—Bill dishonoured—Suit in High Court by payee with leave obtained under cl. 12 of Letters Patent—Whether part of cause of action arose in Bombay—Jurisdiction.*

Defendant No. 1 drew in Bombay on defendant No. 2, who was residing at Calicut, five bills of exchange in favour of the Bombay branch of the plaintiff-bank. The bills were endorsed by the plaintiffs in favour of a bank at Calicut for collection. They were presented to defendant No. 2 who accepted them, but on the due date dishonoured them. The plaintiffs filed a suit in the High Court of Bombay with leave under cl. 12 of the Letters Patent to recover the amount due under the bills from both the defendants. Defendant No. 1 did not enter an appearance, but defendant No. 2 defended the suit and contended that the Court had no jurisdiction to try the suit as his liability having arisen only on acceptance of the bills at Calicut, no part of the cause of action arose in Bombay :—

*Held*, that, in order to give rise to the liability of defendant No. 2 as drawee, the plaintiffs had to establish that the bills of exchange were drawn by defendant No. 1 on defendant No. 2 in favour of the plaintiffs, who were the payees in Bombay; and

that, as that material fact took place in Bombay, part of the cause of action arose in Bombay, and with leave obtained under cl. 12 of the Letters Patent, the Court has jurisdiction to try the suit.

*CANARA INDUSTRIAL & BANKING SYNDICATE v. NARAYAN.* 43 Bom.L.R. 916.

—CL. 16. *See* MINOR, GUARDIANSHIP. 43 Bom.L.R. 926.

LICENCE—Abkari Act—*Toddy trees—Bombay Abkari Act (Bom. V of 1878), Secs. 4, 14, 35, 35A—Bombay Toddy Tapping Rules, 1928, rr. 2, 9-13—Power to grant licence to tap toddy-producing trees—Power controlled by rules which have the force of law and not by s. 4—Statutory duty to grant licence if rules complied with—"May", meaning of, in r. 2—"Shall", meaning of, in rr. 9 to 13—Specific Relief Act (I of 1877), Sec. 45—High Court—Public servant—Order for enforcement of public duties—Licence for tapping toddy trees—Order to issue licence.*

The petitioner owned lands upon which trees producing toddy were grown. Up to July 31, 1939, licences were granted to the petitioner for tapping the trees and supplying toddy to shops for sale. Thereafter owing to the introduction of prohibition no such licences were granted. On November 18, 1940, the petitioner applied,

## LICENCE—(Contd.)

under the provisions of the Bombay Toddy Tapping Rules, 1928, to the Collector of Bombay (respondent No. 1), for the issue of a licence to him to tap and draw toddy from his trees for domestic consumption only. On November 29, 1940, respondent No. 1 replied regretting his inability to grant such a licence. The petitioner thereupon appealed under the said provisions to the Commissioner of Excise (respondent No. 2), but the latter informed him on December 7, 1940, that respondent No. 1 was not bound to issue the licence asked for and that there was no reason to interfere with respondent No. 1's order. The petitioner, thereupon, presented a petition to the High Court, under s. 45 of the Specific Relief Act, 1877, against the respondents praying that they or either of them might be ordered to grant and issue the licence applied for. It was contended on behalf of the respondents that they had acted in the matter under the directions of the Provincial Government, as s. 4 of the Bombay Abkari Act made the Provincial Government the supreme authority in relation to the granting of such licences, and that by virtue of this section respondent No. 1 was bound to obey the orders issued by the Provincial Government with reference to granting of such licences :—

*Held*, that s. 4 of the Bombay Abkari Act related only to control of establishment and had no application to the grant of such licences; that respondents, who were charged with the power to issue licences, were controlled by the Bombay Toddy Tapping Rules, 1928, which were made under the Act, and which had the force of law, and that the respondents were bound to consider the petitioner's application for licence in the light of those rules;

that, even if s. 4 of the Act applied, as there was not in existence at the date of the petitioner's application any notification, rule, or order of the Provincial Government prohibiting the possession of toddy or the tapping or drawing of toddy from toddy trees, respondent No. 1 was not entitled to refuse the petitioner's application and respondent No. 2 to refuse his appeal;

that as the respondents acted under the mistaken belief that the prohibition policy of the Provincial Government amounted to an order justifying them in the action which they took, the Court could interfere and order them to act as they ought to have acted; and

that respondent No. 1 should forthwith grant a licence to the petitioner on payment of such fees, if any, and subject to such restrictions and on such conditions and in such form as was contemplated by s. 30 of the Act.

*RATANSIAH v. McELHINNY.* 43 Bom.L.R. 896.

LICENSE FEE for stacking fire wood and manufacturing sweetmeats. *See* MUNICIPAL ACT (BOROUGH), S. 58(j). 43 Bom.L.R. 533.

LIEN of vendor. *See* CIVIL PROCEDURE CODE, S. 64. 43 Bom.L.R. 206.

—*See* TRANSFER OF PROPERTY ACT, S. 55(4)(b). 43 Bom.L.R. 1014.

LIMITATION ACT (XIV of 1859), S. 1, Cl. (15). See LIMITATION ACT, Art. 148.  
43 Bom.L.R. 194.

LIMITATION ACT (IX of 1871), S. 20. See LIMITATION ACT, Art. 148. 43 Bom.L.R. 194.

—S. 29. See LIMITATION ACT, Art. 148.  
43 Bom.L.R. 194.

—ART. 148. See LIMITATION ACT, Art. 148.  
43 Bom.L.R. 194.

LIMITATION ACT (XV of 1877), S. 19. See LIMITATION ACT, Art. 148. 43 Bom.L.R. 194.

—S. 28. See LIMITATION ACT, Art. 148.  
43 Bom.L.R. 194.

—ART. 148. See LIMITATION ACT, Art. 148.  
43 Bom.L.R. 194.

LIMITATION ACT (IX of 1908)—*Interpretation.*

The Indian Limitation Act ought to receive such a construction as the language in its plain meaning imports. A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but it must, if unambiguous, be applied with stringency. The law must be enforced even at the risk of hardship to a particular party. The Court cannot, on equitable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED *v.* JAN MAHOMED.  
43 Bom.L.R. 346 (P.C.).

—S. 6—*Alienations by Hindu widow—Adoption made after alienations—Death of adopted son after attaining majority—Second adoption—Suit by second adopted son to set aside alienations—Whether suit by second adopted son to set aside alienations barred—Cause of action—Limitation.*

A Hindu died in the year 1900 without issue leaving certain properties. His widow alienated some of his lands in 1901 and 1904 by passing sale deeds in favour of defendants' predecessors-in-title. She adopted a son to her husband, but he died unmarried in 1918 after attaining the age of majority. In 1934 she adopted another son to her husband. In a suit by the second adopted son to set aside the alienations made by his adoptive mother, it was contended that the prior adopted son, who had been validly adopted and had attained majority long after the alienations, had a right to challenge the alienations, and\* as against him the period of limitation had commenced to run, the plaintiff could not acquire a fresh cause of action to set aside the alienations in respect of which time had already run :—

*Held*, that the effect of ss. 6, 7, 8 and 9 of the Indian Limitation Act, 1908, was to bar the prior adopted son's right to sue, and as his right was barred, no further right to sue in respect of the alienations could accrue to the plaintiff.

ANNU *v.* DADU.

43 Bom.L.R. 222.

LIMITATION ACT, 1908, S. 6—(Contd.)

—See LIMITATION ACT, S. 15.

43 Bom.L.R. 329.

—S. 7. See LIMITATION ACT, S. 6.

43 Bom.L.R. 222.

—S. 8. See LIMITATION ACT, S. 6.

43 Bom.L.R. 222.

—S. 9. See LIMITATION ACT, S. 6.

43 Bom.L.R. 222.

—S. 10—*Trust—Deed of settlement—Trust administered by trustees according to deed for number of years—Suit by settlor's heir for declaration that deed was void and inoperative and for order directing cancellation of deed and delivering property.*

A person who claims to be entitled to property, as an heir of the settlor, on the ground that the trust deed is void, is not a person claiming against a trustee holding the property for an express purpose. Section 10 of the Indian Limitation Act, 1908, does not apply to such a case.

A Mahomedan made a trust deed of his immovable property on October 22, 1895, under which the income of the property was to be given to him during his life-time, and after his death the trustees were to pay the income in certain proportions to the beneficiaries under the deed. Since the death of the settlor on June 7, 1897, the trustees administered the property as under the trust. On March 28, 1939, the plaintiff who was the settlor's heir's heir filed a suit for a declaration that the deed was void and inoperative, and for an order cancelling the deed and directing the trustees to deliver the property to him and render account of their management :—

*Held*, that, as the trustees were in possession of the property under the trust deed and had held it for the beneficiaries and administered it according to the deed, the property was not vested in the trustees for a specific purpose; and that s. 10 of the Indian Limitation Act, 1908, therefore did not apply and the suit was barred by limitation.

FIDAHUSSEIN *v.* TYABALLI. 43 Bom.L.R. 622.

—S. 15—*Civil Procedure Code (Act V of 1908), O. XXXII, r. 10—Mortgage—Preliminary decree—Final decree—Decree-holder minor—Stay of suit during minority—Whether application for final decree can be made after period of minority.*

On February 20, 1925, plaintiff No. 1, for himself and as next friend of his minor brother plaintiff No. 2, obtained a preliminary decree on a mortgage. Plaintiff No. 1 then died on January 20, 1927. In April 1933 plaintiff No. 2 attained majority, but died in September of the same year. Meanwhile in June 1933 the widow of plaintiff No. 1 adopted the applicant, who applied on July 31, 1934, for a final decree on the mortgage. A question having arisen whether the application was barred by limitation :—

*Held*, that the application was made within time, inasmuch as on the death of plaintiff.

## LIMITATION ACT, 1908, S. 15—(Contd.)

No. 1, next friend of the minor plaintiff No. 2, the right to apply for a final decree was suspended during the period of plaintiff No. 2's minority in which the suit was stayed by virtue of O. XXXII, r. 10, of the Civil Procedure Code, 1908.

GOVINDNAIK *v.* BASAWANNEWA.

43 Bom.L.R. 329.

—ART. 68—*Administration bond—Breach of condition by administrator—Bond assigned to heir on attainment of majority—Suit against administrator—Period of limitation applicable—Construction of statute of limitation—Indian Succession Act (XXXIX of 1925), Sec. 292—Assignment of administration bond—Whether such assignment creates new cause of action.*

An assignment of an administration bond under s. 292 of the Indian Succession Act, 1925, does not create thereunder a new cause of action so as to give a fresh starting point for the purposes of limitation to the assignee who sues for a breach of a condition in the bond.

A suit by the assignee of an administration bond to enforce the bond is a suit "on a bond subject to a condition" within the meaning of art. 68 of the Indian Limitation Act, 1908, and the period of limitation is three years from the date of the last breach and not the date when some person able to give a valid discharge for the estate claims it from the administrator or his representatives and fails to obtain it.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED *v.* JAN MAHOMED.

43 Bom.L.R. 346 (P.C.).

—ART. 106. See LIMITATION ACT, Art. 144.

43 Bom.L.R. 389 (P.C.).

—ART. 116—*Mortgage—Personal covenant.*

A personal covenant to pay contained in a registered mortgage deed is governed by Art. 116 of the Indian Limitation Act, 1908.

NISAR AHMAD KHAN *v.* MOHAN MANUCHA.

43 Bom.L.R. 465 (P.C.).

—ART. 120.

Article 106 or art. 123 of the Indian Limitation Act, 1908, does not apply to a suit for administration brought against Mahomedan co-heirs by a person entitled to part of the interest of an heir. Such a suit is governed as regards immoveable property by art. 144 and as regards moveables by art. 120 of the Indian Limitation Act, 1908, because the heirs of a Mahomedan succeed to his estate in specific shares as tenants-in-common.

MAHOMEDALLY TYABALLY *v.* SAFIABAI.

43 Bom.L.R. 388. (P.C.).

—*Scope.*

Decisions in India have established a rule of limitation under art. 120 of the Indian Limitation Act, 1908, by which the plaintiff, in the cases to which the rule applies, cannot

R. 135.

## LIMITATION ACT, 1908, ART. 120—(Contd.)

be debarred of his remedy, unless with knowledge of his rights he has been guilty of delay. O. RM. O. M. SP. (FIRM) *v.* NAGAPPA.

43 Bom.L.R. 440 (P.C.).

—ART. 123. See LIMITATION ACT, Art. 144.

43 Bom.L.R. 389 (P.C.).

—ART. 144—*Administration suit—Suit by Mahomedan heir against his co-heirs—Limitation—Immoveable property governed by Art. 144—Moveable property governed by Art. 120.*

Article 106 or art. 123 of the Indian Limitation Act, 1908, does not apply to a suit for administration brought against Mahomedan co-heirs by a person entitled to part of the interest of an heir. Such a suit is governed as regards immoveable property by art. 144 and as regards moveables by art. 120 of the Indian Limitation Act, 1908, because the heirs of a Mahomedan succeed to his estate in specific shares as tenants-in-common.

MAHOMEDALLY *v.* SAFIABAI.

43 Bom.L.R. 388 (P.C.).

—ART. 148—*Indian Limitation Act (XV of 1877), Art. 148, Secs. 19, 28—Indian Limitation Act (IX of 1871), Art. 148, Secs. 20, 29—Indian Limitation Act (XIV of 1859), Sec. 1, cl. (15)—Bombay Regulation V of 1827, Sec. 8, cl. 1—Mortgage—Redemption—Right to redemption barred under Act of 1859—Right whether revived owing to s. 2 of Act of 1871—Acknowledgment by pleader—Such acknowledgment whether valid under Acts of 1859 and 1871—Acknowledgment valid under Acts of 1877 and 1908 whether revives mortgage—Mortgage suit—Law of limitation applicable to such suit.*

The plaintiffs' ancestors mortgaged their lands to the predecessor-in-title of the defendants in October, 1791. One of the mortgagors sued in 1849 to redeem the mortgage in which suit the pleader of the mortgagee put in a statement signed by him of the account of the mortgaged property. In 1863 another of the mortgagors sued to redeem a portion of the mortgaged property, and in the appeal arising in that case the mortgagee's pleader put in in 1867 a memorandum of appeal signed by him in which the existence of the mortgage and the relationship between the parties as mortgagors and mortgagees was admitted as subsisting. The plaintiffs having sued to redeem the mortgage in 1933, the defendants contended that the mortgagors had lost their right to redeem and their title to the property mortgaged was extinguished:—

*Held*, (1) that the law of limitation applicable to the suit was the law in force at the date of its institution, provided that neither the right to the property in question had been extinguished nor the right to sue in respect of it barred before that law came into force;

(2) that the mortgage in suit being of the year 1791 was governed by s. 1, cl. (15), of the Indian Limitation Act, 1859, read with s. 1 of the Amending Act XI of 1861, according to which a suit for redemption of the mortgage was barred after January 1, 1862;

**LIMITATION ACT, 1908, ART. 148—**  
(*Contd.*)

(3) that the suit having been already barred attracted the application of s. 2 of the Indian Limitation Act of 1877 as well as s. 6 of the General Clauses Act, 1897, which prevented the Act of 1877 from affecting any title acquired or reviving any right to sue barred under the Act or under any enactment thereby repealed;

(4) that the alleged acknowledgment of 1849 did not save limitation, because under s. 1, cl. (15), of the Act of 1859, the acknowledgment should have been signed by the mortgagee or some person claiming under him, and an acknowledgment signed by his pleader as the agent of the mortgagee was of no avail;

(5) that in any case the present suit having become barred at the date the Limitation Act of 1877 came into force and the right to sue having been lost under its s. 2, it could not be revived even though the acknowledgments of 1849 and 1867 were good under the Limitation Act of 1908 when the suit was brought;

(6) that the suit was therefore barred by limitation.

YOONUS *v.* SHEIKH HASAN. 43 Bom.L.R. 194.

—ART. 181. See LIMITATION ACT, S. 15.  
43 Bom.L.R. 329.

—See CIVIL PROCEDURE CODE, O. XXI,  
r. 2. 43 Bom.L.R. 880.

—ART. 182(5). See CIVIL PROCEDURE  
CODE, O. XXI, r. 2. 43 Bom.L.R. 880.

—ART. 183. See ARBITRATION ACT, S. 15.  
43 Bom.L.R. 1006.

**MAHOMEDAN LAW, MAINTENANCE—**  
*Daughter—Duty of father to maintain daughter till marriage—Daughter claiming separate maintenance—Justifiable grounds for giving such allowance.*

Under Mahomedan law a father is under an obligation to maintain his daughter till her marriage, but he is not bound to provide her with separate maintenance, except in special circumstances.

Where a Mahomedan daughter lived with her mother who was divorced by her father, and the father married a second wife and became a lunatic, and the daughter claimed separate maintenance allowance:

*Held*, that, under the circumstances of the case, she was entitled to such allowance during the life-time of the father till her marriage.

BAYABAI *v.* ESMAIL. 43 Bom.L.R. 823.

**MUJAWARSHIP—Mujawarship entailing purely ministerial or menial functions—Female, whether competent to hold office of mujawar**

Under Mahomedan law a female is competent to hold the office of a mujawar, where such an office entails the performance of duties which consist in sweeping and cleaning the place, reading the Fatiha, offering prayers and

**MAHOMEDAN LAW, MUJAWARSHIP—**  
(*Contd.*)

incense and looking after the general management of the shrine.

ABDUL AZIZ *v.* MAHOMED IBRAHIM.

HUSSAINBI *v.* KHAIRUDDIN KUTBUDDIN.

43 Bom.L.R. 126.

—WAKF property—Mutawalli—Lease for long term—Sanction of Court—Sanction granted after suit—Sanction by any civil Court.

A long term lease of the wakf property by its mutawalli is valid, provided permission of the Court is obtained for it. Such permission can be granted even after a suit is brought to set aside the lease, and it can be granted by any civil Court.

ZAFARBHAI *v.* CHHAGANLAL. 43 Bom.L.R. 854.

**MATRIMONIAL SUITS, costs of wife.**

Observations as to the principles upon which costs are awarded to a wife in matrimonial suits.

ROZARIO *v.* ROZARIO. 43 Bom.L.R. 830.

**MAXIM :**

"Ex turpi causa non oritur actio." See  
FRAUD. 43 Bom.L.R. 681(F.B.).

**MAYUKHA system, rise and growth of.** See  
HINDU LAW OF INHERITANCE (AMENDMENT)  
ACT, 1929. 43 Bom.L.R. 114.

**MINOR, guardianship—Joint Hindu family—Minor's share in undivided property—Sale of property by karta of family—Sanction of Court to such sale—Sale binding on minor's share—High Court—Original Side—Jurisdiction to accord sanction—Minor living outside town and island of Bombay but within Bombay Presidency—Such minor to be British subject—Minor to be made respondent to application—Guardian ad litem of the minor—Costs of guardian—Guardians and Wards Act (VIII of 1890), Sec. 3—Amended Letters Patent, 1865, cl. 17—Letters Patent, 1862, cl. 16—Supreme Court Charter, 1823, cl. 37—Practice and procedure.**

The High Court of Bombay has, under its general jurisdiction, power to make an order appointing a guardian of the undivided property of a minor who is a member of a joint Hindu family and who resides within the limits of its original jurisdiction, that is to say the town and island of Bombay. Such jurisdiction extends also to a minor in a joint Hindu family, who is a British subject and who resides within the presidency of Bombay. It is derived from the prerogative of the Crown as *paterfamilias* to protect subjects of the Crown who cannot protect themselves.

Where the karta of a joint Hindu family applies to the Court for an order sanctioning a sale of joint family property in which the minor coparcener has a share, the Court, before according its sanction to the sale, should make the minor respondent to the petition and he should be represented by a guardian *ad litem*. Such guardian *ad litem* should normally be an officer of the Court, who should satisfy himself as to the interest of the minor. He may require further evidence as



## MINOR—(Contd.)

to the alleged necessity for the sale, and he may require further evidence as to the price being a good one, and he will also have to consider how the proceeds of sale are to be dealt with. If he requires any funds to enable him to look into the matter properly, the party seeking the order must provide those funds.

*In re RATANJI RAMAJI.* 43 Bom.L.R. 926.

**MITAKSHARA system, rise and growth of.** See **HINDU LAW OF INHERITANCE (AMENDMENT) ACT, 1929.** 43 Bom.L.R. 114.

**MORTGAGE, execution proceedings—Permission of Collector not obtained as required by sch. III, para. 11, Civil Procedure Code (Act V of 1908)—Deed whether null and void—Applicability of s. 65 of the Indian Contract Act (IX of 1872)—Personal liability in respect of such transaction—Transaction of mortgage between legal adviser and client—Scrutiny by Court—Circumstances under which such transaction is valid—Joint Hindu family—Presumption whether such family has joint property.**

A deed of mortgage effected in the course of execution proceedings before a Collector without his permission, as required by sch. III, para. 11, of the Civil Procedure Code, 1908, is null and void. Such a deed falls within the words "discovered to be void" in s. 65 of the Indian Contract Act, 1872. The mortgage, however, stands in respect of the personal liability for the money actually paid, with proper interest thereon. If the loan is bona fide and is actually received and the terms are not unreasonable, the mortgagee is entitled to receive payment of whatever may be due on the mortgage, with interest thereon at reasonable rate.

*NISAR AHMAD KHAN v. MOHAN MANUCHA.* 43 Bom.L.R. 465 (P.C.).

—**Lawyer—Scrutiny for mortgage executed to lawyer.**

Transactions of mortgage between a legal adviser and client to secure the repayment of money advanced at the time are not ordinarily subjected by Courts to the same jealous scrutiny as, for instance, a gift from a client to a legal adviser, or purchases or sales at undervalue between a legal adviser and client. If the money is sorely needed and is paid, the mortgagor has its benefit, the rate of interest is reasonable, and the terms neither excessive nor onerous, the transaction stands as a valid mortgage between the parties.

*NISAR AHMAD KHAN v. MOHAN MANUCHA.* 43 Bom.L.R. 465 (P.C.).

—**Power of sale—Whether power can be restrained if exercised in wrong and improper manner—Injunction to restrain power of sale—Repayment of mortgage moneys—Mortgagee's option for acceleration of repayment—Intimation of exercise of option whether necessary—Advertisement of sale of mortgaged property whether sufficient intimation—Notice of demand or filing of suit whether sufficient—Transfer of Property Act (IV of 1882), Sec. 69 (2) (a)—Notice in writing imperative—Curtail-**

## MORTGAGE—(Contd.)

**ment of three months' period by act of parties whether permissible.**

A mortgagee cannot be restrained from exercising his power of sale merely by reason of the mortgagor filing a suit for redemption, unless he pays the mortgage amount to the mortgagee or tenders the same.

A mortgagor is entitled to file a suit to restrain the mortgagee by an order and injunction of the Court from exercising his power of sale, if the power is exercised in a wrong and improper manner, or contrary to the terms of the contract.

The equitable relief by way of injunction is not to be refused because the mortgagor was unable to pay in the past and may be unable to pay in the future. The relief may be granted even if the mortgagor can come forward later and claim damages on account of an improper sale.

In order that the mortgage moneys may become immediately payable on the exercise of the mortgagee's option, there must be an act indicating to the mortgagor the exercise of that option so as to enable the mortgagor to realise his position and save his equity of redemption if possible. An advertisement by a mortgagee for sale of the mortgaged property by public auction, without any intimation to the mortgagor, is not an appropriate action by the mortgagee to make the mortgage amount immediately payable at his option.

A notice of demand or even the filing of a suit amounts to such appropriate action.

The notice in writing required by s. 69(2) (a) of the Transfer of Property Act, 1882, is imperative, and the period of three months which must expire after service of such notice cannot be curtailed by agreement of parties.

*MOHIDIN SHAKKAR v. JEHLANGIR DINSHEW.* 43 Bom.L.R. 553.

## MUJAWAR—Female.

Under Mahomedan law a female is competent to hold the office of mujawar, where such an office entails the performance of duties which consist in sweeping and cleaning the place, reading the Fatiha, offering prayers and incense and looking after the general management of the shrine.

*ABDUL AZIZ v. MAHOMED IBRAHIM.* 43 Bom.L.R. 126.

**MUNICIPAL. ACT (BOROUGHS) (Bom. XVIII of 1925), S. 58(j)—License fee—Rule for imposing such fee—By-law for taking license necessary pre-requisite before imposition of fee—Storage of fire-wood, coal and charcoal—Manufacture and sale of sweetmeats.**

The Borough Municipality of Broach framed by-laws under s. 61 of the Bombay Municipal Boroughs Act, 1925, one of which made it compulsory for traders in fire-wood and charcoal to obtain licenses for carrying on their trade, but prescribed no fee for the grant of such licenses. Subsequently the Municipality, with the sanction of Government, framed, in the exercise of the power given to it by the provisions of s. 58(j) of the Act, a new rule r. 208

MUNICIPAL ACT (BOROUGH), S. 58 (J)  
—(Contd.)

(a), under which it levied a yearly license fee, not only in respect of storing wood, coal and charcoal, but also for the manufacture and sale of sweetmeats, the object of the levy being to enable the Municipality to meet educational expenses.

The plaintiffs, who respectively were traders in fire-wood and charcoal and manufacturers and sellers of sweetmeats and confectionery, and carried on their business within the municipal limits of Broach, sued for a declaration that the Municipality had no right to recover from them any sum under the pretext of license fees. The lower Courts having held that the levy was legal, the plaintiffs appealed :—

*Held*, (1) that, under s. 90(I) of the Bombay Municipal Boroughs Act, the question of charging license fees would arise when a license was granted, and a license could only be granted if the law required a license to be granted ;

(2) that there was no provision in the Act requiring persons carrying on the trades enumerated in its s. 186(I) to apply for and obtain a license, that under the scheme of the Act it was left to the discretion of the Municipality to so require them, that the Municipality might, by framing the necessary by-laws, require any trade to be carried on under a license, and that the section therefore provided a penalty for using a place for a trade without a license only when the by-laws provided for obtaining a license ;

(3) that the object for which a fee or tax was levied by a public body did not serve necessarily as a guide for saying whether an imposition was a "fee" or "tax" ;

(4) that merely because the Municipality before making the rule had in a public notification indicated the object for which it was to be applied (viz., to meet educational expenses), that would not render the formality observed in passing the rule unsuitable or unauthorised ;

(5) that inasmuch as the by-laws provided for a license to be taken in the case of storage of fire-wood and charcoal, the Municipality was competent to make rules prescribing the fee to be charged for such license ;

(6) but that as regards the manufacture and sale of sweetmeats the Municipality not having first made a by-law insisting upon a license and then framed a rule prescribing a fee under s. 58(j) of the Act, the levy of fees upon the manufacturers and sellers of sweetmeats was not in accordance with law.

SORABJI LAKDAVALA v. BROACH MUNICIPALITY.  
43 Bom.L.R. 533.

—S. 61. See MUNICIPAL ACT (BOROUGH), S. 58(j).  
43 Bom.L.R. 533.

—S. 90. See MUNICIPAL ACT (BOROUGH), S. 58(j).  
43 Bom.L.R. 533.

—S. 110—*Appeal before Magistrate—Whether Magistrate a persona designata or ordinary Court—Admission of additional evidence by Magistrate whether permissible—Assessment whether can be challenged on appeal—Interlo-*

MUNICIPAL ACT (BOROUGH), S. 110—  
(Contd.)

*cutory orders passed by Magistrate on appeal—Jurisdiction of revising Court to interfere in revision against such orders.*

A Magistrate hearing an appeal under s. 110 of the Bombay Municipal Boroughs Act, 1925, is an ordinary Court and as such can allow additional evidence, oral or documentary, to be led before him.

In an appeal under s. 110 the question of the assessment itself can be challenged.

MUNICIPAL BOROUGH OF AHMEDABAD v. ARYO-  
DAYA GINNING & CO. 43 Bom.L.R. 816.

—S. 111—"Decision upon any appeal"—  
*Interpretation.*

The words "decision upon any appeal" in s. 111 of the Act do not imply that the decision of the appeal referred to means the final decision. The revising Court, therefore, can interfere in revision with interlocutory orders passed by a Magistrate under s. 110 of the Act.

MUNICIPAL BOROUGH OF AHMEDABAD v. ARYO-  
DAYA GINNING CO., LTD. 43 Bom.L.R. 816.

## —S. 123.

The accused who relies upon the permission given to him by sub-s. (5) of s. 123 of the Bombay Municipal Boroughs Act, 1925, has the burden cast upon him to prove that he comes within the terms of the sub-section and is thereby relieved of the liability which is otherwise upon him under sub-s. (7) of the section.

EMPEROR v. DAHYABHAI SAVCHAND.

43 Bom.L.R. 519.

—S. 123(5)—*Exception contained in sub-section—Burden of proof.*

In order to bring himself within the exception contained in s. 123 (5) of the Bombay Municipal Boroughs Act, 1925, the burden lies upon the accused to prove that his work was not inconsistent with any provisions of the Act or by-laws. This, however, presupposes that a question has arisen as to whether he has committed a breach of any provision of the Act or by-laws. As soon as the Municipality has notice that the accused is going to rely on s. 123(5), the Municipality must allege what provisions of the Act or by-laws they say the accused has broken which disentitles him to rely on the sub-section. When such an allegation is made, the burden is upon the accused to prove that he has not committed the breach of the Act or by-law alleged. Unless, therefore, the Municipality alleges a breach of some specific provision of the Act or by-law, there is no issue on which any question of burden of proof can arise.

EMPEROR v. BHIKHABHAI MOTIRAM.

43 Bom.L.R. 877.

—S. 159—*Offensive liquid, running out of, into street—Textile mill—Secretary, liability of.*

Under s. 159 of the Bombay Municipal Boroughs Act, 1925, it must be proved, firstly, that the accused is a person who has the

MUNICIPAL ACT, (BOROUGH), S. 159—  
(*Contd.*)

building or land under his control, secondly, that he allowed the water to run upon any street, land or space, and, thirdly, that the water was or was likely to become offensive.

The secretary of a textile mill cannot, in absence of evidence, be made liable as such for an offence under s. 159 as being in control of the mill premises.

EMPEROR *v.* CHAMPAKALAL. 43 Bom.L.R. 110.

—S. 186(1). See MUNICIPAL ACT (BOROUGH), S. 58(j). 43 Bom.L.R. 533.

MUNICIPAL ACT (CITY) (*Bom. III of 1888*), S. 3(m)—“Owner”, meaning of.

The word “owner” as defined by s. 3(m) and used in ss. 257(1) and 375 of the City of Bombay Municipal Act, 1888, does not include trustees of a wakf property who, under a permission of the High Court to raise a loan on the property, borrow money on the property and give to the creditor the right of collecting rents from the tenants of the property entitling him out of the rent to pay to himself a commission of certain per cent. and to appropriate the balance of the rent in reduction of the loan.

The expression “receives the rent” in s. 3 (m) is not used in any technical sense.

EMPEROR *v.* NOORMAHOMED JANMAHOMED. 43 Bom.L.R. 598.

—S. 257(1). See MUNICIPAL ACT (CITY), S. 3(m). 43 Bom.L.R. 598.

—S. 375. See MUNICIPAL ACT (CITY), S. 3(m). 43 Bom.L.R. 598.

MUNICIPAL ACT (DISTRICT) (*Bom. III of 1901*), S. 86—*Appeal to Magistrate—House-tax and water-tax—Decision by Magistrate—Magistrate acts as persona designata—Revision—High Court—Civil Procedure Code (Act V of 1908), Sec. 115.*

A Magistrate hearing an appeal under s. 86 of the Bombay District Municipal Act, 1901, acts as a *persona designata*; and therefore an order passed by him under the section is not open to revision by the High Court under s. 115 of the Civil Procedure Code, 1908.

VITA MUNICIPALITY *v.* GANGARAM TATYAJI. 43 Bom.L.R. 333.

MUSSALMAN WAKF ACT (XLII of 1923), S. 2(c)—*Bombay Mussalman Wakf Rules, 1936, r. 26—Prosecution under s. 10—Sanction of Court—Form of sanction—Mutawalli holding property within jurisdiction of Court bound to file particulars and accounts—Foreign trust immaterial—Dedication of property to wakf by trustees.*

Section 10B of the Mussalman Wakf Act, 1923, enacted by the Mussalman Wakf (Bombay Amendment) Act, 1935, directs that no prosecution under the Act shall be instituted except by or with the previous sanction of the Court given in the prescribed manner, i.e. the manner prescribed by rules under the

MUSSALMAN WAKF ACT, S. 2 (C)—  
(*Contd.*)

principal Act. Rule 26 of the Bombay Mussalman Wakf Rules, 1936, provides that the order of sanction shall state the offence in respect of which the accused is to be prosecuted.

In dealing with a case involving breach of the provisions of ss. 3 and 5 of the Mussalman Wakf Act, 1923, the civil Judge expressed in his judgment an opinion that an offence punishable under s. 10 of the Act had been committed and directed the papers to be sent to the Public Prosecutor for taking necessary action against the offender. It was objected that the subsequent proceedings failed for want of sanction:—

*Held*, that the remarks made by the Judge were sufficient compliance with r. 26 of the Bombay Mussalman Wakf Rules, though it might be better if a formal sanction had been given independently of the judgment.

A mutawalli, who is in possession of property situate within the local limits of the Small Causes Court at Bombay, is bound to furnish the particulars required by s. 3 of the Mussalman Wakf Act, 1923, to the Chief Judge of the Small Causes Court at Bombay, although other properties of the wakf may be situate, and those who benefit from the wakf may be resident, outside Bombay or outside British India. The section applies to any property of a wakf within the jurisdiction of the local Court.

The term “wakf” as defined by s. 2(e) of the Mussalman Wakf Act is not confined to dedication of property by a beneficial owner, but includes a dedication by a trustee provided he keeps within the terms of his trust. Hence, such dedication is constituted by persons collecting money on terms which make it charitable in the hands of the trustees who hold it, their subsequent investment of that money in immoveable property, and their declaration of a trust of that immoveable property for the charitable purpose for which it is held.

There cannot be an offence under s. 5 of the Mussalman Wakf Act unless a statement has been delivered under s. 3 of the Act.

EMPEROR *v.* GULAMHUSSEIN. 43 Bom.L.R. 152.

—S. 3. See MUSSALMAN WAKF ACT, S. 2(e). 43 Bom.L.R. 152.

—S. 5. See MUSSALMAN WAKF ACT, S. 2(e). 43 Bom.L.R. 152.

—S. 10. See MUSSALMAN WAKF ACT, S. 2(e). 43 Bom.L.R. 152.

—S. 10B. See MUSSALMAN WAKF ACT, S. 2(e). 43 Bom.L.R. 152.

MUTAWALLI can lease wakf property on a long term with permission of Court. See MAHOMEDAN LAW, WAKF. 43 Bom.L.R. 854.

NAME-BOARD of company, affixing of, to business premises. See COMPANIES ACT, S. 73. 43 Bom.L.R. 105.

**NATIVE SHARE & STOCK BROKERS' ASSOCIATION—Right of membership—Death of member—Probate duty on right of membership whether leviable—Personal right—Rules of Native Share and Stock Brokers' Association, 1939, rr. 36(h) and 38.**

In view of the decision in *Official Assignee, Bombay v. Shroff* (34 Bom. L. R. 1178) and *Tribhewandas v. Bhikkubhai* (39 Bom. L. R. 666) and rr. 36(h) and 38 of the Native Share and Stock Brokers' Association, 1939, the right of membership of the Association is not property which passes on succession or can be dealt with by will, but, is a personal right which comes to an end on the death of the holder of the membership card and is, therefore, not property on which probate duty can be levied. *In re FRAMROZ MADON*. 43 Bom.L.R. 943.

**NEGLIGENCE—Shipowner—Responsibility of shipowner for health of crew—Illness of crew—Duty of master and Chief Steward—Reasonable and proper care.**

The responsibility of a ship-owner in regard to the securing of the health and safety of the crew is in general limited to the exercise of reasonable care, though a higher degree of responsibility may be imposed on him by statute, in which case the duty is generally imposed in mandatory terms.

The plaintiff was serving as a lascar on board the defendants' steamship on a voyage from Calcutta to ports on the east coast of North America and the United Kingdom in September and October, 1933. The plaintiff fell ill near Gibraltar with a bad cold on September 18, 1933. He was given cough mixture by the Chief Steward with the approval of the Master and was put off duty. Subsequently at every port of call the plaintiff was examined by doctors, but as they declared that it was not a hospital case, he could not be removed to a hospital on shore. When the ship arrived at Avonmouth on the return voyage, the doctor diagnosed the plaintiff's illness to be advanced phthisis, and advised his removal to hospital. This was done on November 3, 1933. He was eventually after treatment sent back as a distressed seaman to India, where he was finally discharged. He sued the defendants for the negligence of the Master or the Chief Steward or both for not taking proper care in regard to the illness from which he suffered during the voyage. No breach of any statutory obligation under the Merchant Shipping Act, 1894, was alleged or proved. The High Court held that the Master and the Chief Steward had failed to take proper care of the plaintiff when they knew that he had a bad cold and that the defendants were therefore responsible for the negligence of their two officers, and awarded Rs. 5,000 as damages to the plaintiff. On appeal by the defendants to the Judicial Committee of the Privy Council:—

*Held*, setting aside the decree of the High Court, that the shipowners were not personally guilty of any neglect or default;

that no defects were found in the equipment of the vessel or in regard to the competence of the officers or to the system of working the ship;

**NEGLIGENCE—(Contd.)**

that, on the evidence in the case, the Master and Chief Steward did all that was possible for them to do under the circumstances; and

that it had not been established that the Master and Chief Steward failed in their duty to the plaintiff and were careless or negligent in the matter of taking reasonable and proper care of him.

Under the law of England shipowners can raise a defence based on the doctrine of common employment to a claim by a seaman against them based on negligence of a fellow servant including in that category the Master of the vessel.

*BROCKLEBANK, LTD. v. NOOR AHMODE*.

43 Bom.L.R. 450 (P.C.).

**NEWSPAPER, libel by. See DEFAMATION.**  
43 Bom.L.R. 631.

**PAKKA ADATIA contract—Interpretation of contract—'Or', meaning of—Contracts effected in different markets for different quantities at different times—Liabilities of parties in respect thereof—Separate outstanding transactions of constituent—Right of pakka adatia to close such transactions for want of margin money—General demand for margin money by pakka adatia whether sufficient—Wrongful closing of outstanding transactions by pakka adatia before due date—Right of constituent to close outstanding transactions—Measure of damages.**

Where the terms of business between a pakka adatia and his constituent were:—"We shall do forward business for four lots of wheat or linseed or one hundred bales of cotton or ten or twelve bars of silver without any deposit. Deposit will be necessary for more business (than this)"—

*Held*, on the true construction of the terms, that the word "or" was to be strictly construed, and that once the constituent had done business to the limit mentioned in any one of the commodities specified, if he wished to do business in any of the other commodities, he must, so long as the business already done to the limit mentioned was outstanding, pay deposit in respect of the further business.

Contracts effected in different markets for different quantities of particular commodities with different delivery dates, evidenced by separate memoranda, are for all purposes distinct, and the liabilities of the parties thereof in respect of each are separate.

Where there are separate outstanding transactions with different provisions as to initial deposit and margin money, the pakka adatia, if he wants to insist upon the payment of margin, so as to give him a right to close any transaction for non-compliance with the demand, must specify to the constituent in respect of what outstanding transaction the demand is made, and what is the amount of the demand in respect of it. The constituent may wish to comply with the demand in respect of some transactions so as to keep them alive, and not wish to comply with it in regard to others. Where the pakka adatia makes one general demand for an amount of margin money

**PAKKA ADATIA—(Consid.)**

in reference to all the outstanding transactions, he is not entitled to close all those outstanding transactions on the ground that the demand has not been complied with.

Where a pakka adatia wrongfully closes his constituent's outstanding contracts before due dates, the constituent is entitled, owing to the special obligation imposed by custom on the pakka adatia, to close at any time upon instructions before the due dates, and to have an account taken on the footing of the prices prevailing in the market on the date on which the constituent instructs him to close the contracts. *ULFATRAI v. NAGARMAL*. 43 Bom.L.R. 269.

**PANCHNAMA—Identification parade—Corroboration—Independent evidence.**

A panchnama is merely a record of what a panch sees. The only use to which it can properly be put is that when the panch goes into the witness box and swears to what he saw, the panchnama can be used as a contemporary record to refresh his memory.

If the police want to rely on a panchnama they must call a panch to prove it.

A police-officer is not entitled to give evidence of what the panch told him that he saw, and that is what it comes to if a police-officer is allowed to put in the panchnama. A police witness may state that he held a panchnama and offer to produce the record if the accused asks for it, but he cannot bring it on record in his evidence-in-chief. If the police hold a panchnama, and do not offer to call the panch, an inference may be drawn against them from the fact that the panch is not submitted for cross-examination. The putting in of a panchnama without calling the panch is not only an infringement of the rules of evidence against the admission of hearsay evidence, but it is unfair to the accused, because it enables the police to get the advantage of evidence in corroboration without putting that evidence to the test of cross-examination.

*EMPEROR v. MOHANLAL*. 43 Bom.L.R. 163.

**PARSI LAW, guardian—Power—Alienation of ward's property.**

A Parsi guardian, whether *de facto* or *de jure*, has no authority to alienate the estate of a ward except with the permission of the Court. *KUBERDAS v. JERKISH*. 43 Bom.L.R. 981.

**PARSI MARRIAGE AND DIVORCE ACT (III of 1936), S. 1(2)—Act extends to "Parsi subjects of His Majesty"—"Subjects of His Majesty"—"British subjects"—Interpretation—Political status—Domicil—Change of domicil does not affect political status—"Resides" in s. 29(3)—Interpretation.**

Section 1(2) of the Parsi Marriage and Divorce Act, 1936, extends the Act even to Native States in India in its application to Parsis, provided the Parsis are subjects of His Majesty.

The expression "Parsi subjects of His Majesty" in the section refers to the political status of such subjects as opposed to their civil status, in other words, to their nationality and allegiance and not to their domicil. The change of domicil does not necessarily involve change

**PARSI MARRIAGE AND DIVORCE ACT, S. 1 (2)—(Consid.)**

of political status of a subject. The words "subject of His Majesty" mean the same thing as "British subject." A British subject, unless a certificate of naturalization in a foreign country has been granted to him, ordinarily means a person who is a natural-born British subject.

*PANTHAKY v. PANTHAKY*. 43 Bom.L.R. 569.

**—S. 29(3)—"Resides"—Interpretation.**

The real meaning to be attached to the term "resides", as used in s. 29(3) of the Parsi Marriage and Divorce Act, depends upon the circumstances of each case. If a person resides permanently at a particular place, that place is his or her residence; but the residence need not necessarily be permanent. It is enough for the purposes of the section if the residence is bona fide, with an element of continuity about it, so that even if it is not permanent, it cannot be said to be merely casual or for a temporary or passing purpose.

*PANTHAKY v. PANTHAKY*. 43 Bom.L.R. 569.

**PARSIS, English law—Mofussil Courts.**

The Parsis in the mofussil are, in the absence of any statutory provision, governed in the first place by usage, and, secondly, by the rules of equity and good conscience, i.e. by the general principles of English law applicable to a similar set of circumstances.

*KUBERDAS v. JERKISH*. 43 Bom.L.R. 981.

**PARTIES, admission by.**

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. Where a party is prepared in a particular suit to deal with the case in a particular ground and makes an admission, that admission is not binding on him in any other suit, and certainly not for all time.

*RAMABAI SHRINIWAS v. GOVERNMENT OF BOMBAY*. 43 Bom.L.R. 232.

**PARTNERSHIP ACT (IX of 1932), S. 19(2)(c)**

**—Decree for money—Assignment by one partner for sum less than decretal amount—Whether partner has implied authority from his co-partners to assign decree—Civil Procedure Code (Act V of 1908), O. XXI, r. 16.**

A partner in a firm has no implied authority from his co-partners to assign a money-decree obtained by the firm to a third person for a sum less than the decretal amount.

*KRISHNAJI BHARMALJI & Co. v. ABDULRAZAK*. 43 Bom.L.R. 888.

**PART-PERFORMANCE, rule of. See TRANSFER OF PROPERTY ACT, S. 53A.**

43 Bom.L.R. 603.

**PATENTS AND DESIGNS ACT (II of 1911), S. 45—Designs—Certificate of registration—**

**Conclusive evidence—Infringement of design—Plea that design was previously published or that it was neither new nor original.**

A certificate of registration of a design issued under s. 45 of the Indian Patents and Designs

PATENTS AND DESIGNS ACT, S. 45—  
(*Contd.*)

Act, 1911, is not final and conclusive, but is only prima facie evidence that the person whose name is entered as the proprietor of a registered design is the "proprietor" of the design. There is nothing in the Act which prevents a defendant in a suit against him for damages for infringement of a registered design under s. 53 from raising in defence a plea that the design was previously published and was neither new nor original.

DWARKADAS v. CHHOTALAL. 43 Bom.L.R. 280.

—S. 53. See PATENTS AND DESIGNS ACT, S. 45. 43 Bom.L.R. 280.

PENAL CODE (Act XLV of 1860), S. 34—  
*Common object.*

Where three accused produced property which had been stolen on the occasion of a robbery and murder, and at the trial they did not offer any explanation of the possession of the property but merely said that they did not produce it, an inference that they were guilty of robbery would be justified. Further, where the evidence disclosed that the accused belonged to the same village as that of the woman murdered at the time of committing robbery and were known to her, the only possible common intention which could be attributed to them was that they intended to murder her in order to prevent her giving evidence against them. The Court, under such circumstances, would be justified in coming to the conclusion that the accused committed the robbery and that pursuant to their common intention to rob the deceased and avoid detection they had the further intention of murdering her, and that they carried out that intention.

EMPEROR v. BASANGOUDA. 43 Bom.L.R. 144.

—S. 70—*Criminal Procedure Code (Act V of 1898), Sec. 386—Fine, recovery of, by sale of immoveable property of offender—Warrant issued for recovery of fine—Darkhast filed after six years from date of sentence—Limitation.*

Section 70 of the Indian Penal Code, 1860, is not controlled by s. 386, sub-ss. (1) (b) and (3), of the Criminal Procedure Code, 1898. Section 386 of the Criminal Procedure Code deals only with procedure for levying fine imposed under the Indian Penal Code.

The warrant issued by a Court passing a sentence, under s. 386, Criminal Procedure Code, to recover fine from an offender is to be deemed as a decree for certain purposes only, and is executed according to the mode laid down in the Civil Procedure Code, 1908, but s. 48, Civil Procedure Code, does not apply to such a warrant.

The period during which such a warrant could be executed is governed by s. 70 of the Indian Penal Code and not by the Indian Limitation Act. A darkhast filed after six years to recover fine by sale of immoveable property of the offender is, therefore, time-barred under s. 70 of the Indian Penal Code.

COLLECTOR OF BROACH v. OCHHAVLAL. 43 Bom.L.R. 122.

PENAL CODE, S. 211. See CRIMINAL PROCEDURE CODE, S. 195 (b). 43 Bom.L.R. 529.

—*False charge—Institution of proceedings—Court—Giving of information to police does not amount to such institution.*

In order to bring a case within the second part of s. 211 of the Indian Penal Code, 1860, criminal proceedings must be instituted in a Court on a false charge. The giving of information to the police of a cognizable offence does not amount to institution of criminal proceedings within the meaning of the second part of the section; and if the case gets no further than a police inquiry, it falls within the first part of the section.

EMPEROR v. KARSON. 43 Bom.L.R. 858.

—S. 302. See PENAL CODE, S. 34. 43 Bom.L.R. 144.

—S. 372. See PENAL CODE, S. 373. 43 Bom.L.R. 847.

—S. 373—*Section 373 not counterpart of s. 372—Possession from third person not necessary.*

Section 373, Indian Penal Code, 1860, is not a counterpart of s. 372 of the Code. Section 373 deals with obtaining possession, and not merely with obtaining possession from a third person. Because an offence under s. 372, which is aimed at disposing of a girl, necessarily involves two parties to the transaction, it does not follow that an offence under s. 373, which is aimed at obtaining possession, must involve two parties.

Where a girl aged seventeen years and a half went with the accused voluntarily and there was nothing to show that the accused had exercised any control over her or prevented her from doing anything she liked:—

*Held*, that the accused did not obtain possession of the girl within the meaning of s. 373, Indian Penal Code, and he could not, therefore, be convicted of an offence under that section.

EMPEROR v. GORDHAN. 43 Bom.L.R. 847.

—S. 394. See PENAL CODE, S. 34. 43 Bom.L.R. 144.

—S. 411. See EVIDENCE ACT, S. 114, ill. (a). 43 Bom.L.R. 629.

—S. 457. See PENAL CODE, S. 34. 43 Bom.L.R. 144.

—S. 499, *Exceptions 1, 9, 10.*

At a meeting of the community, to which both the complainant and the accused belonged, resolutions were passed that the complainant should not be invited to any function of the community and that if he attended any such function he should be turned out. In publishing those resolutions in a newspaper which circulated mainly among the members of the community and some outsiders also, the accused went somewhat beyond the strict limits of the resolutions. On a prosecution for defa-

## PENAL CODE, S. 499—(Contd.)

mation by the complainant the accused relied on the protection afforded by exception 1 to s. 499 of the Indian Penal Code, 1860 :—

*Held*, (1) that exception 1 had no application, because assuming that the newspaper article gave a substantially correct account of the resolutions, it could not be said that their publication was for the public good ;

(2) that excessive publication took the case out of the privileges conferred by exceptions 9 and 10 of the section, for it could not be said that it was necessary for the protection of the interest of the accused or other members of the community that the resolutions should be published in a newspaper.

VINAYAK *v.* SHANTARAM. 43 Bom.L.R. 747.

PERJURY arising out of contradictory statements. See CRIMINAL PROCEDURE CODE, S. 476. 43 Bom.L.R. 864.

PERSONAL DECREE, when not necessary. See DECREE, CHARGE. 43 Bom.L.R. 26 (F.B.).

PLAINT, amendment of. See CIVIL PROCEDURE CODE, S. 92. 43 Bom.L.R. 706.

PLEA of not guilty.

It is not open to a Magistrate to convict an accused who pleads not guilty on his own statement. It is for the prosecution to prove their own case.

EMPEROR *v.* MAVJI. 43 Bom.L.R. 629.

PLEADER, acknowledgment by. See LIMITATION ACT, Art. 148. 43 Bom.L.R. 194.

—mortgage to, by client—Scrutiny by Court.

Transactions of mortgage between a legal adviser and client to secure the repayment of money advanced at the time are not ordinarily subjected by Courts to the same jealous scrutiny as, for instance, a gift from a client to a legal adviser, or purchases or sales at under-value between a legal adviser and client. If the money is sorely needed and is paid, the mortgagor has its benefit, the rate of interest is reasonable, and the terms neither excessive nor onerous, the transaction stands as a valid mortgage between the parties.

NISAR AHMAD KHAN *v.* MOHAN MANUCHA. 43 Bom.L.R. 465 (P.C.).

PLEADINGS, admission.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. Where a party is prepared in a particular suit to deal with the case on a particular ground and makes an admission, that admission is not binding on him in any other suit, and certainly not for all time.

RAMABAI SHRINIWAS *v.* GOVERNMENT OF BOMBAY. 43 Bom.L.R. 232.

POLICE ACT (CITY) (Bom. IV of 1902), S. 9(1)(a)—*Prevention of Cruelty to Animals* R. 137.

## POLICE ACT (CITY), S. 9 (1)(A)—(Contd.)

*Act (XI of 1890); Sec. 3—Agents of Society for Prevention of Cruelty to Animals, Bombay—Appointment by Commissioner of Police, Bombay, as additional Police Officer—Power of such agent to arrest.*

The complainant, an agent of the Society for Prevention of Cruelty to Animals, Bombay, was appointed as an additional Police Officer for the purposes of the Prevention of Cruelty to Animals Act, 1890, by the Commissioner of Police, Bombay, under s. 9(1)(a) of the City of Bombay Police Act, 1902, as it stood in 1934. Subsequently in 1935, the power of appointing additional Police Officers became vested in the Government of Bombay. In 1938, the Government again delegated the power to the Commissioner of Police, Bombay. In 1940, the complainant arrested the accused, a hack victoria driver, for causing unnecessary pain or suffering to his horse by overloading the carriage. It was contended that the appointment of the complainant as additional Police Officer had lapsed because at one period since his appointment the Commissioner of Police ceased to have power to appoint additional Police Officers :—

*Held*, overruling the contention, that the appointment of the complainant as an additional Police Officer for the purposes of the Prevention of Cruelty to Animals Act, 1890, was for life or until the same was revoked by competent authority, and as it had not been revoked, the complainant could arrest without warrant under s. 33(1) of the City of Bombay Police Act, 1902.

EMPEROR *v.* DHULA JETHA. 43 Bom.L.R. 958.

—S. 27 as amended by the City of Bombay Police (Amendment) Act (Bom. XIV of 1938)—Order of externment passed by Commissioner of Police—Commissioner of Police whether executive officer or Court subordinate to High Court—Validity of such order—Whether High Court has jurisdiction to interfere in revision—Application for revision whether lies to High Court—Practice.

In passing an externment order under s. 27 of the City of Bombay Police Act, 1902, as amended by the City of Bombay Police (Amendment) Act, 1938, the Commissioner of Police acts as an executive officer and not as a Court subordinate to the High Court. The High Court, therefore, has no jurisdiction to interfere in revision with such an order. The order can only be called in question by a Court on the grounds mentioned in s. 27(7) of the City of Bombay Police Act, 1902, or under the circumstances referred to in *Emperor v. Anna Vithoba* (33 Bom. L. R. 1164) and *Emperor v. Yarmahomed Ahmedkhan* (40 Bom. L. R. 483) as for instance, when an attempt is made to impose a penalty for breach of the order.

An application for revision of an externment order under s. 27 of the City of Bombay Police Act, 1902, does not lie direct to the High Court.

EMPEROR *v.* ALLADATTA. 43 Bom.L.R. 702.

**POLICE ACT (CITY), S. 27(2A)—Commissioner of Police—Removal of certain persons out of city of Bombay—Unauthorised return of externee—Offence—Sentence—Enhancement of sentence.**

On a charge being preferred under s. 128 of the City of Bombay Police Act, 1902, against a person who has been externed and has disobeyed the order, it is competent for the Court to consider whether the order of externment made by the Commissioner of Police was legal, that is to say, whether the case fell within the terms of s. 27(2A) of the Act.

If there are more than two convictions for separate offences the case falls within s. 27(2A), irrespective of the fact whether the offences were tried together at one trial under the provisions of the Criminal Procedure Code or tried separately; though it would normally be harsh to make an order of externment when all the offences have been committed at one and the same time and as part of the same transaction, if the Commissioner has nothing else to go upon.

The Commissioner of Police, in deciding whether to make an externment order in a case falling within s. 27(2A), is acting in an administrative, and not in a judicial, capacity. It is, therefore, not open to the Court, in dealing with a case of breach of an order of externment made under the sub-section, to consider the reasons which induced the Commissioner to make the order of externment.

Under s. 128 all that the Court can do is to consider whether the order of the Commissioner of Police was legal; and if it was, whether it has been broken; and, if so, what is the proper punishment.

An order of externment under s. 27(2A) is made in the public interest, and it is a serious offence to ignore that order. The mere fact that it has only been ignored once is not a good reason for imposing a light sentence.

The age of the accused is only relevant in passing a sentence where the accused is very young or very old.

Where the accused proves conclusively that he had some reason for coming to Bombay unconnected with any criminal intent, it is a matter which may be taken into account in imposing the sentence.

The period of time during which the accused has remained in custody is a matter to which the Court always pays some regard in imposing a sentence.

EMPEROR *v.* ISHVARLAL. 43 Bom.L.R. 511.

**—Externment order—Disobeying such order—Prosecution for breach of order—Prior convictions under Bombay Children Act, 1924—Whether such conviction comes within the meaning of s. 27(2A) of City of Bombay Police Act—Separate offences in the course of same transaction—Convictions on two counts—Whether such convictions are to be treated as separate convictions within the meaning of s. 27(2A).**

A conviction under the Bombay Children Act, 1924, prior to its amendment by Act VII of 1936, can be taken into account in passing an externment order under s. 27(2A) of the

**POLICE ACT (CITY), S. 27(2A)—(Contd.)**

City of Bombay Police Act, 1902, though such an action is contrary to the spirit of the amended Bombay Children Act.

The convictions referred to in s. 27(2A) of the City of Bombay Police Act need not be convictions arising in the course of separate transactions or convictions passed on separate dates. Thus the offence of house-breaking under s. 457 of the Indian Penal Code and the offence of theft under s. 380 committed in the course of the same transaction and punished separately amount to two convictions and not one within the meaning of s. 27(2A).

*Per Beaumont C. J.* The Legislature in enacting s. 27(2A) did not contemplate that the practice of some Magistrates of convicting accused persons on more than one count in respect of the same transaction would involve two convictions within the meaning of that section. The obvious intent of that section seems to be that a man is not to be externed under it unless on more than two occasions he has shown that he does not intend to live within the law.

EMPEROR *v.* CHHOTALAL. 43 Bom.L.R. 834.

—S. 33(1). See **POLICE ACT (CITY), S. 9(1)(a).** 43 Bom.L.R. 958.

—S. 128.

On a charge being preferred under s. 128 of the City of Bombay Police Act, 1902, against a person who has been externed and has disobeyed the order, it is competent for the Court to consider whether the order of externment made by the Commissioner of Police was legal, that is to say, whether the case fell within the terms of s. 27(2A) of the Act.

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EMPEROR *v.* ISHVARLAL. 43 Bom.L.R. 511.

**PRE-EMPTION—Custom of pre-emption—Ahmedabad city—Custom attached to land—Whether personal law—Custom applies to houses and not to open sites—Custom applies to freeholds—Leasehold estates not affected by pre-emption.**

The law of pre-emption must, in places in which it exists by custom, be regarded as a right attached to the land, and not as a mere personal right.

*Quaere*, whether the law of pre-emption applies by custom to houses within the old limits of the city of Ahmedabad or it applies also to houses in the new extension of the city.

*Quaere*, whether the custom of pre-emption which applies to houses can be extended to open sites.

The custom of pre-emption exists only as between freeholders, that is to say, the neighbouring land in respect of which the right of pre-emption is claimed as also the land sought to be pre-empted must be freehold. The right



## PRE-EMPTION—(Contd.)

of pre-emption does not arise on the sale of a leasehold interest in land.

Per *Divatia J.* The custom of pre-emption exists among the Hindus of Ahmedabad with regard to sales of house properties from beyond legal memory. It is a kind of custom which is so long known and so well known as not to require any proof at the present time.

DASHRATHLAL v. BAI DHONDUBAI.

43 Bom.L.R. 581 (F.B.).

**POSSESSION — Tenant-in-common — Adverse possession—Evidence of ouster necessary—Decree—Final or declaratory—Res judicata—Civil Procedure Code (Act V of 1908), Secs. 11 and 47.**

Possession of immovable property by one tenant-in-common or joint tenant is possession of all, and is not to be regarded as adverse to other tenants-in-common or joint tenants in absence of evidence of ouster.

A Hindu died leaving two daughters A and B who inherited his property. B died leaving her husband C and a minor son, the plaintiff, C brought a suit in 1924 against A for partition of lands comprising a survey number. The suit was decreed in his favour but the decree was not executed and became time-barred. The plaintiff brought a suit in 1937 against A's two sons, defendants Nos. 1 and 2, A being dead, for partition of the same survey number. Defendants contended that the suit was barred by limitation, barred under s. 47, Civil Procedure Code, 1908, and barred as *res judicata* :—

*Held*, (1) that, as the parties were tenants-in-common and there was no evidence that the plaintiff was ousted from the property, the plaintiff's title to the survey number was not barred by limitation ;

(2) that the decree of 1924 directed that C was entitled to partition, but as the survey number paid land revenue to Government, the matter rested with the Collector to effect partition, and that whether the decree was regarded as a declaratory decree or as a final decree, there was nothing for the parties to do in execution, and therefore, s. 47, Civil Procedure Code, did not apply ;

(3) that, if the decree of 1924 was a final decree deciding the rights of the parties, there was nothing to prevent the Collector from performing his duties by partitioning the property, and if it was a declaratory decree it was not a decree finally decided within the meaning of s. 11, Civil Procedure Code, and that section was not a bar to the filing of a fresh suit.

VISHNU v. MAHADEV.

43 Bom.L.R. 971.

**POWER-OF-ATTORNEY—Rights of person holding power.**

A person holding a power-of-attorney, which authorises him to appoint a substitute, is not at liberty to authorise a stranger orally to mortgage the property of the principal.

CHETTYAR FIRM v. U. ON MAUNG.

43 Bom.L.R. 459 (P.C.).

**PRACTICE (CIVIL), admission.**

The fact that an accused is not willing to

## PRACTICE (CIVIL)—(Contd.)

admit that he took part in a robbery which is proved against him ought not to prejudice the question whether he committed murder at the same time.

EMPEROR v. BASANGOUDA. 43 Bom.L.R. 144.

—Pleadings.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. Where a party is prepared in a particular suit to deal with the case in a particular ground and makes an admission, that admission is not binding on him in any other suit, and certainly not for all time.

RAMABAI SHRINIVAS v. GOVERNMENT OF BOMBAY. 43 Bom.L.R. 232.

—Cross-examination, practice about tendering witnesses for cross-examination. See EVIDENCE ACT, S. 138. 43 Bom.L.R. 946.

—Decree—Suit decreed as prayed for.

It is the usual but not correct practice to order "that the plaintiff's suit as prayed be decreed" without formally stating the terms of the various orders, declarations and injunctions which the Court is granting.

HEMANTA KUMARI DEBI v. GAURI SANKAR.

43 Bom.L.R. 777 (P.C.).

**PRACTICE (CRIMINAL)**, inspection of record of case by a party thereto. See CRIMINAL PROCEDURE CODE, S. 548. 43 Bom.L.R. 961.

**PREVENTION OF CRUELTY TO ANIMALS ACT (XI of 1890), S. 3.** See POLICE ACT (City), S. 9(1)(a). 43 Bom.L.R. 958.

**PRIVITY OF CONTRACT**, between the lessor and the mortgagee of leasehold interest from the lessee. See CIVIL PROCEDURE CODE, O. XXXIV, r. 6. 43 Bom.L.R. 789 (P.C.).

**PRIVITY OF ESTATE** between the lessor and the mortgagee of leasehold interest from the lessee. See CIVIL PROCEDURE CODE, O. XXXIV, r. 6. 43 Bom.L.R. 789 (P.C.).

**PROBATE DUTY** on card of membership in Native Share and Stock Brokers' Association. See NATIVE SHARE & STOCK BROKERS' ASSOCIATION. 43 Bom.L.R. 943.

**PUBLIC SERVANT**, salary of, attachment of. See CIVIL PROCEDURE CODE, S. 60. 43 Bom.L.R. 758.

**RATEABLE DISTRIBUTION.** See CIVIL PROCEDURE CODE, S. 73. 43 Bom.L.R. 695.

**RECEIVER** appointed by foreign Court cannot execute decree in British India. See CIVIL PROCEDURE CODE, O. XXI, r. 16. 43 Bom.L.R. 724.

**RECORD** of a criminal case, right of a party to inspect. See CRIMINAL PROCEDURE CODE, S. 548. 43 Bom.L.R. 961.

**REFRESHER**, chamber summons adjourned into Court. See COSTS, TAXATION, ATTORNEY. 43 Bom.L.R. 655.

REGISTRATION ACT (XVI of 1908), S. 17.  
See TRANSFER OF PROPERTY ACT, S. 55(4)(b).  
43 Bom.L.R. 1014.

—S. 17(1)(b). See CIVIL PROCEDURE CODE,  
S. 11.  
43 Bom.L.R. 382 (P.C.).

—S. 17(1)(d). See TRANSFER OF PROPER-  
TY ACT, S. 53A.  
43 Bom.L.R. 603.

RELIGIOUS ENDOWMENT—Original right  
in property with proprietary body—Dedication  
of property by user to purposes of shrine—Whe-  
ther burden of proof on persons asserting such  
dedication—Rules of practice of religious insti-  
tutions—Whether practice of particular insti-  
tution can be presumed from practice obtaining  
in majority of such institutions in a Province.

Where the original right in certain land was  
with a proprietary body, the burden of proving  
its dedication by user to the purposes of a  
shrine lies heavy on the persons asserting it,  
and it is beside the point to show that the evi-  
dence produced by the proprietary body does  
not exclude the theory of dedication. The case  
of dedication is not made out merely by evi-  
dence of neighbourly or considerate conduct to-  
wards a religious institution or by showing that  
small profits have not been churlishly exacted  
by the proprietor from persons held in general  
esteem.

Ascetics and religious institutions exhibit  
great diversity of character and *Udasis* in parti-  
cular conform to no single type. In any case  
to presume that a particular *Udasi* shrine fol-  
lowed a certain practice because on account of  
all religious institutions throughout the Pro-  
vince the practice was found to obtain in a  
majority of the cases is a course of reasoning  
unwarranted by principle or authority. The  
rule of practice of a religious institution should  
be collected from its own constitution or prac-  
tice as proved in evidence.

COMMITTEE OF MANAGEMENT OF GURDWARA  
PENJA SAHIB v. MOHAMMAD NAWAZ KHAN.  
43 Bom.L.R. 998 (P.C.).

RES JUDICATA, constructive, as applied to  
execution proceedings. See CIVIL PROCEDURE  
CODE, O. XXI, r. 57.  
43 Bom.L.R. 747.

REVISION by High Court does not extend to  
an order of externment by the Police Commis-  
sioner, Bombay. See POLICE ACT (CITY), S. 27.  
43 Bom.L.R. 702.

RIGHT OF SUIT, contemplation of action—  
Cause of action.

The mere fact that A is supposed to  
contemplate the bringing of an action against  
B or that A may have stated that he has  
grounds for such an action, does not entitle B  
to institute an action against A to have it  
declared that A has not a good cause of  
action against B.

KANHAIYALAL v. MOHANLAL. 43 Bom.L.R. 287.

RIVER, non-navigable—Owner of land—Owner-  
ship of bed of river.

The owner of land abutting on a non-navi-  
gable river is entitled to the soil in the bed of  
the river *ad medium filum aquæ*.  
NARHARSINGJI v. SECRETARY OF STATE.

43 Bom.L.R. 167.

SALARY of public servant, attachment of. See  
CIVIL PROCEDURE CODE, S. 60.

43 Bom.L.R. 758.

SALE OF GOODS ACT (III of 1930), S. 21  
—Sale of unascertained goods—Contract com-  
plete as soon as goods sold are ascertained and  
appropriated—Payment of price does not affect  
such completion—Liquor—Sale of liquor—  
Bottling of liquor after completion of sale—Deli-  
very of sold liquor at customer's house does not  
affect completion of contract—Bombay Abkari  
Act (Bom. V of 1878), Sec. 45(c)—License to  
sell country liquor—Breach of condition of  
license.

The expression 'specific goods' as used in  
s. 21 of the Indian Sale of Goods Act, 1930,  
necessarily means goods capable of being ascer-  
tained with certainty—*certum est quod certum  
reddi potest*. A sale of some specified quantity  
of liquor out of a store-house or cask is not  
capable of ascertainment until it is removed or  
separated. The words 'specific goods' will,  
according to their natural interpretation, mean  
goods the delivery of which can be demanded  
in specie.

The accused was a vendor of country liquor  
under a license, condition No. 2 of which pro-  
hibited him from selling liquor at any place  
other than the licensed premises. The accused  
sent round his servants to tout for customers  
and canvass orders. The servants secured  
orders and carried them to the accused's shop,  
where liquor was measured out in fulfilment  
of the orders, and it was supplied to the custo-  
mers at their respective places of residence  
and the price of liquor sold was recovered  
there. The accused was prosecuted for an  
offence punishable under s. 45(c) of the  
Bombay Abkari Act, 1878, for a breach of a  
condition of his license for selling liquor out-  
side the licensed premises:—

*Held*, applying the provisions of the Indian  
Sale of Goods Act, 1930, (1) that the contract  
to sell some liquor out of a big cask containing  
much larger quantity, the required quantity  
not being separated or bottled, was not a con-  
tract of sale of specific goods within the mean-  
ing of s. 21 of the Act;

(2) that a contract of sale of a small  
quantity of liquor stored in bulk could more  
properly be regarded as a contract for sale  
of unascertained goods, and, under s. 23(1) of  
the Act, the ownership would not pass till the  
quantity ordered by the purchaser was ascer-  
tained and appropriated, which might be done  
by the bottling of the liquor;

(3) that in view of the provisions of  
s. 23(2) it was immaterial that the delivery  
of the goods took place at the house of the  
purchasers;

(4) that in the present case the servant  
of the seller could very well be treated as a  
bailee for the purpose of the transmission to  
the buyer, and delivery to such servant, which  
admittedly took place in the licensed premises,  
would be effective delivery to the buyer him-  
self;

(5) that it was not material for the pur-  
pose of the charge to ascertain whether the  
price of the liquor was paid in the shop, for

## SALE OF GOODS ACT, S. 21—(Contd.)

the completion of the sale did not depend upon payment of the price of the goods sold;

(6) that therefore the sales in question were completed within the licensed premises and the accused was not guilty of the offence with which he was charged.

EMPEROR v. KUNVERJI. 43 Bom.L.R. 95.

—S. 23. See SALE OF GOODS ACT, S. 21.  
43 Bom.L.R. 95.

SENTENCE, award of. See DEFENCE OF INDIA RULES, 1939, r. 6(5). 43 Bom.L.R. 839.

SEPARATION DEED—*Similarity to commercial contract—Covenant in deed that neither party shall have any claim against the other—Petition by wife for judicial separation and alimony—Whether such petition maintainable—Wife's costs.*

The Courts should give full effect to agreements of the nature of separation deeds. Such agreements are formed, construed and dissolved and are enforced on precisely the same principles as any commercial agreement. Courts will not enforce stipulations in such agreements which are illegal either as being opposed to positive law or public policy.

Petitioner and respondent, wife and husband, who were Christians, entered into a separation deed on September 25, 1934, under which the respondent made all the payments he was required to make. A clause in the deed provided—"Neither party from this day shall have any claim against the other party in respect of any matter or account." The petitioner filed a suit in 1941 against the respondent for judicial separation and alimony on the grounds of alleged cruelty before the deed of separation and desertion:—

*Held*, dismissing the petition, that the separation deed was a conclusive answer to the allegations of cruelty and desertion;

that, as the separation deed was acted upon for seven years and no attempt had been made to set it aside, the Court could not ignore it; and

that as long as the deed stood it could not be maintained that the respondent had deserted the petitioner without reasonable cause.

Observations as to the principles upon which costs are awarded to a wife in matrimonial suits.

ROZARIO v. ROZARIO. 43 Bom.L.R. 830.

SHOP, one man shop is governed by Bombay Shops and Establishments Act, 1939. See BOMBAY SHOPS AND ESTABLISHMENTS ACT, S. 5. 43 Bom.L.R. 952.

SMALL CAUSE COURTS ACT (PRESIDENCY) (XV of 1882), S. 53—*Distress.*

Under s. 53 of the Presidency Small Cause Courts Act, 1882, it is competent to the landlord to apply for the issue of a distress warrant even if the rent in arrears is for one month only.

NASIRUDDIN KARIM MAHOMED v. UMERJI ADAM & Co. 43 Bom.L.R. 546.

## SMALL CAUSE COURTS ACT (PRESIDENCY), S. 60.

An application to discharge or suspend a distress warrant, under s. 60 of the Presidency Small Cause Court Act, is generally made on the ground, (1) that the debtor is not justly indebted for the rent claimed from him, or (2) that the rent claimed is excessive, or (3) that it has not become due or payable, or (4) that it is not due and payable for the period for which it is claimed.

NASIRUDDIN KARIM MAHOMED v. UMERJI ADAM & Co. 43 Bom.L.R. 546.

SOCIETIES REGISTRATION ACT (XXI of 1860)—*Society—Promotion of education—Position of such society whether akin to club or joint stock company—Suit, maintainability of, for wrong done to society—Suit by minority of members in their own name.*

The position of a society registered under the Societies Registration Act, 1860, is like that of a club or a joint stock company. In order to redress a wrong done to the society or to recover moneys or damages alleged to be due to the society, the action should be brought by the society itself. Where the persons against whom the relief is sought are in majority and control the society and do not permit an action to be brought in the name of the society, the minority of members can bring an action in their own names. But they cannot have a larger right to relief than the society itself would have if it had brought the action, and cannot complain of acts which are valid if done with the approval of the majority of the members, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.

A society was registered in 1932, under the Societies Registration Act, 1860, to promote the education of boys and girls hailing from Southern India. At a general meeting of the society called on December 4, 1938, eight persons were elected to form the managing committee and they co-opted one more member in April, 1939. The managing committee resolved to borrow money for the purpose of erecting a school building. The plaintiff, who was a member of the society, challenged the advisability and legality of the acts of the managing committee. On a requisition being sent by eighteen members of the society, a general meeting was convened on October 15, 1939, at which the election of the managing committee and their acts were validated. The plaintiff filed a suit on behalf of himself and other members of the society, except the defendants who were the nine members of the managing committee whose appointment and acts were confirmed by the general meeting held on October 15, 1939. The plaintiff sought for a declaration that the loans raised by the defendants were unauthorised and prayed that a managing committee be constituted under the direction of the Court:—

*Held*, that, as the acts of the defendants which were challenged were in respect of alleg-

## SOCIETIES REGISTRATION ACT—(Contd.)

ed wrong done to the society as a body, it was necessary that the society should be a party to the litigation;

that it was not competent to the plaintiff, either alone or representing himself and the other members of the society other than the defendants, to bring a suit without ascertaining the wishes of the society; and

that, therefore, the suit as framed was not maintainable and the Court had no jurisdiction to try it in the absence of the society.

KRISHNAN *v.* SUNDARAM. 43 Bom.L.R. 562.

SOCIETY, suit for wrong done to society, by a member. See SOCIETIES REGISTRATION ACT. 43 Bom.L.R. 562.

STATUTORY CHARGE on property sold. See TRANSFER OF PROPERTY ACT, S. 55(4)(b). 43 Bom.L.R. 1014.

STAY of suit. See CIVIL PROCEDURE CODE, S. 10. 43 Bom.L.R. 236.

SUBROGATION. See TRANSFER OF PROPERTY ACT, S. 92. 43 Bom.L.R. 225.

SUCCESSION ACT (XXXIX of 1925), S. 211—*Administrator—Power to dispose of property of deceased—Continuation of business of deceased by administrator—Liability of administrator—Parsi—Usage—Rule of equity and good conscience—Principles of English law—Alienation by administrator—Permission of Court.*

To validate a mortgage by an administrator, it must first be proved that the mortgage was executed in the due course of administration, and, secondly, that he was entitled to mortgage the general estate.

An executor (unless expressly authorised by the will) or an administrator is not entitled to continue the business of the deceased except for the purposes of winding it up. If he continues it for any other purpose than winding up, it is deemed to be continued at his own risk.

The Parsis in the mofussil are, in the absence of any statutory provision, governed in the first place by usage, and, secondly, by the rules of equity and good conscience, i.e. by the general principles of English law applicable to a similar set of circumstances.

Accordingly, a Parsi guardian, whether *de facto* or *de jure*, has no authority to alienate the estate of a ward except with the permission of the Court.

KUBERDAS *v.* JERKISH. 43 Bom.L.R. 981.

—S. 219—*Letters of administration—Joint grant—Persons standing in equal degree of kindred to deceased—Discretion of Court.*

Under s. 219 of the Indian Succession Act, 1925, the Court has a discretion whether, or not, to grant joint letters of administration to persons who stand in equal degree of kindred to the deceased. It is not bound to make a joint grant; it may grant letters of administration to any one of them.

DINBAI *v.* MOTIBAI. 43 Bom.L.R. 770.

## SUCCESSION ACT, S. 292.

An assignment of an administration bond under s. 292 of the Indian Succession Act, 1925, does not create thereunder a new cause of action so as to give a fresh starting point for the purposes of limitation to the assignee who sues for a breach of a condition in the bond.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPN. *v.* JANMAHOMED. 43 Bom.L.R. 346.

—S. 307. See SUCCESSION ACT, S. 211. 43 Bom.L.R. 981.

SUIT, withdrawal of. See CIVIL PROCEDURE CODE, O. XXIII, r. 1. 43 Bom.L.R. 646.

SUMMING-UP of a case to jury—*Duty of Counsel—Duty of Judge.*

It is the duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence. Where the accused is not represented, or not properly represented, the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and, if there is, he is not justified in convicting. A reasonable explanation of the evidence should not be rejected because not offered by the accused.

EMPEROR *v.* BASANGOUDA. 43 Bom.L.R. 144.

TALUKDAR—*Inamdar—Occupant of land.*

A talukdar is neither an inamdar nor an occupant of his lands. His wanta is a freehold and not a leasehold. What was paid formerly as tribute and peshkush as a political levy is now converted into a fixed amount in lump as a revenue payment, but his proprietary right over all the lands comprised in the wanta was affirmed at the commencement of the British rule and has not since been taken away by any legal process.

NARHARSINGJI *v.* SECRETARY OF STATE. 43 Bom.L.R. 167.

TALUKDARI WANTA, *nature of.*

A talukdari wanta in Gujarat is neither an alienated nor an unalienated holding. It is a peculiar estate which continues to be the property of its holder under the British rule as it was in pre-British dynasties from ancient times. It was subjected to legislation from time to time.

NARHARSINGJI *v.* SECRETARY OF STATE. 43 Bom.L.R. 167.

TENANT-IN-COMMON, adverse possession—*Ouster.*

Possession of immoveable property by one tenant-in-common or joint tenant is possession of all, and is not to be regarded as adverse to other tenants-in-common or joint tenants in absence of evidence of ouster.

VISHNU *v.* MAHADEV. 43 Bom.L.R. 971.

TODDY TAPPING RULES, 1928, r. 2—*"May"—Interpretation.*

The word "may" in r. 2 of the Bombay Toddy Tapping Rules, 1928, is used merely with the object of enumerating the purposes for which tapping licences are issued, namely,

TODDY TAPPING RULES, 1928, r. 2—  
(*Contd.*)

for supplying toddy to shops, tree-foot booths, hawkers or for domestic consumption, and to indicate that they may not be issued for any other purpose. The word "may" does not mean that the Collector has a discretion to grant or refuse a licence if applied for in respect of one of the designated purposes.  
RATANSHAW v. MCELHINNY. 43 Bom.L.R. 896.

—rr. 9-13.

The use of the word "shall" in rr. 9 to 13 indicates that no question of the exercise of any discretion by the Collector in the granting of a licence arises, provided that the requirements of the rules are complied with, but that a statutory duty to issue a licence is imposed by s. 14(1) of the Act.

RATANSHAW v. MCELHINNY. 43 Bom.L.R. 896.

TODDY TREES, licence for tapping of. See LICENCE, ABEKARI ACT. 43 Bom.L.R. 896.

TRANSFER OF PROPERTY ACT (IV of 1882), S. 6(f). See CIVIL PROCEDURE CODE, S. 60. 43 Bom.L.R. 758.

—S. 53A—*Part-performance—Limits of rule of part-performance—Agreement to lease—Present demise—Registration—Indian Registration Act (XVI of 1908), Secs. 17(1)(d), 17(2)(v).*

The first requirement of s. 53A of the Transfer of Property Act, 1882, is that there should be a writing signed by the transferor or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. The words "signed on his behalf" in the section must mean presumably signed by a person who has authority to bind or represent the transferor.

The third clause of the section makes it a condition that the transferee has performed or is willing to perform his part of the contract. The section is *primarily* intended for the benefit of the transferee. When the section speaks of the performance of his part or willingness to perform his part, it means complete performance or complete willingness so far as he is concerned.

The section debars the transferor from exercising rights which he would have apart from the agreement. There is, however, an exception to this disablement in the words "other than a right expressly provided by the terms of the contract." It is clear that the transferor can in any case derive no rights from this section which are inconsistent with the conditions subject to which the section comes into operation. As it is a condition precedent that the transferee shall have performed his part of the contract or should be willing to perform his part of the contract, the material time being obviously the time when the section is sought to be made use of, it follows that a suit for damages for *breach* of a contract can never be founded upon the section.

The Borough Municipality of Ahmedabad sold the right to occupy their vegetable market for a period of three years at an auction, one of the conditions of which was that the success-

TRANSFER OF PROPERTY ACT, S. 53(A)  
(*Contd.*)

ful bidder was to pass a registered rent-note at his own expense. The defendant's predecessor was the successful bidder, who at the end of the auction signed the conditions of auction, which were also signed by the Chairman of the Standing Committee who held the auction. The sale was in due course adopted by the Standing Committee and adopted by the General Body of the Municipality. The bidder went into possession of the market and paid two months' rent in advance. When called upon to pay the estimated cost of getting a rent-note executed and registered, he took no notice of the demand and also of the reminder that was sent to him subsequently. He still continued to occupy the market and paid the rent regularly till he died. His widow intimated to the Municipality that the contract was at an end and offered to hand over possession of the market to the Municipality, which she later did. The Municipality then sued to recover damages for breach of the contract after forfeiting the deposit, relying on s. 53A of the Transfer of Property Act, 1882 :—

*Held*, dismissing the suit, (1) that the conditions necessary for the coming into operation of s. 53A were not satisfied in the case,

(2) that, apart from s. 53A, there was a present demise of the market, and that the contract contained in the writings relied on by the Municipality required registration under s. 17(1)(d) of the Indian Registration Act, 1908;

(3) that the whole case of the plaintiff implied that there was an agreement by way of lease, and not merely an agreement to execute a lease at a later date such as would come under s. 17(2)(v) of the Indian Registration Act.

BECHARDAS v. AHMEDABAD BOROUGH MUNICIPALITY. 43 Bom.L.R. 603.

—S. 55(4)(b). See CIVIL PROCEDURE CODE, S. 64. 43 Bom.L.R. 206.

—*Statutory charge—Vendor's lien—Agreement giving up claim to refusal of consideration money on redemption of mortgage.*

The plaintiffs, who had mortgaged their land, sold, under a registered deed, a portion of it to defendant No. 1, for Rs. 3,000, which sum was to be spent in redeeming the mortgage, and defendant No. 1 was to take possession of the land sold to him and to deliver rest of the land to plaintiffs. The mortgage deed provided that if there was any balance left out of Rs. 3,000 after redemption it was to be given to plaintiffs, and if the sum was found insufficient to pay off the mortgagee the plaintiffs were to make the shortage good. On the next day there was another agreement between the parties, which was in writing but was not registered, under which the plaintiffs gave up their claim to any balance that might be left after paying off the mortgage and defendant No. 1 undertook to redeem the mortgage whatever it cost. Defendant No. 1 next sued to redeem the mortgage, and got a decree without having to pay any

TRANSFER OF PROPERTY ACT, S. 55  
(4)(b)—(Contd.)

money for redemption. The plaintiffs then sued to recover the amount of Rs. 3,000 less expenses incurred by defendant No. 1, contending that the second deed not having been registered was inadmissible in evidence:—

*Held*, negating the contention and dismissing the suit, (1) that the statutory charge under s. 55(4)(b) of the Transfer of Property Act, 1882, being on the property sold, i.e. the equity of redemption, could not materialise, inasmuch as there was an implied contract to the contrary, viz. that the price was to be paid on redemption and not before;

(2) that it was extremely doubtful whether the statutory provision would operate to give the plaintiffs a charge on the land after redemption;

(3) that even assuming that it could, the charge would only arise when the ownership of the land passed to defendant No. 1, i.e. on redemption of the mortgage, but before that time there was a contract to the contrary, viz. the second agreement, by reason of which no charge for the balance of the price could arise, since the claim to that balance had been abandoned;

(4) that the second agreement did not therefore require registration, because it did not operate to extinguish any right or interest to or in the land, plaintiffs at that time having no such right or interest.

SHANKAR v. GOTIRAM. 43 Bom.L.R. 1014.

—S. 69—Deed of mortgage—Power of sale—Effect and construction of clause containing such power—Provision to buy in property by mortgagee at auction sale—Suit by mortgagor to restrain mortgagee from exercising power of sale—Expiry of mortgage—Mortgagor bound to redeem—Injunction.

The expression "power of sale" is a well-known expression in conveyancing. The words "power of sale," as used in s. 69(c) of the Transfer of Property Act, 1882, refer to a clause to be expressly included in a deed of mortgage. They must therefore be understood to mean what is ordinarily known and understood in conveyancing by that expression.

A power of sale includes all steps which are necessary to be taken in that connection. In order to make the power bad words must be pointed out in s. 69 which render the whole power invalid according to law.

Where a party contends that a clause conferring a power of sale on the mortgagee restricts in any way the liberty of the parties to enter into a contract, the burden is on him to show that the words of the section prevent an agreement between the parties as embodied in the document.

A power to sell necessarily includes a power to postpone the sale. It is a power to sell either now or at a later date.

A power to buy in, or rescind or vary any contract of sale, is not bad as against the provisions of s. 69. The expression "buy in" contained in a power of sale is never intended to give the mortgagee that right. The power

TRANSFER OF PROPERTY ACT, S. 69  
(Contd.)

is used so that in effect the party at whose instance the auction is held takes the property out of the auction, should the highest bid be inadequate in price.

After a mortgage debt has become due, it is not competent to the mortgagor to file a suit to restrain the mortgagee from exercising the power of sale contained in the mortgage deed, without first offering to redeem and tendering the amount in Court.

The relief by way of injunction is always discretionary. The Court will always be slow to grant such a relief to a party who admits that he has committed a breach of the contract and at the same time wants to prevent the opposite party from enforcing his rights under the contract. The more so, in a case where the contract between the parties gives rise to a claim for damages in case the power of sale under the contract is exercised improperly or irregularly.

MULRAJ VIRJI v. NAINMAL. 43 Bom.L.R. 890.

## —S. 69(2)(a)—Notice of demand—Notice in writing.

The notice in writing required by s. 69(2)(a) of the Transfer of Property Act, 1882, is imperative, and the period of three months which must expire after service of such notice cannot be curtailed by agreement of parties.

MOHIDIN SHAKKAR v. JEHangIR. 43 Bom.L.R. 553.

—S. 92—Subrogation—Indian Contract Act (IX of 1872), Sec. 69—Payment of money which another person is bound by law to pay—Reimbursement by person making payment—Tagai loan—Another person repaying tagai loan, whether entitled to recover it—Land Improvement Loans Act (XIX of 1883).

In 1927 R (father of defendant No. 1) borrowed a sum of Rs. 1000 from Government as tagai allowance and made the amount a charge on his land No. 5/2, for the improvement of which the loan was taken, and offered his other lands Nos. 381, 382 and 124 as collateral security. In 1929 R mortgaged lands Nos. 381 and 382 to defendant No. 3. On January 25, 1932, R sold lands Nos. 5/2 and 124 to the plaintiff who kept Rs. 1000 out of the purchase money with himself and paid off the tagai loan with that money. Four days before the sale, i.e., on January 21, 1932, defendant No. 2, who held a money decree against R, attached land No. 5/2 in execution of his money decree and at a Court-sale which followed purchased the land himself. In 1935, the plaintiff sued for a declaration that the amount of tagai loan repaid by him was a charge on lands Nos. 5/2, 381 and 382, and for recovery of the amount by sale of the lands:—

*Held*, (1) that if the plaintiff came within the terms of s. 92 of the Transfer of Property Act, 1882, he would have the same rights as Government not only against defendant No. 1, who borrowed the money from Government but also against defendants Nos. 2 and 3 who derived their rights from defendant No. 1;

TRANSFER OF PROPERTY ACT, S. 92  
—(Contd.)

(2) that the plaintiff did not fall within the scope of the section, because there was in fact no mortgage to Government but only a statutory charge on the lands in favour of Government;

(3) that inasmuch as part of the consideration for sale of land 5/2 was retained by the plaintiff for the discharge of incumbrances on the land, that money should be regarded as the money of R and therefore the plaintiff was not entitled to subrogation under the first part of the section;

(4) that the plaintiff could not come under the third paragraph of the section, because there was no registered agreement giving him the right of subrogation;

(5) that the plaintiff was not entitled to a personal decree against the defendants by reason of the equitable principle enunciated in s. 69 of the Indian Contract Act, 1872, since the repayment of the tagai loan to Government was to be regarded as the act of the vendor R and not the act of the plaintiff purchaser, and even if there was a payment by the plaintiff within the meaning of the section, it was a payment which he was bound to make under the terms of his agreement with R and it was not open to him to say that it was a payment which some other person was bound to make;

(6) that the plaintiff's suit was misconceived and that his only legal remedy was to sue his vendor, defendant No. 1, for damages.

VITHALDAS v. TUKARAM. 43 Bom.L.R. 225.

—S. 108. See LEASE, DETERMINATION OF TENANCY. 43 Bom.L.R. 576.

**TRUST, charity—Money belonging to charity credited in name of charities in bank—Bank crediting trust money to overdraft account of person committing breach of trust with knowledge of breach of trust—Suit against bank for refunding moneys to charities—Limitation applicable to such suit—Indian Limitation Act (IX of 1908), Arts. 36, 120.**

The plaintiff, his brother, father and uncle (defendant No. 2) were members of a joint Hindu family having a family business. The share of the plaintiff's branch in the business was ten annas and that of defendant No. 2 six annas. After the death of the plaintiff's father a partition of the assets of the business was effected and the business was taken over by defendant No. 2. The plaintiff's father was interested in two religious charities and it was decided at the time of the partition that the two branches of the family should provide Rs 10,000 for each of the charities according to their shares in the business. Rs. 2,000 having been already provided for one of the charities before the partition, the plaintiff's branch had to find Rs. 5,000 for that charity and Rs. 6,250 for the other charity. The plaintiff, thereupon, drew two hundis, dated December 1, 1916, for Rs. 5,000 and Rs. 6,250 respectively, on defendant No. 1 bank payable to bearer. Each of the hundis was headed with the name of the charity

R. 138.

## TRUST—(Contd.)

concerned under the word 'credit,' thereby showing the charity as the party of account in whose favour it was intended. The hundis were taken to defendant No. 1 by defendant No. 2, and defendant No. 1 credited the two sums in the names of the respective charities. On February 10, 1920, the two sums amounted to Rs. 15,732-15-9 with interest, and on that date at the instance of defendant No. 2 Rs. 15,700 were credited to defendant No. 2's overdraft account with defendant No. 1, and the balance of Rs. 32-15-9 was paid to defendant No. 2, and the account in the names of the charities was closed. Defendant No. 2 opened two new accounts in the names of the two charities in his money-lending business. He was adjudicated insolvent on January 4, 1926. The plaintiff came to know in 1929 of defendant No. 1 setting off the charity monies against the overdraft account of defendant No. 2, and he thereupon sued defendant No. 1 to refund to the charities the money received by it in reduction of defendant No. 2's overdraft on the footing that this application of the money was a breach of trust on the part of defendant No. 2 of which defendant No. 1 had notice and by which it had profited:—

**Held,** (1) that defendant No. 1 in appropriating the charity money to itself took a transfer of property which in equity it was bound to restore to the charities, as it failed to prove that the transfer was within the authority of defendant No. 2 and not a breach of trust by him;

(2) that, even if any authority was given by the plaintiff to invest the trust funds in defendant No. 2's business, the discharge of the overdraft account of defendant No. 2 did not come within the scope or intention of that authority;

(3) that art. 120 of the Indian Limitation Act, 1908, and not art. 36, governed the plaintiff's suit as the claim against defendant No. 1 was not that a breach of trust was committed by it but that it took the trust property by a transaction with defendant No. 2 which was a breach of trust on his part and with notice that it was a breach of trust;

(4) that the period of limitation ran from the date in 1929 when the plaintiff came to know that the money of the charities was set off against defendant No. 2's debt to defendant No. 1 upon his overdraft.

O. RM. O. M. SP. (FIRM) v. NAGAPPA. 43 Bom.L.R. 440 (P.C.).

## UDASI—Shrine—Practice.

Ascetics and religious institutions exhibit great diversity of character and Udasis in particular conform to no single type. In any case to presume that a particular Udasi shrine followed a certain practice because on a count of all religious institutions throughout the Province the practice was found to obtain in a majority of the cases is a course of reasoning unwarranted by principle or authority. The rule of practice of a religious institution should be collected from its own constitution or prac-

## UDASI—(Contd.)

tice as proved in evidence.

COMMITTEE OF MANAGEMENT OF GURDWARA  
PENJA SAHIB *v.* MOHAMMAD NAWAZ KHAN.  
43 Bom.L.R. 998 (P.C.).

UNCHASTE WIDOW, adoption by. See  
HINDU LAW, ADOPTION. 43 Bom.L.R. 920.

VENDOR'S LIEN. See CIVIL PROCEDURE  
CODE, S. 64. 43 Bom.L.R. 206.

—See TRANSFER OF PROPERTY ACT,  
S. 55(4) (b). 43 Bom.L.R. 1014.

VILLAGE PANCHAYATS ACT (*Bom. IX of 1920*)—*Village panchayat—Right to collect taxes from persons occupying village sites—Whether such right can be farmed out—Validity of such contract—Indian Contract Act (IX of 1872), Sec. 65.*

Under the Village Panchayats Act, 1920, a village panchayat is not competent to farm out its right to collect taxes from persons occupying village sites. Such a contract, entered into by a village panchayat, is *ultra vires*.

But the village panchayat is entitled to recover the money due to it under such a contract under s. 65 of the Indian Contract Act, 1872.

GOVIND *v.* YESHWANT. 43 Bom.L.R. 800.

WAIVER—*Statutory prohibition—Public policy.*

The principle of waiver does not apply to a statutory prohibition based on public policy.

POST MASTER GENERAL, BOMBAY *v.* CHENMAL.  
43 Bom.L.R. 758.

WAKF PROPERTY, lease of. See MAHOMEDAN LAW, WAKF. 43 Bom.L.R. 854.

WANTA LANDS—*Amod Thakor—Proprietorship of half of river-beds and soil of roads bounded on one side by wanta lands—Proprietorship of roads, tanks, and waste area within wanta lands—Talukdari wanta, nature of—Bombay Land Revenue Code (Bom. V of 1879), Sec. 37—"Which are not the property of individuals"—"Are hereby declared to be the property of Government"—Interpretation.*

A talukdari wanta in Gujarat is neither an alienated nor an unalienated holding. It is a peculiar estate which continues to be the property of its holder under the British rule as it was in pre-British dynasties from ancient times. It was subjected to legislation from time to time.

A talukdar is neither an inamdar nor an occupant of his lands. His wanta is a freehold and not a leasehold. What was paid formerly as tribute and peshkush as a political levy is now converted into a fixed amount in lump as a revenue payment, but his proprietary right over all the lands comprised in the wanta was affirmed at the commencement of the British rule and has not since been taken away by any legal process.

The existence of a highway or a public road

## WANTA LANDS—(Contd.)

is consistent with the ownership of a private person in the soil.

There is a presumption that a highway, or waste lands adjoining thereto, belong to the owners of the soil of the adjoining lands. The site of the road must be presumed to belong to the adjoining proprietors half to one and half to the other up to the middle of the road. Where the property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or the river as the case may be.

Hence, the use of the road by the public for passage as of right is not inconsistent with the proprietorship of a private individual to the soil of the road. A road, therefore, cannot be said to be the property of Government merely because it is used by the public.

The owner of land abutting on a non-navigable river is entitled to the soil in the bed of the river *ad medium filum aquae*.

The words "which are not the property of individuals" in s. 37 of the Bombay Land Revenue Code, 1879, are not confined in their application to "all lands wherever situated" but also apply to roads, bridges, beds of the sea, lakes, tanks, etc. Similarly, the words "except in so far as any rights of such persons may be established" govern all the previous expressions and not merely lands.

The words "are hereby declared to be the property of Government" in s. 37 of the Code do not take away rights which existed when the section became law, e.g., wanta lands.

*Held*, on the evidence, that the Thakor of Amod is the full and absolute proprietor of half of the river-bed which is bounded on one side by his wanta lands, and of roads up to the middle line where wanta lands abut on them on one side, as also of roads, tanks and other waste areas which are within or bounded by his wanta lands.

The origin and growth of wanta tenure discussed.

NARHARSINGJI *v.* SECRETARY OF STATE.  
43 Bom.L.R. 167.

WASTE LANDS—*Presumption.*

There is a presumption that a highway, or waste lands adjoining thereto, belong to the owners of the soil of the adjoining lands. The site of the road must be presumed to belong to the adjoining proprietors half to one and half to the other up to the middle of the road. Where the property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or the river as the case may be.

NARHARSINGJI *v.* SECRETARY OF STATE.  
43 Bom.L.R. 167.

WATAN (JOSHI)—*Inalienability of land.*

Joshi service watan land, held under a sanad in the ordinary form used for grants of land given in return for service to be rendered to a village community, are inalienable and not liable to be sold in execution of a decree against the holder of the lands.

KRISHNAJI *v.* PARAPPA. 43 Bom.L.R. 539.



WATAN property, liability to, execution under a decree passed against father. *See* CIVIL PROCEDURE CODE, S. 53. 43 Bom.L.R. 232.

WITHDRAWAL of suit. *See* CIVIL PROCEDURE CODE, O. XXIII, r. 1. 43 Bom.L.R. 646.

#### WORDS AND PHRASES :

———"Aggrieved by a decision". *See* INSURANCE ACT (PROVINCIAL), S. 75. 43 Bom.L.R. 961.

———"Any such decree". *See* CIVIL PROCEDURE CODE, O. XLVI, r. 1. 43 Bom.L.R. 733.

———"Are hereby declared to be the property of Government". *See* LAND REVENUE CODE, S. 37. 43 Bom.L.R. 167.

———"Belonging to". *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, S. 22. 43 Bom.L.R. 325.

———"By operation of law". *See* CIVIL PROCEDURE CODE, O. XXI, r. 16. 43 Bom.L.R. 724.

———"Charitable purposes". *See* INCOME-TAX ACT, S. 4. 43 Bom.L.R. 1027.

———"Common intention". *See* EVIDENCE ACT, S. 10. 43 Bom.L.R. 20 (P.C.).

———"Company". *See* INCOME-TAX ACT, S. 2(6). 43 Bom.L.R. 85.

———"Decision upon any appeal". *See* MUNICIPAL ACT (BOROUGH), S. 111. 43 Bom.L.R. 816.

———"Discontinued". *See* INCOME-TAX ACT, S. 25(3). 43 Bom.L.R. 1034.

———"Dues". *See* LEASE, CONSTRUCTION OF. 43 Bom.L.R. 543.

———"Employer". *See* BOMBAY SHOPS AND ESTABLISHMENTS ACT, S. 30. 43 Bom.L.R. 952.

———"Enforceable as if it were a decree of the Court". *See* ARBITRATION ACT, S. 15. 43 Bom.L.R. 1006.

———"Final order". *See* GOVERNMENT OF INDIA ACT, S. 205. 43 Bom.L.R. 496 (F.B.).

———"Final trial". *See* BOMBAY HIGH COURT RULES (TABLE OF FEES), ITEM 14. 43 Bom.L.R. 655.

———"Instructions for brief". *See* COSTS, TAXING OF ATTORNEYS. 43 Bom.L.R. 655.

———"Matter". *See* BOMBAY HIGH COURT RULES, O. S., r. 563. 43 Bom.L.R. 655.

———"May". *See* TODDY TAPPING RULES, r. 2. 43 Bom.L.R. 896.

———"Might maintain". *See* CIVIL PROCEDURE CODE, O. XXII, r. 8. 43 Bom.L.R. 644.

#### WORDS AND PHRASES—(Contd.)

———"Misconduct". *See* LETTERS PATENT, Cl. 10. 43 Bom.L.R. 250.

———"Mortgagees of that interest". *See* LAND IMPROVEMENT LOANS ACT, S. 7. 43 Bom.L.R. 600.

———"Not subject to appeal". *See* CIVIL PROCEDURE CODE, O. XLVI, r. 1. 43 Bom.L.R. 733.

———"Or". *See* CIVIL PROCEDURE CODE, O. XXI, r. 2. 43 Bom.L.R. 1022.

———"Order". *See* DEFENCE OF INDIA RULES, r. 90B. 43 Bom.L.R. 872.

———"Outside the business or place where the business is carried on". *See* COMPANIES ACT, S. 73. 43 Bom.L.R. 105.

———"Owner". *See* MUNICIPAL ACT (CITY), S. 3(m). 43 Bom.L.R. 598.

———"Ownership". *See* CIVIL PROCEDURE CODE, S. 11. 43 Bom.L.R. 382 (P.C.).

———"Papers exhibited in the proceedings". *See* BOMBAY HIGH COURT CRIMINAL CIRCULAR No. 160A. 43 Bom.L.R. 961.

———"Parsi subjects of His Majesty". *See* PARSI MARRIAGE AND DIVORCE ACT, S. 1(2). 43 Bom.L.R. 569.

———"Person aggrieved". *See* INSOLVENCY ACT (PROVINCIAL), S. 58. 43 Bom.L.R. 805.

———"Possession". *See* BOMBAY SALT ACT, S. 3. 43 Bom.L.R. 869.

———"Power of sale". *See* TRANSFER OF PROPERTY ACT, S. 69. 43 Bom.L.R. 890.

———"Rates, Taxes or dues of whatsoever kind." *See* LEASE, CONSTRUCTION. 43 Bom.L.R. 543.

———"Reasonable cause". *See* LETTERS PATENT, cl. 10. 43 Bom.L.R. 250.

———"Removal". *See* BOMBAY SALT ACT, SS. 3 and 47. 43 Bom.L.R. 869.

———"Resides". *See* PARSI MARRIAGE AND DIVORCE ACT, S. 29(3). 43 Bom.L.R. 569.

———"Right, title and interest". *See* HINDU LAW, DEBT. 43 Bom.L.R. 807.

———"Same judgment-debtor". *See* CIVIL PROCEDURE CODE, S. 73. 43 Bom.L.R. 699.

———"Shall". *See* TODDY TAPPING RULES, Nos. 9-13. 43 Bom.L.R. 896.

## WORDS AND PHRASES—(Contd.)

—“Signed on his own behalf”. See TRANSFER OF PROPERTY ACT, S. 53A.

43 Bom.L.R. 603.

—“Specific goods”. See SALE OF GOODS ACT, S. 21.

43 Bom.L.R. 95.

—“Specific provision to the contrary”. See CIVIL PROCEDURE CODE, S. 1(2).

43 Bom.L.R. 157.

—“Subjects of His Majesty”. See PARSI MARRIAGE AND DIVORCE ACT, s. 1(2).

43 Bom.L.R. 569.

—“Suit relating to property of insolvent”. See INSOLVENCY ACT (PRESIDENCY), S. 68(1)(d).

43 Bom.L.R. 644.

—“Their own works”. See ELECTRICITY RULES, 1937, r. 48.

43 Bom.L.R. 99.

—“Transportation”. See BOMBAY SALT ACT, S. 47.

43 Bom.L.R. 869.

—“Wakf”. See MUSSALMAN WAKF ACT, S. 2(e).

43 Bom.L.R. 152.

—“Which are not the property of individuals”. See LAND REVENUE CODE, S. 37.

43 Bom.L.R. 167.

—“Works”. See ELECTRICITY RULES, 1937, r. 48.

43 Bom.L.R. 99.

WORKMEN'S COMPENSATION ACT (VIII of 1923), S. 10—*Notice of accident—Trivial injury—Trivial injury developing serious consequences—Notice when to be given—Notice to co-employee whether sufficient—Finding that evidence showed sufficient cause for not giving notice whether question of law—High Court—Practice.*

Under the Workmen's Compensation Act, 1923, it is not necessary for a workman to give notice of every trivial accident to which he may be subject.

A workman is, however, bound to give notice of any accident which is not trivial, and it is not for him to decide whether it is likely to give rise to a claim for compensation. If an accident, too trivial in the first instance to require notice, subsequently develops serious consequences, the obligation to give notice as soon as practicable would be met by giving notice when the consequences ensue.

Notice to a fellow workman is not sufficient under s. 10(2) of the Workmen's Compensation Act, 1923.

## WORKMEN'S COMPENSATION ACT, S. 10—(Contd.)

The question whether there was any evidence before the Commissioner for Workmen's Compensation on which he could hold that there was sufficient cause for not giving notice of an accident under s. 10 of the Workmen's Compensation Act, is a question of law on which the High Court can interfere in appeal. AHMEDABAD VICTORIA IRON WORKS LTD. v. MAGANLAL. 43 Bom.L.R. 611.

—S. 12—*Selling agents undertaking to take delivery of goods at manufacturer's godown—Selling agents employing contractor for transport of goods—Contractor employing workmen to remove goods from godown—Accidental death of workman in course of such work—Whether claim for compensation against selling agents sustainable—Construction of Act in light of cases decided under English Workmen's Compensation Act, whether desirable.*

The sole selling agents of a mill company manufacturing cloth, under an agreement with the company, undertook to take delivery of the goods at the company's godowns. The selling agents employed a firm, of whom one N was a partner, to transport the goods from the company's godowns to their shop. On one occasion when the selling agents desired to transport some bales from the company's godowns to their shop, N's firm hired a lorry from a lorry-owner, B who was a cleaner on the lorry was engaged by N to help to remove the bales from the godown and to stack them in the lorry. In the course of this work B was accidentally killed. On a claim for compensation made by B's mother against the selling agents under s. 12 of the Workmen's Compensation Act, 1923 :—

*Held*, that on the construction of the agreement the work which was being done by the contractor, i.e. N's firm, at the time when the accident occurred was work ordinarily done by the selling agents, and therefore the selling agents were liable to pay compensation under s. 12 of the Act.

To construe an Indian Act in the light of cases decided under an English Act differently worded is much more likely to cause confusion than to render assistance. There is no justification for incorporating into the administration of the Indian Act difficulties which arise on the construction of the English Act.

BAI KOKILABAI v. KESHAVAL.

43 Bom.L.R. 986 (F.B.).

## WRONGFUL DISTRESS. See DISTRESS.

43 Bom.L.R. 546.

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## JOURNAL

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### THE BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, 1939.

THE Bombay Legislature has passed the Bombay Agricultural Debtors' Relief Act. It has received the assent of the Governor-General on January 19, 1940. It is to come into force on a notification to be issued by the Provincial Government which may be expected before the expiry of the Small Holders Relief Act.

The object of the Act, as stated in the preamble, is mainly the relief of the agricultural debtors. This is intended to be achieved by a twofold method—by freeing the debtor from his existing debts and by placing impediments in his way of contracting fresh debts. All the debts of the debtors are to be brought into hotchpotch and the total liability is to be ascertained. He is to be freed from this liability by asking him to discharge it by easy instalments whenever this course is within his means or by declaring him insolvent and giving him a discharge. The Act makes it difficult for him to secure fresh loans as his property will be charged even with unsecured debts under s. 54, and as he is prevented from alienating his property under s. 65. The object and the method to achieve it are good, but so long as no provision is made to meet the daily needs of the agricultural debtor the provisions of the Act will make the plight of the debtor worse than before.

The Act extends its benefits to those agricultural debtors who hold lands used for agricultural purposes, who cultivate them personally, and whose income from non-agricultural resources does not exceed Rs. 300 or twenty per cent. of the agricultural income whichever is greater. The limit of Rs. 300 is increased to Rs. 500 in the case of a joint Hindu family. Moreover, the total amount of the debts of the debtor must not exceed Rs. 15,000 on January 1, 1939. Hence a debtor who does not hold land but maintains himself by agricultural labour is excluded from the benefit of the Act. Similarly, a person who gets his land cultivated through his tenants will not get the benefit of the Act. It may be stated here that both these persons are agriculturists according to the Dekkhan Agriculturists' Relief Act, the object of which also is the relief of agricultural debtors. The Dekkhan Agriculturists' Relief Act is repealed by s. 85 of the Act.

The Act seems to be based on the assumption that all agriculturists who cultivate their lands personally are debtors. The idea seems to be that such agri-

culturists are never creditors. Had this not been the idea, the Act would not have made such harsh provisions against creditors. As a fact such agriculturists constitute the majority of creditors and will be hard hit by the Act. These agriculturists have by sheer dint of labour and thrift laid by and advanced money to their fellow agriculturists in times of need.

The Act appears to be directed against private money-lenders. It exempts from its operation debts due to Government, local authorities, co-operative societies, etc. (vide s. 3). Why should such distinction exist if the sole object of the Act was to relieve agricultural debtors of their indebtedness? The distinction made is unjustifiable.

The scheme of the Act is to fix the total liability of the debtor. This is to be done through the medium of what are called Debt Adjustment Boards. The Boards are to come into existence under the Act and are to supersede the civil Courts. They are to go into the history and merits of the transactions between the debtor and his creditors and after determining the total liability by going through several elaborate processes they are to make an award which is to be executed. The Act contains special provisions as regards insolvency and miscellaneous matters.

The Act runs athwart legal ideas and principles. It nullifies decrees pronounced by competent Courts and re-opens the liabilities concluded by such decrees. It defeats legitimate expectations of persons who lent or happened to lend money to agriculturists—expectations which they were well entitled to entertain under the then existing law.

The Act benefits agricultural debtors at the cost of their creditors. It reduces the amounts found due to creditors. To adjudicate upon an amount as being due is one thing and to reduce the amount which is adjudged as being due is another thing. It amounts to taking money out of the pocket of the creditor and putting it into that of the debtor.

On examining some of the provisions relating to the determination of the amounts as being due from the debtor to the creditor one is convinced of the truth of the above remarks. In determining the amount as being due the Debt Adjustment Board is to inquire into the history and merits of the case and is to take accounts of the dealings between the parties from their commencement. In doing this neither a decree of a Court of competent jurisdiction nor a settlement between the parties comes in the way.

Section 42 describes the mode of taking accounts. Sub-section (2), sub-cl. (e), (i), relates to the taking of the accounts of transactions entered into prior to January 1, 1931. It runs as follows :—

“In the case of transactions which were commenced before the 1st January 1931, the Board shall take accounts in accordance with the provisions of this section up to 1st January 1931, provided that in the account of interest there shall be debited to the debtor yearly interest on the balance of the principal for the time being at 12 per cent. per annum or at the agreed rate whichever is lower. On taking such accounts, the amounts found due on 1st January 1931 in respect of the principal as well as in respect of the interest shall, each separately, be reduced by 40 per cent. notwithstanding that a decree or order of a civil court has been passed in respect of any such amount or portion thereof, provided that if such transactions had commenced after 1st January 1930, the reduction in both the amount of the principal and interest found due shall be 30 per cent. The amounts so reduced shall be taken to represent the amount due in respect of the principal and interest on 1st January 1931. Separate accounts shall thereafter be taken of the principal and interest

up to the date of the application provided that the interest shall be calculated at the rate agreed to between the parties or 9 per cent. per annum whichever is lower ;”

There is one more relevant portion of s. 46. It is as regards how far decretal debts are binding. Sub-section (2) of s. 46 is as follows :—

“In so far as such decree or order is in respect of transactions entered into before 1st January 1931, the amount of principal and interest found due on 1st January 1931 shall be reduced by 40 per cent. as provided in paragraph (i) and the rate of interest shall be modified as provided in paragraph (iii) of clause (e) of sub-section (2) of section 42, provided that if the said transactions commenced after 1st January 1930 the reduction shall be by 30 per cent.”

The question is why such reduction in the amounts found due is to be made. One fails to understand any principle justifying this reduction. The reduction is dependent upon whether the transactions commenced before or after January 1, 1931. There will be reduction if the transactions have commenced prior to January 1, 1931, and there will be no reduction if they have commenced after the said date. Wherever there is reduction it will be forty per cent. or thirty per cent. according as transactions have commenced before or after January 1, 1940.

The above provisions lead to absurd results. Let us suppose that A has borrowed a loan of Rs. 100 from X on December 31, 1929, that B an equal amount from Y on January 2, 1930, and that C an equal amount from Z on January 2, 1931. Let us further suppose that the rate of interest agreed upon between the parties in respect of each of these debts is nine per cent. per annum and that no interest has as yet been paid by any of the debtors. Now the principal amounts and the interest thereon in the first two debts will be reduced by forty per cent. and thirty per cent. respectively, so that the amounts that will be found due on January 1, 1931, by way of principal and interest in each will be respectively Rs. 60 and Rs. 5-6-0 and Rs. 70 and Rs. 6-5-0. There will be no reduction in respect of the third debt. Thereafter a further account is to be taken of these debts up to the institution of the application for adjustment debts. Taking the date of application to be January 1, 1941, the amounts that will be found due on that date will be respectively Rs. 119-9-0, Rs. 139-7-0, and Rs. 190. Here we find that though X's loan is older than that of Z he gets Rs. 119-9-0 and Z gets Rs. 190, and though Y's loan is later in time by two days than the loan of X he gets Rs. 139-7-0 and X gets Rs. 119-9-0.

The injustice is more glaring in the case of a debt which is merged in a decree. Let us suppose that X has obtained a decree on January 1, 1931, for Rs. 200 in respect of a loan of Rs. 100 advanced prior to January 1, 1930. Let us further assume that the decree awards interest at the rate of six per cent. per annum on the principal amount of Rs. 100 and that nothing has been recovered under the decree as yet. So the amount that will be due on January 1, 1941, under the decree will be Rs. 260 (leaving aside costs). Now according to the above method of determining the amount Rs. 120 will be found due on January 1, 1931—Rs. 60 by way of principal and Rs. 60 by way of interest. And the decree-holder X will be entitled to that amount only even on January 1, 1941, supposing this to be the date of application for adjustment because X is not entitled to more than double the amount of his principal (vide s. 42(2) (g)).

Under such circumstances it is not unnatural if the decree-holder thinks that he had made a mistake in advancing a loan to an agricultural debtor prior to January 1, 1931, and in obtaining a decree in respect of it.

The misfortune of the creditor does not stop here. The amount found due after taking account is further to be scaled down. Section 52(1) provides that all debts shall be scaled down. The manner of scaling down is detailed in the next three sub-clauses. The section is as follows :—

“52. (1) Notwithstanding any law, custom, contract, or decree of a court to the contrary, all debts payable by a debtor at the commencement of this Act shall be scaled down in the manner hereinafter provided.

(2) If all the debts due by a debtor are unsecured, such debts as are found due on taking accounts under this Act shall be scaled down *pro rata* to the value of the paying capacity of the debtor.

(3) If all the debts due by a debtor are secured debts, and the total amount of such debts found due on taking accounts under this Act is more than eighty per cent. of the value of the property belonging to the debtor, such debts shall be scaled down *pro rata* to eighty per cent. of the value of such property.

(4) If the debts due by a debtor are both secured and unsecured, and if the total amount of the secured debts due on taking accounts under this Act is more than eighty per cent. of the value of the property on which such debts are secured, the secured debts shall be scaled down *pro rata* to eighty per cent. of the value of the property on which such debts are secured and the unsecured debts shall be scaled down *pro rata* to eighty per cent. of the value of the other property belonging to the debtor over which no debts are secured.”

The whole section though simple in language is terse and difficult to understand in all its bearings. We shall illustrate the clause which relates to unsecured debts. According to it the amount of the unsecured debts found due is to be scaled down *pro rata* to the value of the paying capacity of the debtor. Section 51 provides the manner in which the paying capacity of the debtor is to be assessed. It will be in this case the aggregate amount consisting of eighty per cent. of the value of immoveable property and eighty per cent. of the value of moveable property. So in the case of the decree-holder in our illustration the amount of Rs. 120 found due in respect of the decretal amount of Rs. 260 will by operation of s. 52 come to Rs. 96 only; hence the decree-holder who was entitled to Rs. 260 under the decree according to the present law will now be entitled to Rs. 96 only. This is the result of the combined operation of ss. 42, 46, 51, and 52 of the Act.

The amounts found due and scaled down as above are to be paid by the debtor by instalments not exceeding twenty-five in number. In fixing the instalments regard shall be had to the net annual income of the debtor. The instalment is not to exceed the net annual income of the debtor. The net annual income is the balance of his annual income after deducting such sum as may be considered necessary for the maintenance of the debtor and his dependants and the sum due by the debtor to pay the debts due to Government and to local authorities and to pay off loans borrowed for the purposes of financing crops.

The Act contains special provisions as regards insolvency. If the paying capacity of the debtor is inadequate to pay the total amount of his debts as scaled down, or if for any other reason it is found that the debts found due from the debtor cannot be liquidated by annual instalments, he shall be adjudged insolvent.

In the insolvency proceeding only half the property of the debtor is available for the satisfaction of the debts of creditors. And if the remaining half exceeds six acres of irrigated land or eighteen acres of dry land or any land assessed at Rs. 30, the excess also shall be sold for the liquidation of the debts. So the result will be that the debtor will be freed from all his debts and he will be left with the half of his property provided it does not exceed the above-said limits. It is really a novel prin-

ciple even in the law of insolvency that the debtor-insolvent should retain property while his creditors should go unsatisfied.

After examining the provisions of the Act a question arises, is this all allowable under the Government of India Act, 1935? The Act under consideration is obviously expropriatory. And if it is so is it *intra vires* or *ultra vires* of the Provincial Legislature? Legislation as regards money-lender and money lending is within the competence of the Provincial Legislature, but it must not be such as will contravene the provisions of s. 299 of the Government of India Act. It is submitted that the Act under discussion is not within the intendment of s. 299, for according to it the acquiring of property even for a public purpose cannot be made without compensation.

N. B. BUDHKAR.

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## THE ARBITRATION METHOD.

(*Its value in business disputes.*)

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THE new legislation consolidating and amending the law relating to arbitration has found a place in the Statute book and came into force on July 1, 1940.

That the method of present day litigation in the field of ordinary everyday business disputes is very expensive and dilatory cannot be disputed by any one who has had anything to do with the law Courts. According to a great American jurist, next to war commercial litigation is the largest item of preventable loss in civilisation. The commercial world has not failed to recognise this evil, and in fact, beginning with the inauguration of the City of London Chamber of Arbitration about forty years ago, has been definitely turning its attention to arbitration as a more desirable method of settling disputes in business transactions than litigation. In almost all countries well established Chambers of Commerce and other trading and industrial groups are having their own tribunals of arbitration which have for their object the determination, settlement and adjustment of disputes and differences relating to trade, business and manufactures and to customs of trade, and they recommend to their members the insertion in contracts entered into by them of a clause providing for arbitration according to the rules framed by them in this behalf. In the field of international commercial transactions, the International Chamber of Commerce has a similar system and is making meritorious efforts towards international commercial conciliation and co-ordination of arbitration procedure in as many transactions as it can influence. The Arbitration (Protocol and Convention) Act VI of 1937 is India's response to this effort.

The object of the scheme of arbitration in all cases is to provide a means of justice which is prompt, inexpensive and efficient, by offering to the business community the services of a body of men skilled in various technical branches of industry and commerce, who are also acquainted with the legal incidents of arbitration; and by insisting upon the prompt determination of disputes under the simplest rules of procedure involving small expense.

Although our law Courts deserve the highest praise for the standard of justice they maintain, the delay and cost of ordinary litigation frequently cause vexation and sometimes almost a denial or failure of justice. There is no doubt that delay and

expense cause hardship both to those making and to those resisting claims. The plaintiff with a just cause of action finds that it is better to compromise even at a sacrifice than be kept waiting and put to expense; while the defendant with a good defence equally finds it easier to pay than to undergo the worry and incur heavy costs of litigation.

Under the arbitration method, the disputants submit their differences to one or more disinterested parties (arbitrators), usually men in the same or similar line of business under an agreement to abide by their decision. In disputes involving technical matters the appointment of arbitrators having special knowledge of the particular trade or business or profession concerned will avoid a good deal of waste of time which will otherwise be involved in explaining technical terms and methods. The hearings are held by the arbitrators with whatever degree of informality may be desired, subject to a few simple regulations prescribed by law, and the award is made a judgment of the Court with the same force and effect as if it were a judgment made after trial by a Court of law.

If compared with ordinary legal procedure, arbitration has not so far achieved the prominence anticipated for it, it is simply because it still awaits development on the right lines. With the growth of a healthy business mentality it is inevitable that the parties to a business dispute should in their own interests as business men want their differences to be settled in such a way as to leave them friends again. As Lord Justice Scrutton remarked some years ago, commercial arbitration has this merit in it, that while helping business men to get a quick and cheap settlement of their disputes, it enables them to continue trading afterwards as though there had been no dispute.

Litigation too often promotes unfriendliness with the result that litigants, even of the highest type, find themselves enemies at or before the conclusion of the litigation with consequent injury to future business. The arbitration method avoids this, for it is essentially consistent with a spirit of friendliness and good will, and promises to be particularly so when, through usage, it becomes a habit and is regarded as a matter of course on the occasion when a dispute arises.

The invitation to refer a disputed matter to Mr. A. is far less likely to stir up bitterness than the service of summons to dance attendance in a Court house at very inconvenient hours, on pain of losing the case or getting otherwise damaged in case of failure to do so. Further, as Sir Josiah Stamp pointed out in an illuminating address delivered to the London Institute of Arbitrators seven years ago, "arbitration has a future of rich promise. As industry becomes more and more diversified and specialised, technical and complicated questions of fact and quality and degrees of fact and quality are likely to increase vastly in proportion to the simple legal questions of right and wrong, and these will require to be settled by the application of impartial and disinterested judgment requiring specialised skill." Arbitration will have to be more and more resorted to, not merely because it is expeditious where the law is slow, and cheap where the law is costly, but because it is the more appropriate economic instrument of settlement. The superiority of the arbitration method over legal procedure and conflict is well expressed in the following passages in the *Law Quarterly Review*, Vol. IX (1893) pp. 87-8: "A judge knows his own art, the law, but he does not know other people's. When a commercial case comes before him he has to begin at the beginning and learn the very meaning of trade words, trade documents, and trade usages, which to the litigants are the A B C of their calling and he has to do



this through the medium of expensive expert evidence. After having thus laboriously worked up the whole thing, and mastered the commercial position of the parties, he has to apply the law more or less correctly to the result so obtained. The commercial arbitrator grasps the whole situation at once. He may not have the same capacity of weighing and sifting evidence as a trained judge, but he knows instinctively what the usages and course of his particular business require, and he comes to the consideration of the matter animated by a natural sense of justice unfettered by any technicality." "Our law has failed not so much because of its delay or costliness, but because it has ceased to command the confidence of commercial men; and it has ceased to command their confidence because lawyers and judges are not in touch with the living forces of commerce. Whether it is ever possible for them to be so seems now extremely doubtful, so complicated has our commercial and industrial machinery become. . . . The rate at which business is carried on has been enormously accelerated, its methods have changed, intercourse with foreign nations has increased a hundred-fold; entirely new branches of business have sprung up. All these things necessitate a renewal, a remodelling of the law merchant, and the basis of such renewal can best be laid by the decisions of a commercial tribunal in touch with mercantile usage, and governed by flexible principles of natural equity and mercantile convenience."

If these remarks were true forty-seven years ago, they are *a fortiori* so now, as economic activity is every day becoming more and more diversified and specialised, each newly differentiated field of knowledge and activity requiring the application of principles and procedure appropriate to itself. Accordingly, a machine which exists to deal with legal aspects merely, becomes less and less capable of dealing with the finer technicalities and complicated issues of business transactions.

For arbitration to prove of real value, it is however essential that it should not be a mere imitation of the law Court. Legal framework and rules may indeed be necessary but they should rest as lightly and unobtrusively as possible on its method of work. The more arbitration procedure apes that of the law Courts the less is it likely to justify itself.

It is stated in the statement of Objects and Reasons of the new Bill that it seeks to consolidate and standardise the law relating to arbitration throughout British India embodying in it such of the provisions of the existing law, the amended English Law of 1934 (24 & 25 Geo. V, c. 14) and the recommendations of the Civil Justice Committee, as are most suitable to this country. It is therefore reasonable to hope that the new legislation will encourage a greater use of the arbitration method and help to lessen litigation and the resort to the law Courts.

A. RAMAIA.

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## GLEANNINGS

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### BIAS OF TRIBUNAL

It is fortunately a rare occurrence in this country for a litigant or prisoner to feel impelled to call into question the impartiality of the tribunal by which his case is heard. An allegation of this nature was, however, made the subject of a motion to the Divisional Court on July 16 when it was sought on behalf of two women to obtain an order of prohibition against the North London Police Court magistrate,

Mr. Basil Watson, prohibiting him from trying a charge against these women of contravening s. 5 of the Public Order Act, 1936.

This case did not raise any new principle of law, but it would appear from the arguments adduced in support of the motion that there may be some misapprehension as to the circumstances in which the High Court will intervene upon an allegation of bias in an inferior Court. The general principle was laid down by Cave, J., in 1881 in *Reg. v. Mayor and Justices of Deal* (1881, 45 L.T. 439). In that case it was sought to prohibit the Mayor of Deal from trying a case of cruelty to a horse on the ground that he was biased in such cases, the evidence of alleged bias being that he was a subscriber to the R.S.P.C.A. Delivering the judgment of the Divisional Court, Cave, J., said :

"Any pecuniary interest however slight or remote is sufficient to disqualify..... As to the bias in the justices' minds, it must be a real bias in favour of one of the parties to the litigation."

In other words, it is not sufficient to show that the tribunal may have a bias against the particular type of crime, but is prejudiced against the particular person charged. This is well exemplified by a subsequent case in which readers may well think that there may have been some doubt whether or not the prejudice against the class of offence may not have influenced the decision, although clearly a dislike of a particular crime does not logically lead to the conclusion that the alleged offender has been guilty of it. In this case (*Reg. v. Worthing Justices : ex parte Wilder*, 1902, 73. J.P, 761) *certiorari* was sought on behalf of a motorist to quash a conviction for exceeding a speed limit. The evidence of alleged bias, which does not appear to have been contradicted, was that the chairman had said that it would be a good thing if the motor industry (then, of course, in its infancy) were destroyed. Wills, J., delivering the judgment of himself and Channell, J., is reported as having said :

"A magistrate is at liberty to entertain strong views on a subject, though it were better if he kept his views to himself..... It has been pointed out to me by Channell, J., that for centuries past it had been alleged that magistrates were very much prejudiced against poachers, but no one had ever heard of an application similar to the present one being made upon a conviction for poaching."

In the present case the applicants had been charged that in distributing a certain leaflet they had thereby been guilty of "insulting behaviour whereby a breach of the peace was likely to be occasioned" contrary to s. 5 of the Public Order Act, 1906. The learned magistrate upon the facts being opened to him was alleged to have remarked : "This is the same as a leaflet which appeared in a similar case before me a short time ago when I sent the man to prison for five weeks" (*Times*, July 17). It is obvious that in a charge of this kind the guilt or innocence of the accused would very largely depend upon the contents of the document distributed, although, of course, there might be circumstances in the manner and time and place of its distribution by which it could properly be distinguished. It is indeed difficult to see how this statement was evidence of bias any more than if a judge upon a prosecution for libel were to comment that he had already ruled in another case that the document in question was capable of a defamatory meaning. It was, however, further alleged that the learned magistrate when remanding the applicants in custody had said that he disliked "people of that sort." This evidence was denied by the magistrate, who further stated that as the applicants had called his conduct into question, in any event he would prefer not to deal further with the case.

The Divisional Court (Humphreys, Hilbery and Croom-Johnson, JJ.) dismissed the motion. Humphreys, J., delivering the leading judgment, pointed out that there was no evidence of "bias" against the applicants. He then repeated the words of Wills, J., that a magistrate was entitled to hold "strong views," though it was better that he should not express them. The applicants were ordered to pay the costs of the motion.—*L. J.*

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#### NUISANCE

IN a recent article in *The Law Journal* (vol. 89, p. 154) it was pointed out that, as a result of the decisions in *Wringe v. Cohen* (1939, 4 All E. R. 241) and *Sedleigh-Denfield v. St. Joseph's Missionary Society* (1939, 1 All E. R. 725), certain *dicta* in a substantial number of cases must be treated as overruled or modified. If those decisions were to stand, then (1) liability for nuisance did not depend upon knowledge or means of knowledge, and (2), where a nuisance had been caused by a third party, the occupier was under no obligation to abate the nuisance. We note with relief that the House of Lords has overruled the Court of Appeal in the *Sedleigh-Denfield* case. Lord Wright approved the statement by Farwell, J., in *Barker v. Herbert* (1911, 2 K. B. 633, at p. 645) that a landowner may become liable for a nuisance caused by a third party, against his will, "if he permits it to continue and fails to abate it within a reasonable time after it has come, or ought to have come, to his knowledge." His Lordship also observed, in effect, that he could see no difference, in the matter of liability, between nuisances not caused by the landowner and those which he had himself caused: *Sedleigh-Denfield v. St. Joseph's Missions* (1940, 3 All E. R. 350, at p. 366). *Wringe v. Cohen*, although not referred to in the report, appears to have been impliedly overruled. It seems to be impossible to reconcile the view of the Court of Appeal that liability for nuisance is independent of knowledge, with any of the judgments of the noble Lords in the *Sedleigh-Denfield* case. It is still possible that the defendant in the *Wringe* case was liable, because he ought to have known of the condition of the property. So much that we learn must be unlearned. It is comforting to find occasionally that the old law is still good law—particularly where the old law was also "good sense."—*L. J.*

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#### FROZEN WATER PIPES

THE Court of Appeal have now upheld the decision given earlier in the year by Mr. Justice Lewis in *Watson v. Sutton Water Co.*, and reported 56 T. L. R. 787. We made some comment on the case at the time (89 *Law Journal*, p. 254). It was decided upon the common law duty of those who supply water to take care for those who consume it. The plaintiff, who succeeded below, simply said that she was leaving her house late last year, before the great frost came, and asked the defendant water company to cut off her water supply. This they did by turning off a tap outside the house. But, as Lord Justice MacKinnon said, it was a tap which anybody passing the house could turn on again. Some mischievous person did so. The plaintiff could not prove that this mischief was done by the appellant company; yet somehow it was done and the plaintiff's house was flooded. The water company

said that there was, inside Mrs. Watson's house, a "governing tap," that this should have been turned off and that, if it had been, no flooding would have occurred. The Court of Appeal thought little (so far as the report shows) of this plea of contributory negligence. Once the plaintiff, or her son, ordered complete separation from the water supply, and the defendants undertook to carry out that order, there was, it seems, no duty on the plaintiffs to take any additional safeguard.—*L. J.*

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#### DAMAGES AGAINST THE DEAD

WE have all heard much about damages for the dead and the baffling problems raised by *Rose v. Ford* (1937, A. C. 827.), the Act which it expounded, and the consequent decisions. Not so much has been heard on the question of damages against the dead. At all events, if the injured plaintiff is still alive, they do not present the same difficulties as they do if he has unhappily succumbed to his injury. A judge on circuit had such a case before him this week, and it resulted in a judgment for a large sum of over 4,000*l.* against a dead man who was represented by his widow—a poor woman. The learned judge was satisfied that it was the deceased defendant who was to blame for the accident—of course, as usual, a motor vehicle collision; and our sympathy is strong for the injured motor-cyclist. Even 15 months after his injury he was still a cripple on a stretcher. At the same time old-fashioned lawyers cannot even now reconcile themselves to the law which allows judgment and heavy damages to be given against a person who has *not been heard*.—*L. J.*

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#### WAIVING THE TORT

IN concluding his elaborate and convincing judgment in the appeal in *United Australia, Ltd. v. Barclays Bank, Ltd.*, last week, the Lord Chancellor remarked that "while admiring the subtlety of the old special pleaders, our Courts are primarily concerned to see that rules of law and procedure should serve to secure justice between the parties." The result of the judgment of the House, it will be agreed, "secured justice" by its effective declaration that the rule embodied in the decision in *Smith v. Baker*, L. R. 8 C. P. 350, as expressed by Chief Justice BOVILL, was wrong when he laid down that "the law is clear that a person who is entitled to complain of a conversion of his property, but who prefers to waive the tort, may do so and bring his action for money had and received for the proceeds of goods wrongfully sold. The law implies under such circumstances a promise on the part of the tortfeasor that he will pay over the proceeds of the sale to the rightful owner. But if an action for money had and received is so brought, that is in point of law a conclusive election the other way. The principles which govern the subject are very well illustrated in the case of *Buckland v. Johnson*, 15 C. B. 145, where it was held that the plaintiff, having sued one of two joint tortfeasors in tort, could not afterwards sue the other for money had and received." This the House has now authoritatively laid down to be wrong in law, and that the true proposition was that formulated as long ago as the time of Chief Justice Holt, namely, that it is judgment in the first action, and not merely the bringing of the claim, which constitutes a bar to the second action, a conclusion much more in harmony with justice than the very technical rule which till now has been generally accepted.—*S. J.*

## TWO VOICES

AFTER a young barrister had finished arguing an appeal in the King's Bench Divisional Court recently he was asked to re-argue it from the point of view of the respondent, who was not represented. He acquitted himself well in this rather Gilbertian situation, but won his appeal. There is distinguished precedent for his double role, though generally in the past it has been played through inadvertence. Thus Bethell, afterwards Lord Chancellor Westbury, once by mistake drew a bill in Chancery against a client for whom he held a standing retainer, and at the hearing when his two voices were claimed by the defendant he had to argue against his own pleading. "Your honour," he began, "of all the cobwebs that were ever spun in a Court of justice this is the flimsiest; it will dissolve at a touch." It did, and the solicitor who first instructed him must have been but little consoled when Bethell whispered in his ear as he left the Court: "The bill is as good a bill as was ever filed."—S. J.

## RECENT ENGLISH CASES.

DAMAGES—*Measure of—Motor accident—Negligence causing death—Pain and suffering—Loss of expectation of life—Action by administrator—Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. V, c. 41), s. 1.* The plaintiff, whose wife had died in consequence of injuries sustained by her in a collision between two motor vehicles through the negligence of the defendants, brought an action against the defendants claiming (*inter alia*) under the Law Reform (Miscellaneous Provisions) Act, 1934, as administrator of the estate of the deceased, damages for her loss of expectation of life and for her pain and suffering.

As to the expectation of life of the deceased, it appeared that at the time of her death she was thirty-four years of age, that she had been a healthy woman who had never had an illness, that she had four children of her marriage, that her prospect of life according to actuarial tables was another thirty-four years, and that her social position was that her husband, the plaintiff, was a provision shop manager.

As to her pain and suffering, the medical and other evidence showed that her injuries consisted in fracture of the skull, of two ribs, and of the pelvis, and severe bruising of the chest and ankles; that she survived in hospital for four days after the accident, that after admission to hospital she suffered for a time from intense irritation which made it difficult to examine her nervous system, that next day she was quieter and would answer to her name, that her condition improved a little until the third day when she became more restless, resenting interference, that eventually her respiration became feeble and she collapsed and died, and that the degree of pain which she suffered was extremely difficult to estimate owing to her marked restlessness which was probably due to cerebral irritation rather than to actual pain:—*Held*, by the Court of Appeal, reducing both the respective sums which had been allowed as damages by the trial Judge, that the plaintiff should recover 1000 l. in respect of the loss of expectation of life of the deceased, and 50 l. in respect of her pain and suffering. *MILLS v. STANWAY COACHES, LD.*, [1940] 2 K. B. 334.

HIGHWAY—*Pedestrian crossing place—Precedence of foot passengers over vehicular traffic—Duty of driver approaching crossing—Transit across road divided by refuge—Single crossing or two separate crossings—Contributory negligence—Pedestrian Crossing Places (Traffic) Provincial Regulations, 1935 (dated January 25, 1935),*

*Reg. 5.* The plaintiff left the western pavement of a road and started to go over a controlled pedestrian crossing when the traffic lights were in his favour and against the defendant's car, but before he reached a refuge which was on the crossing in the middle of the road, the lights changed and the defendant received a signal that she might proceed over the crossing between the refuge and the eastern pavement of the road. The plaintiff paused at the refuge and then stepped into the roadway in front of the defendant's car which knocked him down. In an action for damages for personal injuries the plaintiff alleged that the defendant had been guilty of negligence and breach of the statutory duty imposed on her by Reg. 5 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, in that she had not allowed him free and uninterrupted passage over the crossing, he having started to go over the crossing, which must be regarded as a single crossing from pavement to pavement, although divided by the refuge, before she had received a signal that she might proceed over the crossing. The defendant denied negligence and contended that there were two crossings, one from the western pavement to the refuge and the other from the refuge to the eastern pavement, and that she was not in breach of her statutory duty because the defendant had not started to go over the crossing where the accident took place before she received a signal to proceed :—*Held*, by the Court of Appeal, that the whole transit from pavement to pavement was not a single crossing but was two separate crossings, interrupted by a refuge, and that as the lights had changed from green to red before the plaintiff left the refuge to cross to the eastern pavement, he was guilty of contributory negligence and could not recover. *WILKINSON v. CHETHAM STRODE*, [1940] 2 K. B. 310.

TRADE MARK—*Infringement—Proprietary medicine—Published formula—Advertisement of competing article—Mark referred to in pamphlet for price comparison—Not used in reference to proprietor of mark or to goods so marked—No infringement—Trade Marks Act, 1938 (1 & 2 Geo. VI, c. 22), s. 4.* The plaintiffs were the owners of a trade mark in the word "bisurated" as applied to "bisurated magnesia," a proprietary medicine sold under a published formula. The defendants, who were manufacturing chemists and retailers, sold the plaintiffs' goods and also made and sold a similar preparation which they called "bismuthated magnesia." They published a pamphlet containing a list of various proprietary medicines made to formula, including bisurated magnesia, and opposite to this list a number of medicines made by them, said to be similar in all respects to the proprietary medicines, but sold, as stated, at a much lower price, the formulæ published in both lists being identical. The plaintiffs having claimed an injunction to restrain the defendants from infringing their mark :—*Held* (per Sir Wilfrid Greene M. R. and Clauson L. J., MacKinnon L. J. dissenting) that the defendants had used the plaintiffs' trade mark as a convenient method of describing the merits of their own goods and had infringed the exclusive right of the plaintiffs as defined by s. 4, sub-s.(1), of the Act. *BISMAG, LD. v. AMBLINS (CHEMISTS), LTD.*, [1940] 1 Ch. 667.

## RECENT INDIAN CASES.

ARBITRATION—*Validity of reference to arbitration at the instance of a lawyer engaged by the agent.* A reference to arbitration at the instance of a lawyer is valid if the *vakâlât-nâmâ* in favour of the lawyer is executed by a duly authorised agent.

empowering the lawyer to enter into such arbitration on behalf of the principal, even though such agent himself is not authorised to refer the matter to arbitration. *EAST BENGAL BANK, LTD. v. JOGESH CHANDRA BANERJI*, [1940] 2 CAL. 237.

**CIRCUMSTANTIAL EVIDENCE, how to be placed before jury—Misdirection.** A theoretical discourse of what is circumstantial evidence couched in language which must be unintelligible to the jury is quite worthless. The Judge should direct the jury that, if the circumstances are capable of a reasonable interpretation consistent with the innocence of the accused, then he is entitled to be acquitted even if the circumstances raise a strong suspicion against him. In a case depending on circumstantial evidence a direction to the jury to the effect that they should consider whether they are prepared to accept the evidence as showing the guilt of the accused is quite inadequate. A direction to the jury at the end of the discussion of the evidence against each individual accused person, asking them to consider whether the accused has been falsely implicated may very likely mislead the jury into thinking that, unless they are satisfied that the case is false, they should find the accused guilty. It is, therefore, a misdirection. *EMPEROR v. MUJJAFFAR SHAIKH*, [1940] 2 CAL. 258.

**CIVIL PROCEDURE CODE, s. 115—"Case decided"—Order refusing amendment of plaint in the matter of description and array of parties—Civil Procedure Code, order I, rule 10.** An order refusing an amendment of the plaint in the matter of correct description and array or addition of parties amounts to a case decided within the meaning of s. 115 of the Civil Procedure Code, and a revision lies therefrom. *JAGDISH SARAN v. BHAGWAT SARAN*, [1940] ALL. 564.

—**O. XXI, rr. 15 and 2—Power of partner who is joint decree-holder to give release to judgment-debtor—Satisfaction of decree if and when can be recorded at instance of one of joint decree-holders—Adjustment of decree in favour of several judgment-creditors binding on all of them only if executing decree-holders authorised to receive payment on behalf of all, or if all of them in fact received their shares.** When partners have become joint decree-holders (and are not merely joint private creditors), no one of them can receive the joint decree debt so as to release the judgment-debtor from further liability in execution. Satisfaction of a decree cannot be entered on the mere report of one of the joint decree-holders : to do so would be a violation of the provisions of Order XXI, r. 15, Civil Procedure Code. If express authority of the executing decree-holder to receive the decretal amount on behalf of all joint decree-holders is proved, or if it is established that in fact all decree-holders have received their shares of the amount, then an adjustment binding on all decree-holders can and should be recorded. *SHAHBAZKHAN FATEKHAN v. KAKALMAL BUDHUMAL*, [1940] KAR. 461.

—**O. XLI, rr. 11 and 12—Admission of appeal—As a whole and not in part only.** Under the terms of O. XLI, rr. 11 and 12, of the Code of Civil Procedure, there are only two courses open to a Court in dealing with an appeal, namely, to dismiss or admit the appeal as a whole. It cannot direct that the appeal be admitted in part only. *ESWABIAH v. RAMESWARAYYA*, [1940] MAD. 785, F. B.

**COMPANIES LAW (Act VII of 1913), s. 103—Memorandum of Association—Managing Agents not given power of borrowing—Unauthorized borrowings by managing agents—Borrowings not bona fide and not for benefit of company—Company whether liable for the borrowings.** Where the managing agents of a company are not

given the power of borrowing money under the memorandum and the articles of association, then the company is not liable for the unauthorized borrowings by the managing agent, where the borrowings are not *bona fide* and necessary for the company, but are an attempt to saddle the company with liabilities without any benefit to it. *THE EQUITY INSURANCE COMPANY, LIMITED v. MESSRS. DINSHAW & CO., (BANKERS), LIMITED*, (1940) 15 LUCK. 515.

CONTRACT ACT (IX OF 1872), SS. 65, 68—*Minor, contract by—Payment made, whether can be recovered under s. 65—Hindu male minor—Marriage, loan for expenses of—Section 68, whether applies—Suretyship, contract of—Nature of—Surety in minor's contract, whether liable.* [Payment made to a minor under a contract entered into by him is not recoverable from him under s. 65 of the Indian Contract Act. Advancing funds to a male Hindu minor for meeting his own marriage expenses is not supplying with necessities within the meaning of s. 68 of the Contract Act and a person advancing such funds is not entitled to be reimbursed from the property of the minor. A contract of suretyship for a minor is a collateral contract and is enforceable against the surety though the main contract entered into by the minor is not enforceable under law. *TIKKILAL v. KOMALCHAND*, [1940] NAG. 632.

EVIDENCE ACT, SS. 13, 40, 41, 42, 43—*Judgment not inter partes—Admissibility.* A judgment not *inter partes* is not admissible to prove the truth of the fact which it states. Where the right of a party has been concluded by a judgment, that judgment is admissible under ss. 13 and 43 of the Indian Evidence Act to prove that fact. *MAROTI v. JAGANNATHDAS*, [1940] NAG. 699.

HINDU LAW—*Debt—Suit against father and sons—Sons exonerated and dismissed from suit—Decree against father alone—Executable against son's interests in joint family property, if.* A decree obtained against a Hindu father after his sons who were impleaded in the suit had been exonerated and dismissed therefrom, can be executed against the sons' interests in the joint family property. The decision of the Privy Council in *Raja Ram v. Raja Bakhsh Singh*, (1937) I. L. R. 13 Luck. 61 has not overruled in any way the decision of the full bench in *Periasami Mudaliar v. Seetharama Chettiar*, (1903) 27 Mad. 243. *KRISHNAN v. SOMI*, [1940] MAD. 815.

—*Inheritance—Illegitimate daughters—Right to succeed to the stridhanam of their mother's mother.* The illegitimate daughters of a Hindu woman are not entitled under Hindu law, apart from special custom, to succeed to the stridhanam of their mother's mother. The general principle of Hindu law is to limit heirship to legitimate issue except in the case of illegitimate sons amongst Sudras in whose favour a special exception has been made in the texts. There is no authority which extends the right of an illegitimate daughter to succeed beyond the right to succeed to her mother's stridhanam. *MEENAKSHI v. MURUGAYYA*, [1940] MAD. 739.

—*Maintenance—Hindu coparcener, whether entitled to sue for maintenance—Suit for partition, if necessary—Unmarried daughter of coparcener, if entitled to sue manager for maintenance.* A Hindu coparcener, whether a major or a minor, who is denied maintenance by the head of the family is entitled to sue for maintenance alone; he need not sue for partition.

An unmarried daughter of a Hindu coparcener can sue the manager of the joint family for her maintenance. She is not bound to sue her father and proceed against his share only in the joint family properties. *CHERUTTY v. RAVU*, [1940] MAD. 830.



INSANITY—*Insanity, how far protects an accused—Indian Penal Code (Act XLV of 1860), s. 84.* Under s. 84 of the Indian Penal Code, an accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. A direction to the jury to the effect that an accused cannot claim the protection of s. 84 of Indian Penal Code, if he knew that he was killing somebody, without the further direction that the jury were to consider whether the accused knew that the act he committed was either wrong or contrary to law, is a misdirection. *GERON v. EMPEROR*, [1940] 2 CAL. 329.

LAND ACQUISITION ACT (I. OF 1894), SS. 3(d) AND 30—*Reference under s. 30 to Subordinate Judge—Decision appealable.* An appeal lies from the decision of a Subordinate Judge appointed by the Provincial Government under s. 3(d) of the Land Acquisition Act, 1894, to decide a dispute referred by a Collector under s. 30 of the Act. The Subordinate Judge so appointed to decide a dispute with regard to the allocation of compensation money is a civil Court and proceedings before him are governed by the provisions of the Code of Civil Procedure. *CHIKKANNA v. PERUMAL*, [1940] MAD. 791, F. B.

LIMITATION ACT (IX OF 1908), s. 20—*Interest—Payment of interest "as such" under s. 20, whether to appear in the handwriting of payer—Court to find from evidence and circumstances, whether payment was for interest.* There is no law requiring that payment of interest "as such" must necessarily appear in the handwriting or under the signature of the party making the payment. No doubt it is necessary that at the time of the payment it must be clearly mentioned that the payment was being made on account of interest. Where there is nothing to show whether a payment has been made in respect of principal or interest, the Court is entitled to find out on the evidence and from the circumstances for what purpose the payment was made. *BACHCHU LAL v. BHAGWATI*, (1940) 15 LUCK. 524.

PENAL CODE (ACT XLV OF 1860), s. 289—*Tethering of horse in narrow street—If negligent omission.* The tethering of a horse in a narrow street where people cannot pass without going near the animal's hind legs is a negligent omission to take order with the animal sufficient to satisfy the requirements of s. 289, Indian Penal Code. *GAGUMAL MULCHAND v. CROWN*, [1940] KAR. 445.

RES JUDICATA—*Mortgage—Suit for possession by mortgagee—Amount due on mortgage determined in suit for possession—Redemption suit brought subsequently—Decision regarding amount due, whether operates as res judicata.* Where a suit is brought for possession of the mortgaged property by the mortgagee and in that suit it became necessary to determine the amount due on the mortgage, the decision regarding the amount due on the mortgage in that suit operates as *res judicata* in a subsequent suit for redemption of the mortgage. *SHEO KUMAR v. MUNNU SINGH*, (1940) 15 LUCK. 545.

## REVIEWS.

*The Code of Criminal Procedure.* By V. V. CHITALEY, B.A., LL.B., AND K. N. ANNAJI RAO, B.A., B.L. Second Edition. 1940. NAGPUR : The All India Reporter Ltd. Royal 8vo. Vol. 1 (pp. 1-1159), Vol. 2 (pp. 1160-2352). Price Rs. 27 for three Volumes.

IN this second edition of a work first published five years ago, the authors have carefully revised the text in the light of the changes effected in the Code and the various decisions reported in the intervening period. The volumes under review deal with ss. 1 to 430. The method of treatment is the same as that employed in the authors' treatise on the Civil Procedure Code. The commentary on each section is prefaced by a synopsis which facilitates reference to the point required in the detailed discussion of the section. The case law bearing on the subject is exhaustively dealt with and the principles of law deduced therefrom are classified under different headings. To add to their utility the volumes contain local amendments to the various sections and a chart showing how the sections are affected by legislative amendments. One more volume will complete this work which will be very useful to the profession as an exhaustive commentary on the Code of Criminal Procedure.

*Sohni's Commentaries on the Code of Criminal Procedure.* Edited by W. T. SUNDARRAJAN, B.A., B.L., Advocate, High Court, Madras. BOMBAY : The New Book Company, 188-90 Hornby Road. 1941. Fourteenth edition, Crown 4to. Pages ccxiii and 1389. Price Rs. 20.

THIS well-known commentary, which now enters into its fourteenth edition, has been carefully and thoroughly revised. It incorporates the amendments made by the Indian Legislature up to 1941 as well as those effected by the Government of India (Adaptation of Indian Laws) Order, 1937, and these are explained in the footnotes to the commentaries. The case law is fully dealt with and brought up to date. Apart from the detailed references to all the Indian cases the editor has cited important English and American cases in elucidating the points under discussion. We, however, think that it was unnecessary to make transatlantic excursions to elucidate principles of procedure. The editor has made the book handy by the deletion of much obsolete and redundant matter. There is a detailed subject index and an useful appendix which gives the text of some thirteen Acts including the Charter Act and the Letters Patent, the Cattle Trespass Act, 1871, the Coroners Act, 1871, the Criminal Law (Amendment) Act, 1908, the European Vagrancy Act, 1874, the Indian Extradition Act, 1903, the Indian Oaths Act, 1873, the Police Acts of 1861 and 1888, the Prisoners Act, 1900, the Prisons Act, 1894, the Reformatory Schools Act, 1897, and the Whipping Act, 1909. This book which has held the field for over a generation will be very useful to the Bench and the Bar.

*Bombay Shops and Establishments Act, 1939.* By D. K. SHAH, B.Sc., LL.B. AHMEDABAD : C. C. Vora, Khadia. Pages 66. Price annas four.

THIS brochure contains the text of the Act and a translation of it into Gujarati with some comments. Merchants and commercial firms and all those who are affected by the Act will find it serviceable.

# The Bombay Law Reporter.

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## JOURNAL

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### ATTACHMENT BEFORE JUDGMENT OF PROPERTY IN AN INDIAN STATE.

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THE question whether a British Indian Court is empowered to order attachment before judgment of property situated in an Indian State requires consideration. There are numerous instances where a British Indian Court passes such an order ; and when the order is sent to the Court of the Indian State wherein the property is situated, the property is attached. In support of this, the following argument is advanced.—

(i) Order XXXVIII, r. 5, read with s. 136 of the Civil Procedure Code empowers a Court to pass such an order.

(ii) Under the new Civil Procedure Code, it is not only within the local limits of the jurisdiction of a civil Court that the right to order an attachment of property before judgment can be exercised by such Court, but it is open to the Court to exercise that right even beyond the limits of its jurisdiction.

(iii) There being reciprocity between British Indian Courts and the Indian State, such orders can be validly passed.

(iv) The territories of Indian States being adjacent to those of British India, it usually happens that persons having property in an Indian State are able to contract debts in British India. To say that a British Indian Court is not empowered to attach before judgment such property, is tantamount to saying that such persons can, after a suit is launched against them in British India, freely dispose of their property in an Indian State and thus frustrate the ends of justice. To avoid this unhappy result, s. 136, Civil Procedure Code, enacts that a Court can attach before judgment property lying outside its jurisdiction.

It is true that in a trial Court the question of attachment before judgment has special importance of its own ; it is equally true that a Court should and must try its level best not to frustrate the ends of justice ; but the question remains whether the argument given above can be accepted, and whether it can be legally maintained that a British Indian Court can order attachment before judgment of property situated in an Indian State.

Under the old Code there was a conflict of decisions as to whether a Court could or could not attach before judgment property lying outside its jurisdiction ;

but in view of the omission of the words "Within the jurisdiction of the Court" and in view of the words "Outside the local limits of the jurisdiction of the Court" appearing in s. 136, the Court is now clearly empowered under O. XXXVIII, r. 5, and s. 136 of the Civil Procedure Code, to order attachment of properties whether situated within or without jurisdiction. (Vide *Haji Jeva Nur Muhammad v. Abubakar Ibrahim Meman*<sup>1</sup>; *Kedar Nath Dutt v. Seeva Veyana Rana Luchman Chetty*<sup>2</sup>; *Kanahyi Ram v. Dina Nath Hardial Mal*<sup>3</sup>; *Somasundaram Chetty v. Muthu Veerappa Chetty*,<sup>4</sup> etc.).

These cases, however, do not decide that a civil Court can attach before judgment property which is outside British India. There is not a single case on the point as to whether a British Indian Court is empowered to order attachment before judgment of property lying in an Indian State. We may, however, refer to some cases that can guide us in reaching a definite conclusion on the point.

In *Mela Mal v. Bishan Das*<sup>5</sup> a question of law arose whether a civil Court at Hoshiarpur was competent to attach before judgment moveable property of a defendant (a British Indian subject) which was in Kashgar in China. It was held that inasmuch as Kashgar was admittedly a foreign territory, the mere fact that a Consular Court had been created there by His Majesty for certain purposes did not bring that territory within British India, and that the rule regarding the attachment before judgment by a civil Court of property beyond its jurisdiction was restricted to Courts in British India.

In *Zubeda Begam Saheba v. Kommana Kaniah*<sup>6</sup> it was held that the Subordinate Judge of Vizagapattam had no jurisdiction in a suit pending before him to attach before judgment properties which admittedly were in the Agency tracts over which the Court had no jurisdiction.

In *Ramabhadra Raju Bahadur v. Maharaja of Jeypore*<sup>7</sup> a suit was brought under the Civil Procedure Code in the Court of the Subordinate Judge of Vizagapattam to enforce a mortgage of properties, some of which were situated in the Agency tracts subject to the special jurisdiction of the Agency Courts, and a decree on the mortgage and for the sale of the mortgaged property was made by the Subordinate Judge, and affirmed by the High Court. On appeal to the Privy Council it was held that so far as the decree was for sale of the mortgaged property in the scheduled districts, the Courts had no jurisdiction to make it, s. 21 of the Code not being applicable to such a case, and it could be set aside notwithstanding that no objection to the jurisdiction had been taken in the Subordinate Judge's Court. The decree was, therefore, varied by the Privy Council by deleting the order for sale so far as applicable to the lands lying within the Agency Districts.

In *Nilkanth Balwant v. Vidya Narsinh*<sup>8</sup> it was held that a Court in British India had no jurisdiction to try a suit so far as it related to properties situated in an Indian State. In this case the properties in respect of which relief was sought by the plaintiffs were situated in Satara, Belgaum and Kolhapur. The Bombay

1 (1871) 8 B. H. C. R. 29.

2 (1878) 1 C. L. R. 336.

3 (1926) 8 L. L. J. 125,  
s.c. 27 P. L. R. 144.

4 (1909) 10 I. C. 794,  
\*s.c. 4 B. L. T. 89.

5 [1931] A. I. R. Lah. 723,

s.c. 32 P. L. R. 645.

6 [1925] A. I. R. Mad. 1100. .

7 (1919) L. R. 46 I. A. 151,  
s.c. I. L. R. 42 Mad. 813, 21 Bom.  
L. R. 914.

8 (1930) I. L. R. 54 Bom. 495,  
s.c. 32 Bom. L. R. 1527, P.C.

High Court held that the Satara Court had jurisdiction to entertain the suit regarding the properties in the Kolhapur District, and for this view reliance was placed upon s. 17 of the Civil Procedure Code, which runs as follows :—

“Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.”

Relying upon this section the Bombay High Court held that the Satara Court was empowered to try the suit relating to the properties in Kolhapur. The Privy Council, however, held that the Court had no jurisdiction to try the suit in respect of the properties in Kolhapur, as the words “Situate within the jurisdiction of different Courts” in s. 17 of the Code of Civil Procedure referred solely to Courts in British India.

From these cases it appears that a British Indian Court has no authority to order attachment before judgment of property situated in an Indian State and, if such order is passed, the Court in an Indian State is not bound to give effect to that order.

The preamble to the Civil Procedure Code recites that it is expedient to consolidate and amend the laws relating to the procedure of the Courts of civil judicature ; and s. 1(3) provides that s. 1 and ss. 155 to 158 extend to the whole of British India and that the rest of the Code extends to the whole of British India, except the Scheduled Districts. It is, therefore obvious that the provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India. When the Code refers to jurisdiction of different Courts, that must mean within the jurisdiction of different Courts to which the Code applies, that is to say, Courts in British India.

Under s. 44 of the Civil Procedure Code the Provincial Government may by notification in the Official Gazette declare that the decrees of any Civil or Revenue Courts in any Indian State, not being Courts established or continued by the authority of the Central Government or of the Crown Representative, or any class of such decrees, may be executed in the Province as if they had been passed by Courts of British India. And under s. 45 of the Civil Procedure Code the Courts in British India are empowered to send decrees for execution to any Court established or continued by the authority of the Central Government or of the Crown Representative in the territories of any foreign Prince or State to which the Provincial Government has by notification in the Official Gazette declared this section to apply.

It would be seen that these provisions relate to the execution of *decrees* and there is no provision in the Civil Procedure Code which lays down that British Indian Courts can order attachment before judgment of property lying in an Indian State. There may be reciprocity between Courts in British India and those of an Indian State ; but that reciprocity cannot avail a British Indian Court to attach before judgment any property situate in an Indian State. The very fact that the Civil Procedure Code makes special provisions regarding execution in Indian States of decrees passed by British Indian Courts, and that there is no provision for attachment before judgment of property in Indian States, goes to show that the Civil Procedure Code does not warrant such attachment.

The conclusion that is arrived at is :—

(i) Under the present Civil Procedure Code, an attachment before judgment can be of property within as well as without the jurisdiction of the civil Court.

(ii) The rule, however, that attachment before judgment can be ordered by a civil Court beyond the limits of its jurisdiction, is restricted to Courts in British India.

(iii) Even if there be reciprocity between the Courts in British India and those of an Indian State, that reciprocity is to be relied upon for execution of decrees and not for attachment before judgment.

(iv) It is not within the powers of a British Indian Court to order attachment before judgment of property lying within an Indian State; and even if such order is passed and sent under s. 136 to the Court of the Indian State within whose jurisdiction the property is situated, that order need not be executed by that Court.

For the ends of justice, there ought to be some provision empowering a British Indian Court to order attachment before judgment of property in an Indian State; but in the absence of any provision to that effect, and in the light of the case law as it stands, such orders cannot be legally passed.

RAM KESHAV RANADE.

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### THE AGRICULTURIST DEBTORS' RELIEF ACT, 1939.

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THE Bombay Legislature has passed the above Act apparently for the relief of agriculturist debtors. But the provisions of the Act are so novel, drastic and revolutionary, that it is very doubtful whether it will give any relief to debtors and whether its operation will be smooth and equitable.

In addition to the defects in the Act pointed out in 43 Bom. L. R. Journal p. 1 there is one more revolting aspect of that Act. An enactment provides a remedy or lays down procedure for the settlement of a dispute that arises between two parties, but no enactment should foment litigation or force people to go to Court, where no dispute exists between them. But this Act by the operation of ss. 17 and 32 makes it compulsory on every creditor to file an application against his debtor, even if there be no dispute existing between them. If the creditor does not file such an application within eighteen months of the appointment of the Board, his debt is to be considered as wiped out. The framers of this Act have hardly contemplated on the inequity of such a provision and, furthermore, on the enormous number of applications that will have to be filed. Every village grocer and trader will have to file a suit for every article or goods given on credit to any agriculturist, be the amount however small or big, and no matter that there is no dispute between the parties.

Further, the Act applies to all transactions even after the appointment of the Board, and hence this would mean that if rupees five worth of grain is given to an agriculturist on credit a day previous to the expiry of eighteen months from the date of the appointment of the Board, and an application is not filed on the very next day for the recovery of the amount, the debt becomes time-barred, and in case of an article given on credit to an agriculturist on any day eighteen months after the Board is appointed, its price cannot be recovered. Such absurd results follow from

the provisions of this extremely ill-digested and ill-considered law passed for the relief of agriculturist debtors!

The enactment will hit hard both the creditors and the debtors. When the credit of an agriculturist is ruined he will only fall an easy prey to extortionate lenders like Pathans who do not have recourse to law for the recovery of their debts but have their own methods of coercion etc. for the recovery of their dues.

There are many other aspects of the Act which are equally subversive of all good principles. In fact the Act will subvert the whole structure of village society and will lead village life into chaos from which it would be difficult to extricate it. The only remedy is to abrogate it or not to appoint Boards on the formation of which the Act comes into effect.

G. C. BHAT.

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## GLEANINGS.

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### ANIMAL OWNERS' NEGLIGENCE.

If it does not go further, the decision of the Court of Appeal in *Aldham v. United Dairies (London), Ltd.*, (1940) 84 S. J. 43, looks like being a leading authority. It clears up the obscurity in the relationship between negligence and absolute liability based on *scienter*, for damage done by an animal *mansuetæ naturæ*, which arose out of the limitation placed on *May v. Burdett*, (1846) 9 Q. B. 101, by *Cox v. Burbridge*, (1863) 13 C. B. (N. S.) 430.

The former decision laid down that the plaintiff was entitled to succeed, without proof of negligence, who had established that she had been bitten by a monkey, kept by the defendant, well knowing that it was of a mischievous and ferocious nature, and was used and accustomed to attack mankind, and that it was dangerous and improper to allow it to be at large. On the other hand, in *Cox v. Burbridge*, where a horse of mild disposition, for no apparent reason, kicked a child aged five, it was held that no claim lay for negligence.

Although the decision was clearly right, the judgments in *Cox v. Burbridge* do not make it clear where a claim based on *May v. Burdett* ends and an ordinary claim for negligence begins. For example, Erle, C. J., at p. 436 of the report, says :—

“To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff... I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it.”

Willes, J., at p. 439, said :—

“As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them unless they are shown to have acquired some vicious or mischievous habit or propensity, and the owner is shown to have been aware of the fact.”

As *Cox's* case was a claim for negligence, although trespass was discussed, it is excusable to suppose that the Court of Common Pleas was laying down the

rule that no action lay for damage by a tame animal, unless knowledge of its propensity to do that particular type of damage was shown, whether the cause of action was called trespass or negligence.

The case of *Cox v. Burbidge* has been applied in a number of later cases. For example, *Hadwell v. Righton*, [1907] 2 K. B. 345, where the defendant's hen when on the highway was startled by a dog and flew into the spokes of the bicycle which the plaintiff was riding, thereby causing her injury. The Divisional Court held that the plaintiff could not recover for, among other reasons, there could be no negligence in the absence of anticipated danger.

Other examples are *Higgins v. Searle*, (1909) 100 L. T. 280 (C.A.); *Ellis v. Banyard*, (1912) 106 L. T. 51 (C.A.); *Jones v. Lee, ib.*, 123; and *Bardley v. Wallaces, Ltd.*, [1913] 3 K. B. 629. In *Higgins v. Searle* a sow had escaped from her sty and was lying beside the road when, roused by the sound of the horn of the plaintiff's car, it stood up and caused a van horse coming the other way to shy. The plaintiff in order to avoid the horse and van drove his car into a wall and suffered damage. It was held, following *Cox v. Burbidge* and *Hadwell v. Righton*, that he could not recover.

The defendant's cows, in *Ellis v. Banyard*, had strayed on to the highway from his field next to it because, in circumstances which were not shown, the gate of the field was left open. The plaintiff was riding her bicycle along the highway, and the cows "threw her down" and injured her. The Court of Appeal held that she could not recover for various reasons, among others, that there was no evidence of negligence. Buckley, L. J., also gave as one of his "cumulative reasons" why the defendant was entitled to judgment, that there was no evidence that the cows were vicious. In *Jones v. Lee* a young horse strayed from the defendant's field which was defectively fenced on to the highway and for some unknown reason ran across the road as the plaintiffs were passing on a tandem bicycle. The horse collided with the bicycle, fell, and as it got up, lashed out and injured one of the plaintiffs and the bicycle. The County Court Judge, having found that it was negligent of the defendant to leave the horse in a field with a gap in the fence, held, following *Cox v. Burbidge*, that the plaintiff could not recover, and a strong Divisional Court, consisting of Hamilton and Bankes, JJ., upheld him. Both Judges apparently took the view that unless the defendant knew of the propensity of the horse to behave as it did, the plaintiff could not recover (see 106 L.T., at pp. 125 and 126).

The decision in *Bradley v. Wallaces, Ltd.*, turned on whether an action lay where a man working on premises was kicked by a horse whose tail he had slightly touched, the horse, which was not known to have any vicious propensities, having been brought there by the servant of the person sought to be made liable, and left unattended. The Court of Appeal held that no action lay for negligence, as leaving the horse unattended, assuming it were negligent, would not in the ordinary course of things lead to its kicking a man.

It is not clear to what extent the case of *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K. B. 370, followed *Cox's* case, and to what extent it arrived at the same result by another route. There two sheep of the defendant's had got on to the highway, having separated from the rest of the flock which was in a field next to the highway. The Court of Appeal held that the defendant was under no duty to members of the public to prevent sheep straying on to the highway. Pickford,



L.J., thought that the case of *Cox v. Burbidge* did not apply, for in that case the horse had behaved viciously, whereas in the case then before the Court, the sheep had behaved naturally, for they had merely run across the road and collided with the plaintiff's car. He did not think that an owner was liable for allowing harmless domestic animals on the highway even if they, on their own volition, caused an obstruction (see [1916] 2 K. B., at pp. 378 and 380).

The authorities up to *Hodges'* case appear, therefore, to establish that a person will not be liable for the act of an animal *mansuetæ naturæ*, that is, an act that the animal does of its own volition and not under direction, which he allows to be at large, unless it was the type of act that the particular animal would be likely to do and that person knows it. Moreover, both Hamilton, J., in *Jones v. Lee*, 106 L. T., at p. 125, and Avory, J., in the Divisional Court, in *Hodges'* case, [1916] 1 K. B. at pp. 213-4, thought that such an act must have a vicious or mischievous quality.

The case of *Deen v. Davies*, [1935] 2 K.B. 282, marked a distinct departure from the last noted view. The defendant in that case rode his pony into Merthyr Tydfil and put her in a stall, tied to a wooden bar. The pony escaped and in running through the streets, on its way home, injured the plaintiff. It having been found that the defendant was negligent in tying-up the pony, the plaintiff was held entitled to recover. There was nothing vicious in the behaviour of the pony, but the Court thought that the defendant ought to have anticipated that the pony would behave as it did, if not properly tethered. Romer, L.J., distinguished the case from *Hodges'* case on the basis that a different principle was applicable in the circumstances of a person bringing an animal on to the highway from that which applied where the animal strayed on to the highway from adjoining land (see [1935] 2 K.B., at pp. 294-295).

*Alldham v. United Dairies (London), Ltd.*, *supra*, raised the negligence point very clearly. There a pony of the defendants, attached to a milk cart, was left for half an hour in a main thoroughfare. It had often been left in the particular spot and the evidence showed that it used to put its "paws" on the pavement and move its jaw, of which the defendants were aware, but the jury at the trial found that the defendants did not know that the pony had a propensity to attack human beings. When the plaintiff was passing the pony it "jabbed at her," bit her face, caught her by the coat, dragged her down and pawed her with its feet. The jury also found that the defendants were negligent in leaving the pony unattended knowing that it had a habit of straying on to the foot pavement. Humphreys, J., the trial Judge, held that the plaintiff could not recover, but the Court of Appeal reversed his decision.

The principal judgment is that of du Parcq, L.J., who lays down the following propositions (see p. 527 of [1939] 4 All E.R.):—

(a) The general principles of the law of negligence are the same in the case of the control of an animal as in the control of a motor car or any other inanimate object, subject to limitations, in the case of an animal *mansuetæ naturæ*, owing to its capacity for spontaneous action.

(b) Negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do something contrary to its ordinary nature.

(c) Even if a defendant's omission to control or secure his horse is negligent, an act on the part of the horse which is contrary to its ordinary nature cannot be

regarded, in the absence of special circumstances, as being directly caused by such negligence.

These propositions seem to give due weight to the authorities, to reconcile them, and, if one may say so, to be clear and precise. It is to *Aldham's* case that the lawyer will, we think, look in the future for enlightenment on this branch of the law.—S. J.

#### INNKEEPER'S LIABILITY FOR THEFTS FROM CARS.

THE black-out affords increased opportunities for pilfering from cars outside hotels.

The liability of an innkeeper for a theft from a motor car (before the war) was considered in *Thorpe v. Weymouth* at Bristol County Court in November last year. The plaintiff had left his car in the "pull-in" of the New Inn, Farmborough, while having some refreshment in the bar or lounge. After a stay of a quarter of an hour, the plaintiff found that his raincoat was missing, and he immediately informed the licensee, the defendant. The police were unable to recover the property, and the plaintiff therefore claimed its value (11. 1s.) from the defendant for breach of his common law duty. The car was a tourer, and therefore the doors could not be locked, but they were left shut, with the hood up.

The plaintiff's case was that he was not disentitled from recovering by any negligence on his part, as there was no obligation upon him to place his goods in the care of a servant of the innkeeper. The defendant's case was that the so-called "car park" was only a temporary "draw-in" for customers, to prevent obstruction of the traffic. It was not in the same category as the accommodation outside big hotels, where an attendant was sometimes provided. Moreover, the plaintiff had merely gone into the bar or lounge, and, as he had not entered the inn, the defendant's common law liability as an innkeeper had not arisen. If, however, the plaintiff had been a guest, the loss was due to his own negligence, and the defendant was therefore not liable.

The learned Deputy Judge (Mr. A. M. Wilshere) observed that the premises were admittedly an inn. He found as a fact that the "car park" or "pull-in," as the parties respectively described it, was used as a part of the inn by the defendant, whose liability as an innkeeper therefore arose. Nevertheless the plaintiff was himself negligent in leaving the coat in the car, and his claim therefore failed. Judgment was given for the defendant, with costs.

The position in regard to a recognised car park was illustrated in *Stewart v. Titley* (1939, L. J. N. C. C. R. 89). The plaintiff had left his car in a flood-lit car park outside the "Black Prince" on the Rochester Way. An attendant, in a peaked cap, was provided, but the car was missing at 11-20 p.m. It was eventually recovered, but the plaintiff claimed damages for its temporary loss, as there had been an implied invitation to park the car, and the defendant was liable as an innkeeper at common law, or as a bailee. The defendant denied liability on the ground that the car was not left "within the inn," or "received" in the car park, but had merely been left there for the plaintiff's convenience. Furthermore, the innkeeper's liability only arose in the event of the goods being lost, and it ceased if and when the goods (like the plaintiff's car) were recovered. His Honour Judge Sir Gerald Hurst, K.C., held that, once the goods were within the inn, the innkeeper's liability arose at common law. It was therefore unnecessary to prove delivery and reception of the goods. The de-

fence failed on the plea that the car was not "within the inn," and the liability of the innkeeper could only be discharged if the loss was due to an act of God, the King's enemies or the guest's own negligence. None of these was alleged, and, as the defendant was liable at common law, no question arose of his liability as a bailee. Judgment was given for the plaintiff for 52*l.* with costs.

There was no evidence of any direction by the attendant to place the car in the park, but this circumstance did not enable the case to be distinguished from *Aria v. Bridge House Hotel (Staines), Ltd.* (1927, 137 L. T. 299). In that case the hall porter had directed the plaintiff to park his car in the space which was commonly used for the purpose, and was marked by a sign, "Free for Visitors." While the plaintiff was at dinner his car was stolen, but the defendants denied liability and, in the alternative, contended that their liability was limited to 30*l.* under the Innkeepers' Liability Act, 1863, s. 1, a copy of which had been duly exhibited. Swift, J., ruled, however, that that Act did not apply to the facts of the case, and—without deciding any question of negligence—he held that the plaintiff was entitled to judgment for the amount awarded by the jury, *viz.*, 267*l.* 10*s.*, with costs.—*L.J.*

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#### TAX ON KNOWLEDGE

If Sir Kingsley Wood is not afraid, as Mr. A. P. Herbert put it, to go down to history as the first Chancellor of the Exchequer to put a tax on the Word of God, he may not be deterred from putting a tax on Halsbury's Laws of England. He must then be classed with Habakkuk as *capable de tout*. It is not, however, necessary to equate His Majesty's Judges and writers of legal textbooks with the Major and Minor Prophets, or the Statutes with the Decalogue, in order to make out a very strong case for the exemption of them all from the operation of the purchase tax. Legal textbooks are not luxuries; they are the tools of a lawyer's trade. Agricultural implements and medical appliances are to be exempt from the tax because in the community's interest it is inadvisable to restrict their use; but we are at a loss to understand how the community can do other than suffer from inadequate legal help at a time like the present. Textbooks and legal reports and periodicals are always necessary, and they are doubly so now, as everyone knows. To keep abreast of the present spate of legislation without them passes the wit of man. Cost of production has risen enormously during the war, and the proposed tax must inevitably raise the price still higher. Lawyers are certainly not profiting from the war, and students (who cannot study without books) are poorer than ever. A tax upon any book is a deterrent to knowledge; but a tax upon law books is more; it will result in the impairment of an essential social service. There is another aspect, less tangible but potent. In our struggle against tyranny we are given free and great aid by the Dominions and Colonies because we have the same conception of liberty, based on our common heritage of the law. Legal reports, textbooks and periodicals go in large numbers from us to all parts of the Empire, and although the tax does not apply to exports, any detriment to their production at home weakens a link which should be preserved.—*L. J.*

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#### THE BLACK-OUT DANGER

WE have often expressed our view that the imposition of black-out regulations does not alter the common law at all, but increases the necessity for observing its

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rules. Generally one has to insist on this point for the guidance of those who use our roads; but a decision of Mr. Justice Humphreys this week (*Times*, August 20) shows that additional care must also be taken by those who are responsible for their safety. The plaintiff, a pedestrian, collided with a sand-bin which was left on the footway in a London borough. He sued the local Council for negligence and succeeded. The learned Judge said that it was the duty of the defendants to keep their roads safe, and that in this case safety could have been assured by putting a big splash of white on the sandbin. It is not for us to say whether such an expedient would have averted this particular accident, but it is certainly true that the duty of the highway authority is to keep their roads safe and that an action for negligence may follow in any case where it can be shown that something has been done to make them unsafe. The defendant had brought about a source of danger and had done nothing to warn passengers of it; so that the antiquated doctrine "no liability for non-feasance" would not save them. A good case showing the limits of that doctrine or rule is *Shoreditch Corporation v. Bull* (1904, 2 L. G. R. 756), which was applied and followed in *Newsome v. Darton U. D. C.* (1938, 3 All E. R. 93). No doubt there must be many cases of this kind in these days of dark roads; and the learned Judge granted a stay of execution pending notice of appeal. We shall await the appeal with interest and, *pendente lite*, must say no more.—*L. J.*

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#### ABOUT TURN

LORD Eldon used to tell a somewhat similar story of the great Dunning in an earlier generation: "I was once junior to Mr. Dunning, who began his argument and appeared to me to be reasoning very powerfully against our client. Waiting till I was quite convinced that he had mistaken for what party he was retained, I then touched his arm and, upon his turning his head towards me, I whispered to him that he must have misunderstood for whom he was employed, as he was reasoning against our client. He gave me a very rough and rude reprimand for not having sooner set him right, and then proceeded to state that what he addressed to the Court was all that could be stated against his client, and that he had put the case as unfavourably as possible against him in order that the Court might see how very satisfactorily the case against him could be answered. And accordingly Dunning very powerfully answered what he had before stated." Similar stories are told of Lord St. Leonards and of the Scots Lord Eldin.—*S. J.*

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#### RECENT ENGLISH CASES.

DEFAMATION—*Libel*—*Newspaper article*—*Article defamatory in primary sense, but defamatory in secondary sense by reason of special facts*—*Special facts known to certain readers of article, but no evidence that anyone misled thereby*—*Liability of publisher of newspaper*. In an action for libel in respect of words which are not defamatory in their primary meaning, but are capable of being understood in a secondary and defamatory sense by persons having knowledge of certain special facts, in order to support an innuendo that the words bear the secondary and defamatory meaning, it is sufficient for the plaintiff to allege and to prove that there are persons who knew the special facts and so might understand the words in that secondary and defamatory sense, without proving that any person did in fact under-

stand them in that sense. *HOUGH v. LONDON EXPRESS NEWSPAPERS LD.*, [1940] 2 K. B. 507.

LANDLORD AND TENANT—*No covenant to do external repairs—Landlord's right to enter and view the premises and effect repairs—Landlord's practice to do all repairs—Accident to third party on highway through want of repair of cellar cover—Action against landlord for damages for personal injury—Negligence—Liability of landlord.* In order that a person injured while proceeding along a highway by the defective condition of premises alongside it may be entitled to sue the landlord instead of the occupying tenant for personal injuries, it is not necessary that the landlord should have covenanted with the tenant to do the external repairs; it is sufficient that he has reserved the right to enter on and view the premises and to do all necessary repairs. *HEAP v. IND COOPE AND ALLSOP, LD.*, [1940] 2 K. B. 476.

—*Rent—Payment by stranger to tenancy—Acceptance by landlord—Payment not ratified by tenant—Satisfaction.* Payment to a landlord by a stranger to the tenancy of a sum equivalent to the amount of the rent owing by the tenant is not a good satisfaction of the rent, even if it be accepted by the landlord, unless it is made by the payer as agent for, and on behalf of, or in the name and on account of, the tenant, or with his authority or subsequent ratification. *SMITH v. COX*, [1940] 2 K. B. 558.

MASTER AND SERVANT—*Servant employed at weekly wages—Absences from work ill—No wages paid or expected to be paid—Subsequent claim for wages during those periods—Inference of implied term that those wages are not to be paid.* The question whether a servant is or is not entitled to be paid his wages during short periods of absence from work through illness, depends entirely on the terms of the contract which will often require to be ascertained by reference to the facts.

In a case therefore where a servant had been absent from work on three occasions through sickness and he had neither received nor expected to receive wages during those periods, the Court drew the inference that it was an implied term of the contract of employment that he should not be paid wages during such absences from work. *O'GRADY v. SAPER, LD.*, [1940] 2 K. B. 469.

## RECENT INDIAN CASES.

CHEQUE—*Countermand of payment—Bank's liability—Negotiable Instruments Act (XXVI of 1881), ss. 10, 31.* A bank, which has negligently paid a cheque notwithstanding countermand of payment by the customer, cannot debit the customer's account with the amount of the cheque. The current account rule of a bank that "the bank will register instructions from the drawer regarding cheques lost, stolen, etc., but cannot guarantee constituents against loss in such cases in event of a cheque being paid" applies to events happening prior to the time when a cheque reaches the bank and is presented for payment and has no application where the negligence is committed by the bank after presentation. *SYED MAHAMMAD YAKUB v. IMPERIAL BANK OF INDIA*, [1940] 2 CAL. 678.

CIVIL PROCEDURE CODE (Act V of 1908), O. XXI, r. 53—*Decree for partnership accounts, whether saleable at the instance of a creditor who has attached it in execution of his decree.* A decree for accounts passed in a suit for dissolution of

partnership and for partnership accounts, though attachable, is not saleable at the instance of a creditor who has attached it in execution of his decree. *KHIMJI POONJA AND CO. v. RATANSHI HIRJI BHOJRAJ*, (1940) 19 PAT. 935.

—*Sch. II—Reference to arbitration—Debt due to joint Hindu family—Only managing member joining the reference—Whether other members of the family bound by it—No record of.* A manager of a joint Hindu family is competent to make a reference to arbitration so as to bind the other members of the family and the mere fact that the other members of the family did not join the reference does not invalidate it. *KANSHI RAM v. HARNAM DAD*, [1940] LAH. 599.

GAMING AND WAGERING—*Brokers' claim against customer—Customer, if can set up plea of gaming and wagering.* The plaintiff acted as broker on behalf of the defendant for sale and purchase of jute. The defendant never intended to give or take delivery and was simply gambling in differences, but the plaintiff was not a party to those gambling transactions :—*Held*, that the plea of gaming and wagering could not be set up by the customer against the broker's claim. *GOAL DAS DAGA v. MANICK LAL BAITY*, [1940] 2 CAL. 385.

LIMITATION ACT (IX OF 1908), SS. 19 AND 20—*Promissory note debt—Payment towards debt generally—Appropriation not made by either party before suit—Payment whether available under s. 20 to save limitation.* Where a debtor makes payment to his creditor to whom he owes money on a promissory note and the payment is an open payment and the evidence establishes that neither party made any appropriation either towards the principal or towards the interest at any time prior to the suit, or after the suit, the payments in question cannot save limitation. *RISHI KISHEN v. KRISHNA KUMAR*, (1940) 15 LUCK. 578.

## REVIEWS.

*The Madras Law Journal* : Golden Jubilee Number. MADRAS : Madras Law Journal Office, Mylapore.

WE accord first our hearty greetings to our esteemed contemporary on attaining its golden jubilee. Fifty years ago it saw the light of day ; and at this date it is in vigorous growth. We wish it a long career of usefulness. This is the oldest law journal extant in India. The memorial volume, which symbolizes the jubilee, is divided into two parts. The first part contains messages of goodwill. The second part contains articles, twenty-two in number, on different topics of law written by writers of note. The volume contains much interesting reading.

*Principles and Forms of Pleading.* By SURESH CHANDRA GHOSH, Barrister-at-Law. CALCUTTA : Eastern Law House, Ltd., 15 College Square, 1941. Roy 8vo. Pages cxxvii and 1410. Price Rs. 16.

PLEADING, we are told, is an art, in which perfection depends on practice; and brevity is the soul of pleading as of wit. The object of pleading is definition, and a good pleading is concise, precise, relevant and comprehensive. It is a survival, in a remote way, of the forms of action in England. The idea underlying a settled form is to direct the attention of the plaintiff to the requirements of law and the points of

attack which he is prepared to deliver. The book is divided into four parts. Part I deals with the history of pleadings and outlines the present day English and Indian systems of pleading. The principles of pleading are dealt with in part II, which treats in a systematic manner the general rules which govern the difficult art of pleading. No beginner in law can afford to neglect a study of these pages, for he can thereby assimilate the collected experience of bygone centuries which has contributed to the growth of the science of pleading. What is most practical in the book, however, is part IV, which sets out about six hundred forms of plaints and written statements in all conceivable forms of action, arranged, for facility of reference, in an alphabetical order. We have nothing but praise for this attractive volume. It is calculated to be of great use to the beginner; and even an experienced lawyer can derive considerable help by turning to it occasionally, if not constantly.

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*Indian Succession Act.* By NRISINHADAS BASU, B.L., Advocate, Calcutta High Court. CALCUTTA : Eastern Law House, 15 College Square. 1941. Second Edition. Roy. 8vo. Pages clxx, 1276 and cxlxxiv. Price Rs. 12.

THIS is an exhaustive and up to date edition of the Indian Succession Act. The text of the Act as well as cases noted are brought down to July 1940. The annotations are arranged under cognate headings, printed in heavy type. Plentiful excerpts are taken from the English standard works on the subject. The principle and scope of each section are fully brought out. The practitioner need hardly go to any other edition of the Act, for he will find whatever information he needs within the covers of this bulky volume. There is an interesting introduction which surveys in brief the history of the legislation on the subject. The appendix contains sixteen Acts germane to the subject and also rules framed by the different High Courts in India. The volume is neatly printed and moderately priced.

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*The Indian Income-tax Act.* By A. C. SAMPATH IYENGAR, B.A., B.L. Advocate, High Courts, Madras and Bangalore. MADRAS : Madras Law Journal Office, Mylapore. 1941. Royal 8vo. Pages 712 cxxxii, lxxii. Price Rs. 10-8-0.

SINCE the amendment of the Indian Income-tax Act in 1939 several commentaries on the Act have been published and the present one is one more. The author has approached his subject with this difference that he has stated the principles of the law in a narrative form without the least detriment to the exhaustiveness of his exposition. The treatment of the subject is both lucid and concise and towards this end the author has interspersed his text with illustrations and has not burdened it with detailed facts of cases. The case-law is dealt with in the footnotes appended to each proposition of the law in the text and for further elucidation these are amplified by the inclusion of brief summaries of the cases cited. No case of any importance is left out and the case-law has been brought down to the end of 1940. To add to its utility the book contains a number of appendices which include the Excess Profits Tax Act, 1940, notifications relating to exemptions under s. 60 of the Indian Income-tax Act, 1922, Double Income-tax Relief Orders and Rules, the Indian Income-tax Rules, 1922, the Indian Income-tax (Amendment) Act, 1940, and the Excess Profit Tax (Amendment) Act, 1940. This is an up-to-date, comprehensive and clear treatise on a somewhat

intricate statute of everyday reference ; and we recommend it to the profession with confidence.

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*The Law of Pleadings in British India.* By RAI BAHADUR P. C. MOGHA, B.A., LL.B. CALCUTTA : Eastern Law House, 15, College Square. 1940. Sixth edition. Royal 8vo. Pages 897. Price Rs. 10.

THIS is a revised and up-to-date edition of a book which has now established itself as one of the authorities on the law of pleadings in British India. The case-law reported up to April 1940 is incorporated. The portion dealing with the principles of pleading and the footnotes appended to the part dealing with precedents are thoroughly revised and certain portions are rewritten in view of new Acts and amendments. It is not necessary here to expatiate on the manifold merits of this book which is well-known to the profession at large. The learned author has spared no pains in elucidating the science and art of pleadings. It is a work of outstanding merit and must find a place on the shelves of every legal practitioner. The book is moderately priced and neatly got up.

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*Law relating to Company Directors in India.* By H. R. MEHROTRA, G.D.A. CALCUTTA : Progressive Publishing Co., P. 35B, Central Avenue. 1940. Demi 8vo. Pages. 274. Price Rs. 8.

THIS book which is primarily written for the use of directors, managing agents and other company officers summarizes the important provisions of the Indian Companies Act, 1913, relating to the rights, powers, duties and liabilities of company directors. The author has dealt with the subject under different heads and has in a clear and concise manner indicated the varied responsibilities which are imposed by law on the directors of companies. All leading decisions on the subject are referred to in the text. The author, who as a Public Accountant and Auditor of Companies, had practical acquaintance with the difficulties and requirements of company directors and officers, has here lucidly set forth the principles and has within a small compass gathered all the necessary information on the subject. The book will be of great help to company officers as well as to accountants and auditors as a handy reliable compendium.

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*The Indian Sale of Goods Act, 1930.* By OM PRAKASH AGGARWALA, M.A., Punjab Civil Service. LAHORE : Lahore Law Depot, Kachery Road. 1941. Demi 8vo. Pages 731. Price Rs. 7-8-0.

THE law governing the relations of buyer and seller affecting as it does the community at large needs to be widely known and any new exposition of it is welcome. The book gives a comprehensive survey of the entire law on the subject contained in the Act of 1930. The author has critically examined the principles underlying the rules formulated in the provisions of the Act and these are illustrated by select cases. The case-law, both English and Indian, is brought down to December, 1940. The author in dealing with the English decisions has pointed out the extent to which the English law differs from the Indian enactment. A number of useful appendices add to the utility of the book, viz., one dealing with 'conflict of laws' and an-



other with C.I.F., F.O.B. and Ex-ship contracts. The book will be of great use to the profession and to the public generally.

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*The Law of Hundis and Negotiable Instruments.* By CHIRANJIVA LAL AGARWAL, M.A., LL.B., Advocate, Lahore High Court. LAHORE : The University Book Agency, Kacheri Road. Fourth edition. 1941. Demi 8vo. Pages 480. Price Rs. 5-8-0.

IN its fourth edition the author has carefully revised the text and has considerably enlarged it. The book opens with a short introduction which traces the origin, growth, object and meaning of negotiable instruments and hundis. This is followed by a brief summary which outlines the essential features of the Negotiable Instruments Act, 1881. These preliminary chapters will be helpful to the beginner as a clear conspectus of the subject before he ventures to tackle the intricate provisions of the Act. The commentary on the Act is lucid, and the relevant case law, both English and Indian, is fully dealt with. There are useful appendices which give the various forms of hundis and the customs relating to them prevalent in India, stamps on negotiable instruments, the Bills of Exchange Act, 1882, and the rules relating to Notaries Public. The book can be recommended not only to the lawyer and the student of law but also to bankers, businessmen and students of commerce.

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*The Arbitration Act, 1940.* By N. L. GUPTA, B.SC., LL.B., U.P.C.S. (Judicial). ALLAHABAD : Law Publishing House, 33, Sheocharan Lal Road, 1940. Royal 8vo. Pages 306. Price Rs. 5.

THIS is, we believe, the first commentary on the recently enacted Arbitration Act which consolidates and amends the law of arbitration in British India. With the rapid growth of commerce and the consequential development of the practice of arbitration the law relating to it has assumed a highly technical aspect and any attempt to clarify it will therefore be of great help to arbitrators and lawyers alike. The learned author has clearly set out the plain meaning of the various sections and in elucidating these has extensively referred to the relevant case law on the subject. A number of appendices add to the usefulness of the book. These include Reports of the Select Committee and the Civil Justice Committee of 1925, the Indian Arbitration Act, 1899, and the English Arbitration Acts of 1889 and 1934. The book may be recommended to arbitrators and lawyers as a handy guide on an important piece of legislation.

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*The Law and Practice of Excess Profits Tax in India.* By S. K. IYER, B.A., B.L., Advocate, Madras, and S. C. MANCHANDA, M.A., Barrister-at-Law. LAHORE : Indian Law Agencies, Krishna Nagar. 1940. Roy. 8vo. Pages xvii, 116 and lxvii. Price Rs. 5.

THE Excess Profits Tax Act is purely a war measure, and let us hope it will disappear when the war is over. It is a piece of legislation co-ordinate with the Income-tax Act, and shares with it the clumsy drafting. The authors have done well in commenting on the new Act. The annotations are prepared from decided cases,

and illustrated by concrete examples. The appendices contain the various rules framed under the Act. The book will undoubtedly be of help in interpreting the provisions of the Excess Profits Tax Act.

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*The "Yearly Digest" 1940.* Edited by R. NARAYANASWAMI IYER, B.A., B.L.,  
MADRAS : Madras Law Journal Office, Mylapore. Royal 8vo. Columns  
1296. Price Rs. 4.

THIS is a digest of Indian and select English cases reported in all the important legal journals during the year 1940 and is indispensable to the profession. Its arrangement of titles and sub-titles leaves nothing to be desired.

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*The Indian Partnership Act.* By ANUKUL CHANDRA MOITRA, M.A., B.L.  
CALCUTTA : Sanyal & Co., 1/1A, College Square. 1940. 2nd edition.  
Demi 8vo. Pages 335. Price Rs. 3-12-0.

IN this second edition the author has revised the commentary in the light of new decisions and has added much useful matter to the appendices. These latter contain the Rules framed by the several Provincial Governments under the Act, the procedural law in partnership suits, the text of the English Partnership Act, the repealed sections of the Indian Contract Act relating to partnership, and accounting and book-keeping in partnership concerns. The case-law is exhaustively dealt with and brought up-to-date. This edition, like its predecessor will commend itself to the profession.

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*How to form a Company.* By H. R. MEHOTRA, G.D.A. CALCUTTA : Progressive  
Publishing Co. 1940. Demi 8vo. Pages 160, Price Rs. 3.

THIS book deals with the law and practice relating to formation of companies under the Indian Companies Act. The main provisions of the Act are arranged in a practical order and the reader is taken from the initial stages of the formation of a company down to the issue of the certificate of incorporation. There are also chapters dealing with the principal statutory requirements of companies and various forms and other vital information are embodied in the appendices. To promoters and officers of companies this publication will be useful.

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*For Necessary Action, Vol. II.* LAHORE : Indian Cases, Ltd. 1941. Royal 8vo.  
Pages 164.

THIS is a further selection from the speeches and judgments of the Hon'ble Sir Douglas Young, Chief Justice of the High Court at Lahore, delivered since the publication of Vol. I in 1938. The speeches cover a large variety of topics ranging from an apocalyptic new year's message to a graceful tribute to the memory of the late Mr. C. F. Andrews. The judgments are those delivered in five causes célèbres including the famous Shahid Ganj case. There is much instructive and interesting material in this book which will fill in the leisure hours of the busy lawyer or the lay reader.

# The Bombay Law Reporter.

## JOURNAL

June 15, 1941.

### RIGHTS OF A HINDU COPARCENER MURDERING HIS FATHER

- 1 क्लीबोऽथपतितस्तज्जः पट्युन्मत्तको जडः ।  
अन्धोऽचिकित्स्यरोगाद्या भर्तव्याः स्युर्निरंशकाः ॥  
याज्ञवल्क्य ८१४० ॥
- 2 औरसाः क्षेत्रजास्त्वेषां निर्दोषा भागहारिणः ।  
याज्ञ. ८१४१ ॥
- 3 पितृद्विद् पतितः षण्डो यश्चस्यादौपपातिकः ।  
औरसा अपि नैतैऽं लभेरन्क्षेत्रजः कुतः ॥  
नारद.
- 4 अनंशौ क्लीबपतितौ जात्यधर्षधिरौ तथा ।  
उन्मत्तजडमूकाश्च येन केचिन्निरिन्द्रियाः ॥  
मनु ९।२०१ ॥
- 5 सर्वेषामपितु न्याय्यं दातुं शक्यता मनीषिणा ।  
ग्रासाच्छादनमत्यन्तं पतितो ह्यददद्भवेत् ॥  
मनु ९।२०२ ॥
- 6 मृते पितरि न क्लीबकुष्ठयुन्मत्तजडान्वकाः ।  
पतितः पतितापत्यं लिङ्गिदायांशभागिनः ॥  
तेषां पतितवर्जेष्वपि भक्तवत्त्वं प्रदीयते ।  
तत्सुताः पितृदायांशं लभेरन् दोषवर्जिताः ॥  
देवल
- 7 “अतीतं व्यवहारान् ग्रासाच्छादनैर्बिभृ-  
युरन्धजडक्लीबव्यसनिव्याधिता-  
दौष्वाकर्मिणः पतिततज्जातवर्जमिति ॥  
बौधायन

1. CONSIDERING the various texts above quoted it appears that the persons suffering from certain disabilities are excluded from partition as well as inheritance.

Though from the text of Baudhayana above quoted the disqualification was originally confined only to those who were incapable of transacting business ( अकर्मिणः ), later on as observed by Mayne in his learned treatise on Hindu Law, physical and mental incapacity according to the standards of those days as well as incapacity to beget offspring formed the real foundation of the rules of the disqualification, and the exclusion of the outcast and the person addicted to evil deeds was based on social grounds. The bar on disqualified persons was imposed, though partly on religious grounds, was chiefly on physical and mental incapacity.

2. On the question whether murder as a ground of exclusion from inheritance can be supported from the ancient texts of Hindu Dharma Shashtra, in *Vednayaga Mudaliar v. Vedammal*<sup>1</sup> their Lordships of the Madras High Court in dealing with the case of the mother who had murdered her son as succeeding to his estate discussed the meaning of the terms 'Patit' ( पतित ) degraded person and Pitradwit ( पितृद्विद् ) hostile to his father, as to whether on the strength of these terms, a murderer can be excluded from inheritance, and came to the conclusion that the point under consideration was clearly one untouched by the Hindu law. In the matter of the term, 'Patit' they observed that the rules dealing with the matter of degradation which even assuming that they were at one time more than mere moral injunctions could not be treated as otherwise than obsolete. As regards the text purporting to exclude from the succession a son 'hostile to the father', though their Lordships remarked that it undoubtedly showed how repugnant to the spirit of the Hindu law must be the contention that the estate of the deceased person passes to the heir who murders him, as if it were a reward for his unnatural act, they laid down that the text had never been acted upon and that it also must be considered obsolete. But their Lordships of the Privy Council in *Kenchava v. Girimallappa*,<sup>2</sup> have observed as follows (p. 574) :—

"There is much to be said for the argument of the Subordinate Judge that the principles of jurisprudence which can be traced in Hindu Law, would warrant an inference that according to that law a man cannot take advantage of his own wrong, and that if this case had come under consideration by the Hindu sages they would have determined it against the murderer."

But thinking it unnecessary so to decide, their Lordships remarked that the High Court had rightly decided that the principles of equity, justice and good conscience excluded the murderer. Thus it is now an undisputed proposition of Hindu law that a murderer is disqualified from succeeding to the estate of the person murdered and that he should be treated as non-existent when the succession opens on the death of his victim and he cannot be regarded as a fresh stock of descent.

3. But the question is whether a Hindu co-parcener murdering his father can forfeit his rights in the joint family property as a coparcener. On behalf of the murderer it is likely to be contended that the rulings on the point of succession cannot be applied to his coparcenary rights in the joint family property which he acquires by birth in the family and that any interest in the joint family property being once acquired by birth cannot be divested on account of his subsequent disqualification due to his act of murder and that this disqualification based on the ground of murder is on a different footing from other disabilities which under Hindu law exclude a person from inheritance and partition.

4. The original word Daya heritage as given in the Mitakshara signifies wealth which becomes the property of another solely by reason of his relation to the owner.<sup>1</sup> It comprises both heritages—the unobstructed अ प्रतिबन्ध) and obstructed (सप्रतिबन्ध). The words (मृते पितरि) 'when the father is dead' in the passage from Devala Smriti quoted at the outset are explained in Smritichandrika as used in the text simply to indicate the time of partition. So from this it appears that the general word inheritance comprises both the rights of succession and survivorship. This interpretation gets support from the dicta of Mr. Justice Coutts Trotter on p. 976 of I. L. R. 45 Madras,

"Chapter II Sec. 10 Plactium I (of Mitakshara as arranged by Mr. Colebrooke) begins with the statement that the rule of exclusion propounds an exception to Daya-Grahan by the sons, widows and other heirs and the reunited members and this by necessary implication refers one back to the definition of Daya in the beginning of Chapter I. Daya apparently means property considered in the light of something which in the natural course of events will pass from one person to another and includes both Apratibandha Daya and Sapratiibandha Daya, the former passing by survivorship to the sons, &c. and the latter passing by succession to the widows and other heirs. This is the reference to Vibhaga or partition in placita 6 and 7 and placitum 8 also shows that the word Daya-Grahana includes within its scope both property which passes by survivorship and that which passes by succession."

5. The next question to be considered is whether a subsequent disqualification would deprive a person of his coparcenary rights acquired by his birth. It is likely to be argued that the properties once vested in a co-parcener cannot be divested. In this connection in *Muthusami Gurukkal v. Meenammal*,<sup>2</sup> Mr. Justice Sheshagiri Ayyar while dealing with the case of an insane father surviving his son, has on page 470 made some general observations out of which those that are relevant for the purpose in hand are as follows :—

"Ideas which we find imported into the discussion of this question by speaking of the inheritances 'vesting', or 'being divested,' of the succession opening on the death of the father', &c. which may have meaning when applied to Jeemutha Vahana's exposition of Hindu Law are not correctly applied to Vijnaneswara's School of Law."

Similarly in A. I. R. 1935 Madras 775 Mr. Justice Vardachariar observed as follows :—

"Further though a text of a Yagnavalkya postulates equal rights of father and son in paternal grandfather's estate, the development of this conception into the doctrine of right by birth, with the incidents of right to demand partition and right to interdict alienation, is found only in the Mitakshara and even under the Mitakshara the right of survivorship is more a result than an expressed incident."

Later on in the same case it has been further observed as follows :—

"When in placitum 6 Vijnaneswara goes on to draw a distinction between disqualification prior to division and disqualification subsequent to division, he is developing something like the modern theory of vesting and divesting which is only latent in the original text."

This means that the right of a coparcener is vested in him only after division of his share in the family partition and not before. In I. L. R. 13 Patna p. 712 Mr. Justice Wort has on p. 729 remarked as follows :—

<sup>1</sup> तत्र दायशब्देन यद्धनं संबन्धादेव निमित्ता-  
दन्यस्य स्वं भवति तदुच्यते । स च द्विविधः

अप्रतिबन्धः सप्रतिबन्धश्च ।—मिताक्षरा.

<sup>2</sup> (1918) I. L. R. 43 Mad. 464.

"The term 'Vesting' however seems to me to be inappropriate to anything but to a case of inheritance but may be loosely used in relation to the right acquired by the birth of a person born in a joint Hindu family".

6. All these passages quoted from the various rulings establish that the interest which a person acquires by birth in the joint family property cannot be legally said to be vested in him. Moreover, it is clearly laid down in Mitakshara<sup>1</sup> that the disqualified persons would not get any share if they be affected by the disability before partition. If the right of vesting is to be conceded, then a coparcener who, after birth but before partition, gets disqualified, cannot be excluded from his share in the family property—a result quite contrary to the original texts in Hindu law. •

7. The position of a person excluded from right of inheritance and partition in a joint Hindu family is discussed in the various texts of Hindu Dharma Shastra. Mitakshara lays down that though the excluded persons do not share the estate, they must be supported by an allowance of food and raiment only and that the penalty of degradation would be incurred if they be not maintained.<sup>2</sup> Manu also states the same thing (Vide Manu IX, 202). Yagnavalkya in verse 2 quoted at the outset opines that the sons of excluded persons are entitled to allotment if free from similar defects. But from the passages quoted at the outset from Narada and Devala, it appears that the outcast and their issues were not provided with maintenance as those excluded on other grounds. It is observed in Vishnu-Smriti<sup>3</sup> that sons born to a degraded man, after the commission of the act which caused his degradation, could not be allowed any share. Vasishtha also enjoins that outcasts as well as their sons should not be maintained.<sup>4</sup> From all these texts it is clear that the sons of all persons excluded from inheritance as well as partition except those of the degraded, born after the act of degradation, were provided with shares if they were themselves free from any such defects. But since the establishment of the British Rule in this country, the change of religion and loss of caste which at one time were grounds of forfeiture of property and of the exclusion from inheritance have ceased to be so since the passing of the Freedom of Religion Act, XXI of 1850. All this discussion shows that generally the disability is purely personal and does not extend to the legitimate issue of the disqualified person.

8. Further it is laid down in the Mitakshara that if the defect be removed by medicaments or other means at a period subsequent to the partition, the right of participation takes effect on the same principles on which "When the sons have been separated, one who is afterwards born of a woman in class shares the distribution."<sup>5</sup> This text of Mitakshara has been commented upon in *Venkateswara Pattar v. K. Mankayamma*<sup>6</sup> as follows :—

"But the statement in placitum 7, as regards the right of a person whose disqualification subsequently disappears is wholly the author's own; there is nothing corresponding to it even in the Dayabhaga system of Jimutavahana. The Mitakshara bases this rule on the analogy of the after-born son. Having introduced this conception, Vijnaneswara does not

1 एतेषां विभागत्प्रागेव दोषप्राप्तावनंशत्त्वमुपपन्नं न पुनर्विभक्तस्य ।—मिताक्षरा.

2 एते क्लीबादयोऽनंशाः रिक्तभाजो न भवन्ति । केवलमशनाच्छादनदानेन पोषणीयाः भवेयुः ।—मिताक्षरा.

3 Vishnu, XV, 34-38.

4 Vasishtha XVII, 52.

5 विभागोत्तरकालमप्यौषधादिना दोषनिर्हरणे भागप्राप्तिरस्त्येव । 'विभक्तेषु सुतो जातो सवर्णायां विभागभागी' त्यस्य समानन्यायत्वात् ॥—मिताक्षरा.

6 [1935] A. I. R. Mad. 775, 778.

pause to make it clear whether this doctrine of restoration is to be applied even to cases of strict inheritance (Sapratibandha) by co-heirs or only to cases of partition among coparceners. Consistently with other well established theories in the law of inheritance, there is no scope for applying this doctrine as between co-heirs, because the inheritance is once, for all vested at the moment the succession opens".

The word Adi (आदि) in (औषधादिना) has been interpreted in the Balambhatti commentary as including Prayaschitta which would remove disabilities based upon religious grounds. From all this discussion, it appears that the disabilities based upon physical and natural defects were more leniently dealt with than those based upon social and religious degradation. The disability of a coparcener due to his act of the murder of his father would have been severely dealt with by the Hindu Dharma Shastras if they were required to consider his right in the family property, as generally the sin of a father's murder was punished by the infliction of Dehant Prayaschitta (the death punishment), and therefore in ancient Hindu law texts we do not find any discussion about the forfeiture of the rights of a coparcener murdering his father, in the joint family property.

9. As regards the right of a coparcener disqualified on account of physical and natural defects in the joint family property which he acquires by birth, it is laid down in *Muthusami Gurukkal v. Meenammal*<sup>1</sup>:

"The right of a member of a Hindu joint family to share in ancestral property comes into existence at birth and is not lost but is only in abeyance by reason of a disqualification. It subsists all through, although it is incapable of enforcement at the time of partition if the disqualification then exists. Hence, if on the death of all the other members, the disqualified member becomes the sole surviving member of the family, he takes the whole property by survivorship".

This principle finds support in Smritichandrika which while dealing with the case of excluded persons has quoted Katyayana who states that *on failure of kinsmen he may take the paternal wealth*, though this text does not appear to be cited in any ruling on this point. The same principle has been upheld in *Venkateswara Pattar v. K. Mankayammal*<sup>2</sup>. So all that has been held in favour of an ordinary disqualified person is that he is entitled to maintenance and will be given the right of survivorship only when he happens to be the sole surviving member of the family.

10. As already discussed above a murderer, though he could not be excluded on the strength of any explicit text of Hindu Dharmashastra, has been deprived of his right of inheritance to the estate of the murdered person on the general principles of justice, equity and good conscience. The case of a Hindu coparcener murdering his father stands on quite a different footing from that of a murderer who commits the murder of a third person whose estate he was to inherit. In *Vednayaga Mudaliar v. Vedammal*<sup>3</sup> the Madras High Court while commenting on the term 'hostile to the father' considered it as obsolete but further observed as follows:—

"Even were it otherwise, relating as the text does to the case of father and son there would be no warrant for treating the words importing that relation as merely illustrative and virtually comprehending all cases of heritable relations, the foundation of the rule being *most probably, the special reverence and regard to the father as head of the family inculcated by the Hindu Shastras*".

These remarks lend some support to the inference that if the case of a coparcener murdering his father had been before their Lordships and if his rights in the co-

1 (1918) I. L. R. 43 Mad. 464.

3 (1904) I. L. R. 27 Mad. 591.

2 [1935] A. I. R. Mad. 775.

parcenery property were to be considered by them, their Lordships would have, it appears, enjoined the forfeiture of even his coparcenery rights in the family property. Under the Hindu Dharma Shashtra the penalty for the murder of a father could not be otherwise than the death of the murderer; so they had no occasion to consider and deal with his civil rights in the family property. It is only after the introduction of the British rule in India that the offence of murder has been provided with the sentence of transportation for life only in appropriate cases. There are therefore very rare cases wherein a murderer after serving his sentence of transportation for life would turn up and claim his coparcenery rights such as partition &c. in the joint family property. Any how this point is not so far covered by any authoritative ruling. There is only one case *Nilmadhav Mitter v. Jotindra Nath Mitter*<sup>1</sup> referred to in *Har Bhagwan v. Hukam Singh*.<sup>2</sup> In this case the son who was excluded from inheritance by reason of his murdering his father served out the punishment inflicted upon him and claimed maintenance from his son who had got the inheritance and it was held that the murderer was entitled to maintenance and so his after-born son. But it is a case of inheritance under Dayabhaga and therefore the question of a coparcener's rights in the family property did not therein arise. But any how it may be taken as an authority for the proposition that the coparcener (murdering his father) and even his after-born sons would be entitled only to maintenance out of the family assets though the idea of providing maintenance to such persons appears most revolting to the spirit of Hindu Dharma Shastras. Taking the logical stand in the matter, the murderer coparcener is required to be taken to be extinct in the family and that is why the person was excluded on the ground of social and religious degradation as well as his issues born after the act of degradation were neither allotted shares nor provided with maintenance.

11. But relying upon the text of Mitakshara, as regards the right of a person, whose disqualification subsequently disappears, it may be argued on behalf of the murderer that the disqualification due to murder would be removed by undergoing the term of the sentence of transportation for life and he would be free to claim his coparcenery rights which, in the case of an ordinary disqualification, only remain in abeyance so long as the defect lasts. But in the matter of this Mitakshara text it has been observed in *Venkateswara Pattar v. K. Manikayammal*,<sup>3</sup> as follows:—

"The original texts [both in Manu and Yagnavalkya] themselves do not provide for a case in which the disabilities may subsequently cease. It is therefore no wonder that *they give us no guidance in determining the exact legal status of a man under disability*, with reference to joint family property."

Thus Hindu law does not lay down any rule in regard to the precise point at issue and when Hindu law is silent on the point, Bombay Regulation III of 1827 enjoins that English Law directed by the principles of justice, equity and good conscience should be resorted to: vide *Gangu v. Chandrabhagabai*.<sup>4</sup> If therefore a murderer is to be excluded from his right of inheritance to the estate of the victim of murder under the general principles of justice, equity and good conscience, why should not a coparcener murdering his father be made, on the same general principles, to forfeit his coparcenery rights in the family property? After all the point is a moot one and there is likely to be a divergence of opinion on it.

B. R. PATWARDHAN.

1 (1913) 17 C. W. N. 341.

2 (1922) I. L. R. 3 Lah. 242.

3 [1935] A. I. R. Mad. 775, 778.

4 (1907) I. L. R. 32 Bom. 275, 295.



## SAGOTRA MARRIAGES.

THE impact of modern ideas has created violent disturbances practically in every department of knowledge and walk of life. The force of this impact is more keenly felt in the social sphere where old ideas and patterns of social behaviour are rapidly being felt to be obsolete and vexatious. The same spirit of discontent is invading the structure of Hindu law and we find new legislative enactments over-riding the provisions of the old Hindu law.

Some reformists think of abolishing the prohibition of sagotra marriages. Mr. Gajendragadkar's article in 42 Bom. L. R. Journal, pp. 49-52, illustrates such an advocacy.

It is obvious that the texts of ancient Dharmashastra and the present Hindu law are unanimous in holding that sagotra marriages are void. It is urged that it is unnecessary and even undesirable in the present advanced stage of Hindu society to stick to old rules of conduct which are difficult of justification on rational grounds. Thus the texts being unambiguous, it is attempted to go behind the express provisions of these texts and to find out what the ancient law-givers meant by this interdiction. It is also sought to be made out that this prohibition of sagotra marriages may be at variance with the true spirit of ancient Dharmashastras. But the question of intention or true spirit animating the relevant provisions of Hindu law in this behalf and the extraneous evidence as to the various meanings of the word "gotra" can only be relevant when the wording of the text is ambiguous.

Restrictions as to sapinda relationship seem reasonable, as the prohibition of marriage on the ground of consanguinity is present in practically every personal law; but it is now being urged that there is no reason underlying the interdiction of sagotra marriages. It must be admitted that both these restrictions involve a premium on personal liberty and circumscribe the choice of a marital partner. But that cannot be helped, for, the moment we act as social individuals and submit ourselves to social norms and patterns of behaviour there is bound to be a certain premium upon the freedom of individual action. A specific distinction is being made between सपिण्ड and सगोत्र restrictions, the former being pronounced as wholesome and the latter unreasonable and vexatious; but there are no definite criteria adduced to show the undesirability of the latter. Simply by adducing various interpretations of the word गोत्र one cannot establish that सगोत्र restrictions are undesirable on eugenic grounds. There can be no doubt that the question of marriage laws is a sociological problem which pertains primarily to the bio-sphere of human activity. Thus it would be more reasonable and especially with the advanced state of society in which we find ourselves at present, if we try to import sociological considerations in this essentially sociological problem. It is unsafe for a jurist or legal reformer to be too sanguine about the abolition of an age-old pattern of social behaviour or introducing a new one after the analogy from a different structure of society. It is advisable both in the interests of society whose laws we wish to remodel, and in the interest of modern science and reason and also in conformity with our advanced stage of society, that these sciences of life should be consulted before any judgment is pronounced. As Prof. Jennings says, man is first a biological animal, his affairs are biological affairs, and ought to be carried on not in contravention of genetical laws but by obeying them.

So before stigmatising a custom or pattern of social behaviour as unreasonable or unjust, one ought to specifically point out the social evil which such custom or mode of standardized behaviour (Āchāra) has produced during its continuance through the life of social groups. He must also point out the social advantages and welfare or better results following the abolition of such customs. It is urged that the prevalence of the सगोत्र restriction constitutes in itself a social wrong which heaps injustice upon marital partners; but there is as yet no evidence produced of evil results or deterioration of social groups which has resulted because of the observance of the सगोत्र rule or of population groups showing better results, a better vitality or a greater survival value which will follow the abolition of the said restriction.

When we read the various interpretations of the word गोत्र in Vedic and subsequent times, we are inclined to dispute the desirability of such a characteristic system of mating whose meaning itself is not uniform. But the fact of the word गोत्र being interpreted in manifold ways does not unsettle the inference that सपिंड and सगोत्र restrictions were observed even in Rigvedic times. It is admitted that the rule in the case of सगोत्र and antagonistic गोत्रs was observed from the times of the Brahmana literature i.e. from about 2000 B.C. It will not also be desirable if we ignore the effects of such a system on the genetic structure of social groups.

There appears to be a very general agreement among critics on Hindu law about the desirability of सपिंड restrictions; first because restrictions as to consanguinity and affinity exist in practically every personal law and secondly because these restrictions are wholesome from biological considerations. It is not clear whether before pronouncing सगोत्र restrictions as unreasonable and vexatious, and an interference with personable liberty in the advanced stage of Hindu society, the same were tested from the findings of the modern biological science and found undesirable. To my knowledge, no such attempt has as yet been made. This problem is quite a technical one and one which does not deserve a superficial treatment accorded to it up to now.

While admitting the desirability of सपिंड restrictions, it is tacitly admitted that according to the laws of biological inheritance persons belonging to the same type of genetic constitution should not be mated. But if the genetical qualities or potentialities are widely variable then even the सपिंड restrictions are silly; but if the genetical traits persist and are not variable then the सगोत्र restrictions are justifiable. Besides, it is rather strange that when the modern tendency is more and more towards out-breeding or even promiscuity, one should ask for सगोत्र men and women to be allowed as marital partners.

As I have suggested above that despite the various meanings of the word गोत्र the said restrictions are being observed for at least 4000 years. It is a question for the experts to decide whether, during forty centuries of a deliberate system of hereditary transmission a fixation of strains is inevitable. If it is established that an almost rigid observance of a particular system of perpetuation which excludes members of the same family or गोत्र or members of antagonistic गोत्रs during a period of 4000 years has absolutely no effect upon the genetic constitution of racial groups, then the demand for the prohibition of सगोत्र restrictions would have some force. It is urged that when after thousands of years in the present times both bride and bridegroom belonging to one गोत्र cannot even by a stretch of imagination trace their connection to the common ancestor of both, the prohibition imposed upon the marriage of such bride and bridegroom is hardly justifiable.

It is inaccurate to say that मनु does not refer to सगोत्र restrictions. (Vide मनु. ch III. 5. असर्पिदा च या मातुः असगोत्रा च या पितुः सा प्रशस्ता द्विजातीनां दारकर्मणि मैथुने ॥) \*

If we look to judicial pronouncements on the question of सगोत्र restrictions, we find the idea of सगोत्र relationship to have been based on propinquity of blood. (Vide 32 Bom. 619 ; 11 Mad. 49 ; A. I. R. 1933 Lah. 588.) It is not also true to say that शूद्राः have no गोत्राः (A. I. R. 1935 Mad. 497)

It is also being urged that the various qualifications of a bride according to Hindu law as mentioned in verses 52, 53, 54 of याज्ञवल्क्य are not at all mandatory. (A. I. R. 1941 Journal, pp. 23-24) (अविष्कृतब्रह्मचर्यो लक्षण्याम् स्त्रियमुद्वहेत् अन्यपूर्विकां कान्तां असर्पिदां यवीयसी ॥ etc.) It is contended that inasmuch as most of the qualifications are not mandatory, there is nothing in the text itself to show that the restriction as to सगोत्र is mandatory. It must be admitted that the above text does not expressly lay down गोत्र as mandatory ; but neither does it lay down सर्पिद restriction as mandatory. It cannot be said that the various qualifications laid down are mere अर्थवादः left to the sweet will of marital partners for their observance.† There is ample evidence to show that these restrictions are wholesome both from the standpoint of the individual and the society. Manu in Ch. III. 6, 7, has enumerated such other qualifications which every lover of modern science and reason will have to admit as desirable. Under these circumstances it cannot be contended that these restrictions can be ignored as not being mandatory. The question as to how these restrictions are supported by modern sociological considerations is obviously outside the scope of the present article.

Another consideration which is rather seriously being urged is to formulate rules under Hindu law which should be applicable to all sections of the society alike ; in short the rules must be without exception of universal application throughout all the groups of population. This may, possibly be, one of the chief motives why the सगोत्र prohibition, which is more strictly observed in the Brahmin varna, is sought to be done away with. This proposition cannot be upheld, if the principles enunciated in ancient Dharmashastras as underlying the structure of Hindu society are to be respected ; or even on the strength of modern sociological considerations. The ancient law-givers did not intend to lay down homogeneous laws which would be applicable in the same manner to all the sections of society.

V. R. TALASIKAR.

\* मेघातिथि commenting on this verse says गोत्रं वसिष्ठमुगर्गादि-वंशः स्मर्यते । i.e. a family of the descendants of the ancient sages. His idea of a प्रवर is तंत्रं हि वर्णयन्ति ऋषिर्वसिष्ठादिः आथो वंशस्य कर्ता तद्गोत्राः ततः प्रसूताः प्रवराः इति

तत्पौत्राः तपोषियादि अतिशयगुणयोगेन प्रख्याततमाः पूष एव नियमः । i.e. the celebrities in that ancestry.

† विज्ञानेश्वर clearly says सर्पिदासमानगोत्रासमानप्रवरास्तु भार्यात्वमेव नोत्पद्यते.

APPLICABILITY OF THE INDIAN LIMITATION ACT  
TO PROCEEDINGS BEFORE ARBITRATORS  
UNDER CO-OPERATIVE SOCIETIES ACT.

THE question whether the provisions of the Indian Arbitration Act apply to the proceedings before arbitrators appointed under the Bombay Co-operative Societies Act is not free from doubt; for the Bombay Co-operative Societies Act does not contain any clear provisions on this point.

The preamble to the Indian Limitation Act declares that, that law is intended for suits appeals and certain applications to 'Courts'. Beaumont C. J. in *Raghawendra v. Industrial Bank, Guledgud*<sup>1</sup> has stated :—

"Now it seems to me perfectly clear that the award of the arbitrator under s. 54 of the Bombay Co-operative Societies Act is not a decree of the Civil Court... I doubt myself whether the award ever becomes the decree of the Civil Court within the meaning of article 182 of the Indian Limitation Act."

Rule 35 of the Bombay Co-operative Societies Rules which regulates the procedure of proceedings before the arbitrators or Government nominees appointed under the Act, says that the decision or the award of the nominee shall be given in accordance with justice, equity and good conscience. It is significant that in rule 35 there is no mention of 'law' with justice, equity and good conscience as governing the principles of giving awards.

This topic was discussed by Mr. K. L. Punjabi, at one time the Registrar of Co-operative Societies, Bombay, in an article under the heading "Does Limitation Act apply to claims of Societies in Bombay Presidency?" contributed by him to the December 1937 number of the *Bombay Co-operative Quarterly*. Therein he said :—

"Under the circumstances it seems fairly clear that although the mandatory and rigid principles of the Law of Limitation *are not binding upon the arbitrators* appointed under s. 54 of the Bombay Co-operative Societies Act yet they afford some guidance to the *arbitrators who would be justified in rejecting stale claims* in all cases where they are convinced that the enforcement of the claims would cause undue hardship on the defendants particularly if the society has not acted as promptly as it ought to have done".

From the above remarks of Mr. Punjabi he seems to be of the opinion that though the law of limitation, strictly speaking, does not apply to proceedings before arbitrators, nevertheless arbitrators would be justified in rejecting stale claims apparently on the ground of justice and equity. On the other hand arbitrators cannot be said to be *legally wrong* if they reject the plea of limitation advanced in proceedings before them. Thus the opinion of one who was at one time the head of the department does not help us in solving this doubt. Though it is considered doubtful whether the provisions of the Indian Limitations Act apply to proceedings before the arbitrators it is now established by decisions of the Bombay High Court that the law of limitation applies to *execution proceedings of the awards* passed by arbitrators. The learned Chief Justice has remarked in *Raghawendra v. Industrial Co-operative Bank*, that awards of arbitrators are not decrees of civil Courts thereby suggesting that arbitrators are not civil Courts but His Lordship also holds that darkhast must be filed within three years from the date of the grant of the certificate by the Registrar indicating thereby that the Indian Limitation Act applies to execution proceedings of the awards. Further their Lordships of the Bombay High

Court in *Maratha Co-operative Bank v. Keshav Trimbak Hunde*,<sup>1</sup> have held that the application to execute an award made under the provisions of the Bombay Co-operative Societies Act is subject to provisions of the Indian Limitation Act. Rangnekar J. has said in this case :—

“To hold that an award under the Co-operative Societies Act is not subject to the Law of Limitation would obviously lead to some absurd results”.

The question whether the provisions of the Indian Limitation Act apply to proceedings before arbitrators appointed under the Co-operative Societies Act is not directly decided by any of the High Courts. Recently a case on this point has been decided by the Burma High Court in *U. Kyau. Tha v. Co-operative Town Bank of Henzanda*.<sup>2</sup> The provisions of the Burma Co-operative Societies Act and the rules made thereunder are exactly similar to the provisions and the rules under the Bombay Co-operative Societies Act. Section 5 of the Burma Act read with rule 15 provides that any dispute touching the business of a Co-operative Society between members or past members or persons so claiming shall be referred to the Registrar for his decision. The Registrar can also appoint his nominee. He is to decide the case according to equity, justice and good conscience, and awards made by arbitrators are to be enforced as decrees of civil Courts. According to the Burma Act the jurisdiction of civil Courts in matters connected with Co-operative Societies is also barred. These provisions regarding awards under the Burma Act are exactly similar to the provisions on this subject under the Bombay Co-operative Societies Act. Hence the case decided by the Burma High Court can be taken to be a good authority by arbitrators in this province. The plaintiff-appellant in this case sought to have the awards passed under the Co-operative Societies Act declared void on various grounds, the most important of which was that the claim preferred by the society was at the time of the reference to the arbitrator barred by the law of limitation. It cannot be said that the Courts have no jurisdiction even to consider whether the awards bear errors in law on the face of them. For the Courts in considering awards are not to pass judgment in the matter of the dispute between the parties but in the matter of awards whose validity is challenged. These are entirely different matters. It seems unreasonable to hold that there is nothing in the statute regulating reference to arbitrators to indicate that the arbitrator is free to act in defiance of the laws of the land. There is no authority for such a proposition.

The Indian Arbitration Act, 1940, allows the Court to set aside an award when an arbitrator has misconducted himself or the proceedings or the award has been improperly procured or *otherwise invalid* (s. 30). In Halsbury's Laws of England, Vol. I, under 'arbitration', para. 1132, it is observed that one of the grounds on which an award may be set aside is that the arbitrator has misconducted himself. In para. 1133 we find that misconduct occurs if the award is on its face erroneous in a matter of law. Looking into English cases we find that Bruce J. has observed in *In re Astley and Tyldesley Coal and Salt Co.*<sup>3</sup>—

“It seems to me unreasonable that parties to a submission should be precluded from raising the defence of the Statute of Limitations *unless a provision to that effect be drawn up and embodied in the submission*”.

It is true, no doubt, that the provisions of the Indian Arbitration Act or the re-

1 (1938) 40 Bom. L. R. 889.

3 (1899) 68 L. J. Q. B. 252.

2 [1940] A. I. R. Rang. 157.

marks in Halsbury's Laws of England are not applicable to awards under the Co-operative Societies Act. Still there is no reason why these observations should not apply with equal force in the case of arbitrators under the Co-operative Societies Acts. It cannot have been intended that in cases before the arbitrator, he should be permitted to ignore the operation of the laws applicable in matters which come before him and should be permitted to give his decision according to his mere caprice. Surely an arbitrator cannot be said to have decided according to justice, equity and good conscience, if he has allowed himself to ignore the laws of the land applicable to the matters before him.

Giving all such valid and sound reasons the Burma High Court has held in the case referred to above that where an award made by an arbitrator has ignored the law of limitation the civil Court has jurisdiction to set aside such an award. It is submitted that if the point comes before the Bombay High Court, it would give an exactly similar judgment. In the meantime arbitrators or the Government nominees appointed under the Co-operative Societies Act should always take into consideration the plea of limitation, if raised by the defendants in the proceedings before them. The Co-operative Department also should issue a circular giving clear instructions to their arbitrators on this point. The Department should further note that any attempt to strengthen the belief that the arbitrator is not bound by any rules of limitation would be, in a way, giving encouragement to Co-operative Societies to be careless and negligent about their duties. Cases of great negligence even to-day are not wanting. Claims are sometimes enforced against heirs of deceased members after a considerable time and the plight of sureties who are made responsible for the failure of principal borrower to repay the loan after lapse of time can be easily imagined particularly if the sureties have been kept ignorant of the continuing default of the principal debtors.

The above discussion is in reference to awards and proceedings before arbitrators. It is not applicable to orders passed by liquidators under s. 50 of the Act, for entirely different rules under the Act are applicable to those orders.

K. B. GAJENDRAGADKAR.

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#### WAGES FOR A HOLIDAY.

UNDER the Indian Factories Act a workman is entitled to a weekly holiday which he is supposed to have earned by working for a week. Previous to the enforcement of the Payment of Wages Act, if a workman was absent on a day immediately previous or subsequent to the holiday, factory owners treated the workman as absent on that working day as well as on the following or preceding holiday, as the case might be. Even after the enforcement of the Payment of Wages Act, if a workman is absent on the two days immediately preceding or succeeding a holiday the majority of factory owners treat him as absent for three days and effect deduction in his wages accordingly. In one instance a Factory Inspector objected under the Payment of Wages Act, to an alleged non-payment of wages for a holiday falling in the period when a machine was stopped. This could only happen from a failure to appreciate the whole scheme of the Act.

The Payment of Wages Act does not contemplate total deduction of the wages for a holiday for a casual absence of one or more days nor does it go to the other extreme of payment of full wages for a holiday when they would not be rightly due. The Act has contemplated an ingenuous and a very equitable method of calculation which requires a clear understanding in order to be fully appreciated.

The Act lays down that the amount payable under the terms of the contract of employment is wages, and any deduction from the same should fall strictly under one of the clauses of sub-s. (2) of s. 7. Clause (b) of that sub-section provides for deduction for absence from duty and s. 9 of the Act lays down substantive provisions for the same. Sub-section (2) of s. 9 makes it clear that deduction for absence shall be in proportion to the number of days a workman is absent and the ratio provided is the total working days and the total wages on the one hand and the days the workman is absent and the deduction on the other. Thus in computing the entire wage for the purposes of deduction for absence, holidays are to be excluded at the outset, and wages are to be imagined to be payable for working days only, and in computing any deduction that may be made therefrom only the actual days of absence, exclusive of holidays, are to be counted. The notion of payability of wages under the Act is thus at variance with the commonly accepted notion inasmuch as ordinarily we understand wages to be payable for the wage-period as a whole including holidays, while under the Act it is the amount payable for the number of working days only.

Thus if a workman is paid Rs. 14 per *hapta* of sixteen days the employer should exclude the holidays in that *hapta* for the purposes of computing the amount to be deducted. Let us assume that there are two holidays in that *hapta*. Thus, in ordinary parlance we say that the wages are Rs. 14 for a *hapta* of sixteen days, and if the workman remains absent say for three consecutive days i.e. Saturday, Sunday and Monday, and if Sunday is a holiday, the employer deducts three days wages at the rate of Rs. 0-14-0 per day and the workman is paid Rs. 11-6-0. This, however, is contrary to law and for the purposes of the Act the wages are Rs. 14 for a *hapta* of fourteen working days and the employer is entitled to deduct wages for two working days only i.e. Saturday and Monday, at the rate of Rs. 14 per *hapta* of fourteen working days, and the workman must be paid Rs. 12. It will be clear that all the holidays in the wage-period having been excluded in the entire computation at the start there can be no second deduction for holidays at any stage under any circumstances.

It will thus be seen that the question of payment of wages for a holiday does not arise at all under the scheme as contemplated under the Payment of Wages Act. The Act requires that what would otherwise be wages for a holiday should be rateably added to the wages for working days and having done so, holidays should be left out of calculation in computing any absence from duty. Non-payment of wages for a holiday is, therefore, something which does not arise under the Act and the correct thing for an Inspector to do under such circumstances is to complain of disproportionate deduction and consequent breach of s. 9(2).

It will be noticed that in the scheme as contemplated by the Act a workman gets the exact proportion of wages for a holiday that he can be said to have earned by his work in the factory.

## RECENT ENGLISH CASE.

**NUISANCE—Ditch—Culvert blocked on respondents' land—Overflow—Damage—Liability.** An occupier of land "continues" a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take reasonable means to bring it to an end when he has ample time to do so; and he "adopts" it if he makes any use of the erection or artificial structure which constitutes the nuisance.

On the respondents' land was a ditch in which at a later date was placed a pipe or culvert for carrying off rain water, the pipe not being laid by the respondents, or with their knowledge or consent, and thus by a trespasser. They, however, subsequently became aware, through their servants, of its existence and they in fact used it for the draining of their fields. To prevent leaves or other matter blocking the opening of the pipe a grating was placed, not at some little distance from its opening where it would have been effective, but on the top of the pipe itself, with the consequence that during a heavy rainstorm the pipe became choked with leaves, so that the water overflowed on to the appellant's premises causing damage in respect of which he claimed to recover damages :—

*Held*, that the respondents must be taken to have had knowledge of the existence of the unguarded pipe on their land, notwithstanding that it was placed there by a trespasser, and, consequently, they were responsible for the damage caused to the appellant. *SEDLEIGH-DENFIELD v. O'CALLAGHAN*, [1940] A. C. 880.

## RECENT INDIAN CASES.

**CAUSE OF ACTION—Merger of cause of action into judgment—Effect of notification by the Governor-General in Council relating to execution of decree—Code of Civil Procedure (Act V of 1908), s. 44.** A cause of action on which a judgment has been obtained is no longer in existence, but it merges into the judgment so obtained. This principle of law applies to domestic judgments of British Indian Courts, but has no application to a foreign judgment. Hence a fresh suit lies in British Indian Court on the same cause of action on which a foreign judgment has been already obtained even though such foreign judgment could be enforced in execution in British India by virtue of the notification issued by the Governor-General in Council under s. 44 of the Code of Civil Procedure, 1908. *NIL RATAN MUKHOPADHAYAYA v. COOCH BIHAR LOAN OFFICE, LTD.* [1941] 1 CAL. 171.

**CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 488—Proceedings against whole family if contemplated—Magistrate, if can take into consideration the property of the family.** Section 488, Criminal Procedure Code, does not contemplate proceedings against a whole family merely because the husband against whom the proceedings are taken is a member of a joint Hindu family. Though the Magistrate may consider what is the property of the family, in considering what sum he should award the wife for maintenance, the order should be passed against the husband himself and not against the joint family. *HEMIBAI v. KUNDIBAI*, [1941] KAR. 58.

**DIVORCE—Suit by husband—Liability to deposit costs of wife—Practice of English courts—Divorce Act (IV. of 1869), s. 7—Poverty of husband—Stay of pro-**



*ceedings until payment of wife's costs ordered by the Court.* A husband suing for divorce under the Divorce Act, 1869, is liable to deposit a reasonable sum for the costs and expenses of the wife to enable her to defend herself upon the charge of adultery. This rule is acted upon by the Divorce Courts in England and should, according to s. 7 of the Divorce Act, 1869, be followed in India.

Where the husband fails to pay the sum ordered by the Court to be paid to the wife for her costs for defending the suit and pleads inability to do so on account of poverty, the Court should stay proceedings in the suit until the payment is made. *MASIH v. MASIH*, [1940] ALL. 802.

**HINDU LAW—Suit by widow—Legal representative—Reversioner—Abatement of suit—Code of Civil Procedure (Act V of 1908), s. 2(11), O. XXII, r. 9.** In a suit to enforce a mortgage, the widow of the mortgagee represents her husband's estate and upon her death the reversioners are her legal representatives within the meaning of s. 2(11) of the Code of Civil Procedure. Hence, if upon the death of the widow the reversioners are not substituted within the period stipulated by law, no fresh suit on the mortgage can be brought by the reversioners or their successors-in-title. *ABDUL RAHAMAN v. BALAI PADA SET*, [1941] 1 CAL. 137.

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## REVIEWS.

*The Code of Criminal Procedure, Vol. III.* By V. V. CHITALEY, B.A., LL.B., and K. N. ANNAJI RAO, B.A., B.L. NAGPUR : The All India Reporter Ltd., 1941. Super Royal 8vo. Pages 2353 to 3599.

THIS concluding volume of the authors' commentary on the Criminal Procedure Code, deals with ss. 431 to 565 and the Schedules to the Act. A number of appendices containing reports of the Select Committees and extracts from certain enactments are included. The volume contains an exhaustive general index which facilitates ready reference. As the merits of this publication are already enumerated at length in the earlier reviews of the two preceding volumes, it is hardly necessary to say anything further in bringing it to the notice of the profession.

*All India Digest, 1931-1940, Vol. I—Criminal.* MADRAS : The Madras Weekly Notes Office, No. 5, Thambu Chetty Street. Royal 8vo. Columns 1988. Price Rs. 10.

THIS is a digest of criminal cases reported in the course of the last ten years in the leading law journals in India. The headnotes of cases are grouped under statutory headings and the statutes of local legislatures are arranged alphabetically under Provincial headings. To facilitate reference appropriate sub-headings are provided where the number of cases under a section are numerous. All the features which go to make a digest useful to the profession are present here and to lawyers practising in criminal Courts it will be helpful.

*Penology in India.* BOMBAY : The Indian Publications, Ltd., Lalgir Chambers, Tamarind Lane, Fort. 1940. Demi 8vo. Pages 208. Price Rs. 3.

THIS is a record of the proceedings of the First Indian Penal Reform Conference held in Bombay in February, 1940. At this conference a number of interesting and instructive papers, dealing with various aspects of penology in India, were read. All these are collected here under appropriate headings and will be of use to those who are interested in the subject of penal reform. It is a commendable venture on the part of the publishers to gather all this informative material in a handy publication.

*Supplement to Watan Act and the Law of Saranjams and Inams.* By N. H. PHADNIS, LL.B. DHARWAR : The Karnatak Law House. 1941. Demi 8vo. Pages 92. Price Rs. 2.

As its title indicates this is a supplement to the author's commentaries which were published in 1936. In this supplement the case-law is brought down to the end of 1940, and the recent Government Resolutions bearing on the subject are incorporated. This supplement brings up to date the author's previous publication which is so well known to the profession.

*Yajnavalkya-Smriti* with commentaries of Mitakshara, Viramitrodaya and Dipakalika : Prayasachitta Adhyaya, Chapters II to IV. By J. R. GHARPURE, B.A., LL.B., (Hons.), Principal, Poona Law College. BOMBAY : Collections of Hindu Law Texts, Angre's Wadi, Girgaon. 1941. Royal 8vo. Pages 1487-1654.

THIS volume contains three more chapters, translated into English, of the Prayasachitta Part of the Yajnavalkya Smriti, with the three standard commentaries on it. Chapter II deals with Duties in adversity ; chapter III treats of Duties of hermits ; and chapter IV handles Duties of the ascetics or the philosophy of the soul. The translation aims at facilitating the work of Judges and Lawyers in dealing with cases which give rise to questions of Hindu Law, and this purpose it carries out satisfactorily.

*Smritimuktaphalam.* Part V. Dharma Shastra Granthamala. By J. R. GHARPURE, B.A., LL.B. (Hons.), Principal, Poona Law College. BOMBAY : Collection of Hindu Law Texts, Angre's Wadi, Girgaon. 1940. Royal 8vo. Pages 825-1034.

IN the province of Madras, Vaidyaratdikshitiyam, as this work is otherwise called, is a Hindu law work of paramount authority. The present volume contains parts V & VI of that work. Part V deals with determination of Hindu dates, and is of academic interest to the lawyer. Part VI deals with prayasachitta or penances or redemption of sins. There is at the end an alphabetical index of the sayings of sages quoted by the author. This is unquestionably a valuable edition of the work in Sanskrit.



THE HON. MR. JUSTICE B. J. WADIA

# The Bombay Law Reporter. JOURNAL

August 15, 1941.

Mr. JUSTICE B. J. WADIA

ON July 31, 1941, Mr. Justice Wadia took farewell of the Bombay Bar on the eve of his retirement. He was born on August 4, 1881. His father Jamshedji, who died in June last, was a well-known business magnet and an eminent economist. Jamshedji's thoughtful articles on economic and financial matters are well-known to the old readers of the *Times of India*. Mr. Justice Wadia received his early education at the Cathedral and the St. Xavier's High Schools. After passing the Matriculation Examination in 1896, he joined the St. Xavier's College, from which he passed the examination for the degree of B.A. standing first in the first class and winning the Cobden Club Medal in Political Economy and the Sir James Ferguson Scholarship. From 1901 to 1905 he was a Dakshina Fellow at the College imparting instruction in English to freshmen. In 1901 he took the degree of M.A. in Languages and Literature and in 1903 he passed the examination for the degree of LL.B. He proceeded to England in 1904 to qualify himself for the Bar. In the Bar Examination Final he took a first and was awarded a Certificate of Merit. In 1906 he was called to the Bar by the Inner Temple, and from January 1907 he commenced to practise at the High Court Bar.

During the Great War, when some of the Professors at the St. Xavier's College were interned, Mr. Justice Wadia acted as Professor in English at that College from 1914 to 1916. In 1914 he was also appointed Professor of Law at the Government Law School (now College), Bombay, and in 1919 he became its Principal, a post which he filled with distinction till 1925. He was a most popular Principal and his lectures at the Law School elicited high encomiums from law students.

During the twenty years that he was at the Bar he had built up a lucrative practice, and in June 1928 he was elevated to the Bench as acting Additional Judge for two months. In that brief period he made his mark as a sound Judge and won the esteem of the Bar. He again officiated as Judge of the High Court in 1929, 1930, and 1931, and was made a permanent Puisne Judge on June 19, 1931.

Mr. Justice Wadia brought to his exalted office many of the best attributes of a good Judge—learning, industry and impartiality. In that fierce light which beats upon the Bench he held the scales of Justice with a firm and even hand. To do

justice and to give birth to the persuasion that justice is done, are two different things which he invariably combined. His thorough conscientiousness, untiring patience and devotion to duty, inspired confidence alike in the minds of advocates and suitors. There was no case, simple or complicated, in which he did not endeavour to grasp thoroughly all the facts before giving his decision. Leaning always towards doing substantial justice, he set his face against technicalities of any kind. He was never swayed by pre-conceived prejudices or extra-judicial considerations, and was ever anxious to temper justice with mercy. He was thoughtful and considerate towards those who, in the performance of their duties or in search of their rights, figured before him. His treatment of the members of the Bar, whether seniors, or juniors, was uniformly courteous and kind.

During the twelve years that he was on the Bench many interesting cases bearing on different branches of the law came before him for adjudication. We will note a few of them.

The mere use of a portion of joint family funds for a number of years under a sort of family arrangement for a temple does not establish a dedication to the temple (*Bansilal v. Govindlal*<sup>1</sup>). A father or manager of a joint Hindu family has no authority to impose the risk and liability of a new business upon any coparcener (*Mulchand v. Jairamdas*<sup>2</sup>). Under Hindu law a fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consent with knowledge of its nature (*Bai Appibai v. Khimji*<sup>3</sup>). A bequest "for the political uplift of India" does not create a valid charitable trust and is invalid (*Subhas Chandra Bose v. Gokhdandas Patel*<sup>4</sup>).

Under Mahomedan law mere entries in books of account are not sufficient to support a gift (*Mahomed v. Aishabai*<sup>5</sup>). Under Sunni law a gift of a life-interest in a property is valid; and such a life-interest is not enlarged into an absolute estate (*Saroobai v. Hussein*<sup>6</sup>).

Among Parsis a minor above the age of eighteen years and under twenty-one can maintain a suit for breach of promise of marriage (*Freny v. Shapurji*<sup>7</sup>). Cruelty under the Parsi Marriage and Divorce Act, 1936, need not necessarily be physical violence. A course of harsh conduct pursued by either spouse against the other may amount to cruelty (*Cawasji v. Shehra*<sup>8</sup>). Among Jews a formal bill of divorce is not necessary to get rid of a betrothal ceremony (*Ezekiel v. Reuben*<sup>9</sup>).

A sale or mortgage by a debtor of the whole of his property in consideration of a past debt is an act of insolvency (*In re Adamali Nulvala*<sup>10</sup>). Where there are several brokers working for the same party, the broker who is entitled to his remuneration is not necessarily the one who has first introduced the business, but the broker whose work is the effective cause of the completion of the business (*Liladhar v. Mathuradas*<sup>11</sup>). Sale of pledged goods without proper notice does not render the sale void, but makes the pawnee liable in damages for conversion to the pawnor (*Cooverji v. Mawji*<sup>12</sup>).

1 (1932) 34 Bom. L. R. 733.

2 (1935) 37 Bom. L. R. 288.

3 (1936) 38 Bom. L. R. 77.

4 (1940) 42 Bom. L. R. 89, 91.

5 (1934) 36 Bom. L. R. 1155.

6 (1936) 38 Bom. L. R. 903.

7 (1937) 39 Bom. L. R. 486.

8 (1937) 39 Bom. L. R. 1138.

9 (1931) 33 Bom. L. R. 725, 726.

10 (1932) 34 Bom. L. R. 1162.

11 (1934) 36 Bom. L. R. 119.

12 (1936) 38 Bom. L. R. 982.



It is contempt of Court to write articles in newspapers vilifying parties to a pending suit (*Demibai v. Rowji*<sup>1</sup>). The Courts of one country are not bound, by the comity of nations, to accept as conclusive, on a question as to its own law and in a matter upon which it is called upon to adjudicate, the judgment of a foreign Court (*Messa v. Messa*<sup>2</sup>). No suit lies to get a refund of the penalty imposed under the Sea Customs Act (*Bruusgaard v. Secretary of State*<sup>3</sup>).

A combination of numerals can form a trade-mark. The right to use a particular trade-mark is confined to the article to which it is affixed, but it is open to a person to prove that the particular trade-mark has been so associated with his products that his name would suggest itself to the purchaser on seeing it on any other 'allied' product (*Anglo Indian Drug & Chemical Co. v. Swastik Oil Mills Co.*<sup>4</sup>). The features necessary to the validity of a patent are novelty and utility (*Lallubhai v. Chimanlal & Co.*<sup>5</sup>).

A solicitor has a lien upon the funds, money or property, recovered for his client (*Narayandas v. Narayandas*<sup>6</sup>). The Court does not interfere for the purpose of preserving the solicitor's lien after a bona fide compromise between the parties has been arrived at (*Jhaverchand v. Achaldas*<sup>7</sup>). A solicitor's lien is subject to all the equities between the solicitor's client and any other party interested in the property over which the lien is claimed (*Anwar Laljee v. Ebrahim Laljee*<sup>8</sup>). A solicitor trustee is not entitled to make a profit from his office as trustee, but when he acts as a solicitor for any of the beneficiaries or when he acts for himself and his co-trustees jointly, he is entitled to his usual costs in addition to his out-of-pocket costs (*Shivramdas v. Nerurkar*<sup>9</sup>). Where an unusual expense is about to be incurred in a case, the solicitor must inform his client fully of it (*Gorakhram v. Pirozshah*<sup>10</sup>).

Mr. Justice Wadia has been taking a very keen interest in the affairs of the the University of Bombay. He was nominated a Fellow of the University in 1921, and was elected a member of the Syndicate in 1930 and of the Academic Council in 1935. Now that he is free from the trammels of his high office, there is no worthier alumnus of his Alma Mater to grace the Vice-Chancellor's chair. Rumour goes that in 1933 he was offered the Vice-Chancellorship, but, as the post demanded more time than he could spare as Judge, he declined the offer. A man of parts and learning, he is very simple and unassuming in his manners and gentle and affable by nature.

"No haughty gesture marks his gait, no pompous tone his word,  
No studied attitude is seen, no palling nonsense heard:  
He 'll suit his bearing to the hour—laugh, listen, learn, or teach,  
With joyous freedom in his mirth, and candour in his speech".

A serious *homme de lettres*, he has drunk deeply and not merely tasted the Pierian spring. A devotee of the 'Sweet Swan of Avon', his literary pursuits make us look askance at Coke's aphorism that "Lady Common Law should lie alone." His learned and thought-provoking contributions on various social, educational and other kindred topics, have appeared from time to time in various magazines and journals. A felicitous after dinner speaker, his *bons mots* set the table on a roar.

1 (1937) 39 Bom. L. R. 471.

2 (1937) 39 Bom. L. R. 571.

3 (1940) 42 Bom. L. R. 532.

4 (1934) 36 Bom. L. R. 1165.

5 (1935) 37 Bom. L. R. 665.

6 (1932) 34 Bom. L. R. 703.

7 (1932) 34 Bom. L. R. 721.

8 (1939) 41 Bom. L. R. 1091.

9 (1937) 39 Bom. L. R. 633.

10 (1933) 35 Bom. L. R. 73.

Mr Justice Wadia retires from the Bench wearing the white flower of a blameless life. His life's spring-time is over and its autumn days have come. But a scholar has no *ennui*. We heartily wish him long life and good health to enable him to do useful work in many other spheres.

ON July 31, 1941, after the Courts rose, the Hon'ble Mr. Justice B. J. Wadia took his seat in the Sessions Court where the members of the Original Side Bar and Attorneys of the High Court had mustered strong. Addressing his Lordship, Mr. M. C. Setalvad, Advocate-General, said :

My Lord,

I have the privilege, as representing the Bar on the Original Side, of giving expression today to the universal feeling of regret at the disappearance from the Bench of a personality so well esteemed and popular as your Lordship. The qualities which go to the making of a great Judge are said to be many and varied ; and not infrequently has there been a debate as to which of them are the most essential to the making of a great or a good Judge. But it will not, I think, be gainsaid that a keen and burning desire to do justice must needs be the foundation of all judicial eminence. And, if I may venture to say so, this quality your Lordship possessed in a pre-eminent degree. No one who practised at your Lordship's bar could fail to be struck with your persistent and overpowering desire to do justice. Whatever the legal forms, and whoever the persons appearing before you, your one and constant endeavour was to see that truth was discovered and substantial justice done.

My Lord, those alone who had the privilege of assisting your Lordship in this endeavour could fully realise the atmosphere of goodwill and kindness which pervaded your Lordship's Court. The administration of justice has undoubtedly to be carried on, in a certain measure, in a spirit of sternness and rigidity. But an even greater quality making for its efficient administration is the feeling and kindly heart of the Judge which alone can probe into the springs and motives of human conduct and reach a true conclusion. No one who had the occasion to appear in your Lordship's Court could forget that beneath a dignified and perhaps even a stern exterior lay a kind and gentle heart influencing every act and observation of the Court. A Judge's task is not an easy one ; and often a Judge's patience is sorely tried. It may be the exuberance or even the eloquence of counsel or it may be the irrelevant and irrational answers of witnesses ; but never have I heard a word of reproach or resentment or even of impatience escape your Lordship's lips.

That reminds me, My Lord, of another great quality which has distinguished your Lordship's long career on the bench. I refer to your innate modesty and unassuming nature. So unobtrusively did your Lordship give the benefit of your long and varied experience to the Bar and the litigating public that appearing in your Lordship's Court one felt that the Bench and the Bar were alike engaged in the common pursuit of unravelling the truth.

Having adverted to but a few of the qualities which distinguished your Lordship's career on the Bench, I will pass on to mention what perhaps the Bar has valued the most in your Lordship's Court. The willing and unstinted confidence which your Lordship reposed in every member of the Bar, whatever his standing, will never

be forgotten. It was that confidence and the co-operation it called for in return which made us all feel so much at home in your Lordship's Court.

Notwithstanding your elevation to the Bench, we on the Original Side have always regarded you as one of us. Born and bred as it were on the Original Side and nurtured in its traditions, it was but fitting that your long years on the Bench should have been given almost wholly to the administration of justice on the Original Side. The greater, therefore, is our regret at parting with one who so endeared himself to us all.

Notwithstanding your devotion to the law you have found time for work in the sphere of education and literature, and while bidding you farewell with a heavy heart, every one of us wishes your Lordship a long and happy retirement with ampler opportunities for your literary and educational activities.

His Lordship replied :

Mr. Advocate General and friends,

I should not do justice to the feelings that are uppermost within me this evening if I did not say how deeply I appreciate the very kind and generous manner in which you have referred to me and to my work. Nothing can be more gratifying to any man than the appreciation of his work by his fellow-workers, and I look upon your appreciation as my highest reward. I thank you all very sincerely for it. I have a fairly long period of years, beginning from 1907, to look back upon in the legal profession. Some of us, whom I met in the High Court when I joined the Bar, have passed away ; others are happily still amongst us. It was always a pleasure to me to have worked with them during all the years that I was at the Bar, and I shall carry away very happy memories of that association in my retirement.

It is a needless platitude for any Judge to say how much he depends upon the help and assistance which he gets from the Bar. Our Bar is a strong, well-trained and independent Bar, and from all those who have appeared before me I have derived much help and assistance in the work that I had to do. To all of them, here and outside, seniors as well as juniors, I wish to tender my best thanks. My best thanks are also due to the members of the entire High Court staff, both on the Original and the Appellate Sides, from the highest officer downwards ; and I take this opportunity of thanking them in public for their unfailing courtesy towards me and their co-operation during the tenure of my office.

The profession of the law is an old and honourable one. Our heritage from the past is great. It is a heritage to which our best energies are called. And I am sure every member of the Bar, from the most senior down to the youngest junior, considers himself, along with the Judge, only a servant in the administration of justice. It should be the motto of each one of us to say that—Judges, advocates, solicitors, all may come and all may go ; but the great traditions of this Court, the great traditions of the Bar, the traditions of honour and industry and fearlessness, will go on for ever. I do not say this by way of request ; I do not even say it by way of an expression of hope. I say it as an expression of my faith and belief, engendered by years of collaboration with you, that these traditions will be maintained.



Many hard things are sometimes said about the legal profession. Much of the criticism is unjustified ; more still is misinformed ; and my first impulse, when I hear it or read about it, is to say to myself : " Well, let them say it." Just as the answer to the question whether life is worth living depends upon the individual who lives his life, so also the answer to the question whether our profession is elevating depends upon him who practises it. One can live as greatly in the law as in any other profession. Every calling is indeed great when greatly it is pursued. And if we keep to our high ideals, live up to them and work for them, I, for one, have no apprehensions of the future.

Friends, this is evening time. It is the evening of your day's work ; it is the evening also of my labours in the law. It is said that welcome ever smiles and farewell goes out sighing. Sighing, or not sighing, men pass, the institution remains ; and I am sure you will all be keenly conscious of the supreme necessity of safeguarding its independence and maintaining its reputation for impartial service to the public.

I have nothing further to say. I wish you all well. I wish you the best of luck. I only hope that we will remember each other in the future whenever kind memory gilds the past.

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Mr. M. A. H. Payne, President of the Bombay Incorporated Law Society, speaking on behalf of the attorneys of the High Court, said.—

My Lord :

As representative and speaking on behalf of the attorneys of the High Court of Bombay, I associate myself with every word which has fallen from the Advocate General who has gracefully expressed the sentiment and opinions we would have liked ourselves to put into words. But there is one thing I may add, and that is, that your Lordship in the execution of your office as Judge of the High Court, have won not only the high respect and admiration, but also the esteem and personal affection of every member of our branch of the profession. We highly appreciate and are very grateful as we have every reason to be, for the unfailing courtesy, kindness and consideration you have always accorded to us, whether as practitioners appearing before you in Court or as individuals when we have had occasion to meet you outside the Court. We regard your departure from the Bench as a heavy personal loss to ourselves as well as a loss to the judiciary of the Presidency, and it needs no words to assure you that we shall always hold you in grateful memory as a Judge before whom we could bring our cases with perfect confidence that they would receive a patient and sympathetic hearing and an acceptable judgment. In bidding you farewell, as a Judge we wish you may have many years and much happiness in your retirement and that the future may have in store for you every good thing you desire.

His Lordship replied :

Mr. President and Members of the Bombay Incorporated Law Society.

I am very thankful to you all for the appreciative manner in which the President has referred to me and my work on behalf of the solicitors of Bombay. I have come in personal contact with most, if not all, of them, especially as a

Chamber Judge. To the good work that they have done and are doing, and, as I hope and wish, they will continue to do in the future, I have borne testimony on more than one occasion in the past, and I take this occasion to do the same thing over again this evening. You, Mr. President, have referred just now to my courtesy. Now, courtesy is an infectious substance. It catches on, and it comes back to the person from whom it first emanates. Courtesy always begets courtesy, and I am very glad to say that with our mutual feelings of goodwill our work in Chambers and in Court has always been very smooth and pleasant. In my opinion it would be difficult, well-nigh impossible, for any Chamber Judge to go through his work unless he places faith and confidence in the solicitors who appear before him. I have reposed great trust in you, and I am glad to be able to say that the trust has been justified. The solicitor often does a lot of spade-work in preparing the cases which counsel argue in Court. The value of that spade-work is immense, not merely to the Bar, but also through the Bar to the Bench. How much valuable and helpful it is, those of us alone who, as the Advocate General has said, have been born, bred and nurtured on the Original Side, know best. I wish that your work was more appreciated by the public than it is. It is difficult for any outsider, even for counsel who goes over a brief of about fifty pages in an hour's time or less, to realise how many hours of patient labour and search have contributed to the pages which he reads within a short space of time.

Mr. President, I will not let this opportunity go without referring to the controversy which will always remain with us—the controversy regarding the Dual System. I have never swerved from the opinion which I have always held, that to do away with that system would, especially in a big commercial city like Bombay, be a distinctly retrograde step. We have been told that the public are against the system; but so far as I know the Judges have not had before them any authoritative expression of opinion to that effect from any large and disinterested public body who have thought and considered over this question. It will always remain with us along with that old question, the question of costs. Several years ago when I was appointed on the Committee to consider the question of reducing costs, we heard the cry from all sides that costs have increased, are increasing, and ought to be diminished. We have not shut our eyes to that complaint. We have tried to remedy it as best as we could, though I know that it has been done at great sacrifice to you. I wish you only to remember this, whether you are advocates or solicitors, that this is a matter which must be primarily considered from the point of view of the public. Advocates and solicitors exist for the public and not the public for them. The times are changing fast. However much we may love the old ways and the old methods, no one can hope that the things we have loved can continue unchanged for ever. And yet, on this the last day of my judicial career, I like to express my fervent wish that the two branches of the legal profession may continue to work together for many years to come. The system means efficiency, and I venture to say that in the long run it also means economy.

The time has now come for me to say good-bye to all my friends, advocates as well as solicitors. To all of you I extend my best wishes for your future success and welfare.

With these words, my friends at the Bar, and my solicitor-friends, I bid you my last and sorrowful, but most sincere, farewell.

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## SOME ANOMALIES IN THE INDIAN CHRISTIAN MARRIAGE ACT, 1872.

THE Indian Christian Marriage Act, 1872, is designed for the purpose of solemnising marriages between persons, one or both of whom is or are a Christian or Christians. Section 4 of the Act provides for such marriages. It would, therefore, appear that marriages could be performed under this Act between a Hindu or a Mahomedan and a Christian, and also when both the parties are Christians. Section 88 of the Act, however, reads "Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into".

I do not think there is any dispute on the point that a Hindu belonging to one of the four main castes cannot, according to Hindu law, lawfully contract a marriage with a person outside his caste, and as such cannot contract a lawful marriage with a Christian. The question, therefore, arises : Can a Hindu and a Christian marry under the Indian Christian Marriage Act, 1872 ? There is as yet no legal authority deciding it. In *Chetti v. Chetti*,<sup>1</sup> which was a case decided in England, it was held that a Hindu who had married in England according to English law cannot seek shelter under his personal law whereby he is debarred from marrying outside his caste. The learned Judges held that whatever the position in India the Hindu in this case would be bound by the English law as the marriage took place in England. A reference was made to the Indian Christian Marriage Act, 1872, and Sir Gorell Barnes remarked that the Act applied only to marriages contracted in India. Another case similarly decided was that of *Rex v. Hammersmith Superintendent Registrar of Marriages : Mir-Anwarruddin*, Ex parte,<sup>2</sup> where a Mahomedan sought to dissolve his marriage with an English woman, which had taken place in England, by pronouncing *talak* which he could do by his personal law and the law of his domicile, and it was held that *talak* might be an appropriate method of dissolving a Mahomedan union according to Mahomedan law but a marriage solemnised in England between him and a Christian woman could not be dissolved at the will of one of the parties.

In *Saldanha v. Saldanha*,<sup>3</sup> the question came very near to being decided. The parties however were Christians and it was held that the prohibition under s. 88 did not embrace the prohibition as to the form of marriage. This decision does not help us to come to any definite conclusion as to the validity of a marriage between a Christian and a Hindu under the Act in India, but the learned Judges seem to accept the principle laid down in *Sotomayor v. De Barras*<sup>4</sup> that the law of a country where the marriage is solemnised must alone decide all questions relating to the validity of the ceremony, but, as in other contracts, so in that of marriage personal capacity must depend on the law of domicile. In India where there are many communities each governed by its own customs and usages it is not the *lex domicilii* which has to be considered but the personal law applicable to each community by their religion. If therefore either or both the parties to a marriage are debarred by their personal law from marrying each other then I think that in view of s. 88 a Hindu and a Christian cannot marry under the Indian Christian Marriage Act, 1872. A marriage between a Hindu and a Christian is unthinkable under Hindu law and cannot be performed by a Hindu religious ceremony. If performed it is void *ab initio*. It is not only a question

1 [1909] P. 67.

2 [1917] 1 K. B. 634.

3 (1929) 32 Bom. L. R. 17.

4 (1877) 3 P. D. 1.

of the form of marriage but of the essentials of marriage and although in view of the decision in *Saldanha v. Saldanha* we might exclude from the scope of s. 88 the mere prohibition on the ground of form we cannot, in my opinion, overlook cases which are prohibited on essentials.

I have been unable to obtain much assistance from the commentaries on the subject. Mr. Paul Appaswamy has in his "Law applicable to Christians" devoted some pages to this very point. But I am afraid his opinion would not bear much weight in view of the observations of Mr. Justice Blackwell in *Saldanha v. Saldanha* (p. 28) :—

"I do not myself think that the words used in s. 88 justify the limitation suggested in the marginal note, that the personal law applicable is the personal law as to prohibited degrees. I think that the expression 'personal law' in that section would include any personal law, apart from any personal law as to the form of the marriage, which forbade either of the parties to enter into a contract of marriage with one another."

Nor do I think that the marginal note to the section would limit the implications of the section and it is a well-established rule that the marginal notes should not be referred to for the purpose of limiting or extending the words of the Act itself. The observations of Mr. Justice Blackwell are very pertinent and should prove useful in considering the question of the validity of a marriage between a Hindu and a Christian. If, as he says, the expression "personal law" includes any personal law then a Hindu who cannot, according to his personal law, marry a Christian is debarred from marrying a Christian under the Act. For the purposes of s. 88 the term "personal law" would include much more than the restricted words of the marginal note seem to import. Mr. Appaswamy goes further and says that the term "personal law" in the section was intended to apply only to the personal law applicable to Christians of different denominations. It is difficult to conceive that the legislature ever intended such a restricted meaning and if it did so it would be more correct to expect something in clearer terms.

There seems to be an erroneous impression that the Indian Christian Marriage Act, 1872, is designed for solemnising all mixed marriages. The wide scope of s. 4 should be read with the restricted meaning of s. 88 of the Act. Considering that the Act is mainly concerned with the forms of marriage, s. 88 seems to have been specially added to exclude from the purview of the Act those marriages which either of the parties is debarred from contracting under his or her own personal law. It is interesting to note that whereas a Hindu, in view of what is stated above, is debarred from marrying a Christian under the Act, a Mahomedan is not. Under the personal law of a Mahomedan he can contract a valid marriage with a *kitabia* i.e. a Christian or a Jewess but not with an idolatress i.e. a Hindu or a fire-worshipper. But a Mahomedan woman cannot marry a Christian under the Act as under Mahomedan law a Mahomedan woman cannot contract a valid marriage except with a Mahomedan. Of course such a marriage is not void under Mahomedan law but only invalid and the impediment can be removed by the non-Mahomedan converting to Mahomedanism. But for the purposes of s. 88 it is enough to note that such a marriage being forbidden under Mahomedan law the section comes into play. This striking contrast between the case of a Hindu and that of a Mahomedan should make it clear that s. 88 is not contradictory to s. 4 but only restrictive to s. 4.

Likewise it would be interesting to consider the question whether a Catholic divorcee can marry under the Act. Divorce is not permitted to Catholics. Canon

law does not recognise divorce. Marriage according to canon law is indissoluble, and a Catholic who may have obtained a divorce under the Indian Divorce Act still remains married under the personal law. I may state here that most of the High Courts have accepted canon law as the personal law of the Catholic. In *Saldhana v. Saldhana* Mr. Justice Blackwell says (p. 27) : " I think that the words 'personal law applicable to either of the parties' " in s. 88 clearly refer to the personal law of the religious community to which either of the parties belong " and adds " In my opinion on the evidence in this case the personal law applicable is the canon law of the Church of Rome." A similar opinion has been expressed in *Lopez v. Lopez*<sup>5</sup> and *Lucas v. Lucas*.<sup>6</sup> Assuming therefore, that in view of the opinion expressed by the High Courts canon law is the personal law of the Catholics as applied in this country at least for purposes of marriage, then a Catholic divorced under the Indian Divorce Act cannot remarry under the Indian Christian Marriage Act, 1872, if the prohibition under s. 88 is to be considered. I am not certain if Protestants recognise divorce. To all appearances they do. But individual ministers may refuse to celebrate a marriage of a person whose former marriage has been dissolved on the ground of adultery. In such cases the parties have recourse to the Act and then I do not believe that the Registrar would be justified in refusing to celebrate the marriage as Protestantism does not impose any definite prohibition against divorce.

It should also be noted that according to canon law a Catholic cannot marry a non-Catholic divorcee. This doctrine is based on the principle that matrimony is indissoluble. There are, however, in canon law six cases of dissolution by the Church of valid marriages where the marriage is *ratum* but not *consummatum*. But these exceptions apply only where both the parties are Catholics. We are not concerned with such here. The Native Converts' Marriage Dissolution Act, 1866, provides for dissolution on account of desertion or repudiation in consequence of a change of religion by one of the parties. The Act excludes Mahomedans and Jews from the operation of the Act. But in canon law mere desertion or repudiation in consequence of the change of religion would not entitle the other party to marry a Catholic without the Pauline dispensation. The point has been dealt with at length and very ably by Rev. Fr. A. Macry S. J. in his Notes to " Civil-Ecclesiastical Law " by Mr. J. A. Saldanha. I need only state that the personal law of the Catholic forbids him to marry a non-Catholic divorcee who has not obtained the Pauline dispensation and hence he cannot marry such a divorcee under the Indian Christian Marriage Act, 1872.

The restriction under s. 88 may also be brought into operation in the case of a remarriage of a person whose partner has been continuously absent for a period of seven years. The presumption under s. 494 of the Indian Penal Code, drawn negatively, is not accepted under canon law which requires clear evidence that the party has died or some convincing evidence that the party must have died. In the absence of such definite evidence the other party cannot remarry under canon law and so he or she cannot remarry under the Act. The evidence necessary in each case would be a question of fact.

G. J. SALDANHA.

## GLEANINGS.

## ACCIDENTAL LIBEL.

CAN A. libel B. by accident? After perusing the majority judgments of the Court of Appeal in *Newstead v. London Express Newspaper, Ltd.* (1939, 4 All E.R. 319) we must say once more that he can. That decision is more or less a corollary to the historic decision of the House of Lords in *Hulton & Co. v. Jones* (1910, A.C. 20), which is well remembered by all our readers who practise in this field of law and by a number of literary and business men. The plaintiff (happily still with us as a County Court Judge) bore the unusual name of Artemus Jones. A writer of light material in the defendants' newspaper, describing a motor festival on the Continent, spoke of an imaginary Artemus Jones, whom he pretended to see there. He used words which need not now be repeated but which were highly defamatory. The plaintiff sued for libel and was able to bring many creditable witnesses to Court who swore that they thought the words referred to him. So though the plaintiff admitted that neither the editor of the newspaper nor the writer of the article knew anything about him, he got his verdict and held it, after a stern battle both in the Court of Appeal (1902, 2 K. B. 444) and the House of Lords (1910, A. C. 20). As one looks back, however, over the judgments, one realises that the Judges were not unanimous on the reasoning by which they reached their decisions. Lord Alverstone, who gave the first judgment and dismissed as bad law the plea that intention is an ingredient in the tort of defamation, said :—

"Dealing with the authorities it is, I think, beyond dispute that, apart from express malice, the intention or motive with which the words are used is immaterial." Fletcher Moulton, L.J., on the other hand thought that there could be no libel unless the publisher intended to defame the plaintiff. It was to his mind settled law that words were not published "of and concerning" the plaintiff (according to the vital words in the averment) unless the writer intended to refer to him. He wanted to allow the appeal. Farwell, L.J., had to decide between these opposing views and came down on the side of Lord Alverstone, but for reasons which liken the action for libel to an action for negligence or for deceit, thus :—

"The intention to libel may be proved not only when the defendant knows and intends to injure the individual but also if he has made a statement concerning a man by a description by which the plaintiff is recognised ... if it is made *recklessly*. ... The element of intention which is as essential to an action of defamation as to an action of deceit can be proved in the same way in both actions."

We have had to abridge our quotation. It is enough to show what the learned Lord Justice thought. And when the defendant went on to the House of Lords two of the Law Lords went out of their way, if we may say so, to express concurrence in his view. Any of our readers who turns to the report will find that Lord Atkinson and Lord Gorell both thought he "put the case on the true ground," *i.e.*, that recklessness was an ingredient in libel. Lord Loreburn and Lord Shaw were nearer to Lord Alverstone. Libel consists in using language which "other persons knowing the circumstances would reasonably think to be defamatory" of the plaintiff. If this can be shown the tort is committed and it is no defence to say that the defendant did not intend to defame him or anyone else.

So we learnt that there may be such a thing as an unconscious libel. But there was much in the judgments to show that the Judges, or many of them, thought that negligence must be shown where the defendant could establish his complete innocence of any intention to defame the plaintiff. This view was clearly in the mind of counsel who drew the pleadings in the recent case of accidental libel. The defendants had published a statement which was perfectly true of one "Harold Newstead, a Camberwell man," but equally false of another Harold Newstead, also a resident in that borough. The innocent man sued for libel. When met by the defence that the words were not intended or understood to refer to him and were true of another, he replied with a charge of recklessness. The defendants' description of the bigamist (for such the other Newstead was) was not sufficiently particular to show precisely to whom their observations referred. Other papers had been more precise and there was evidence of "recklessness" in that those particulars had been omitted from the defendants' publication. Now if recklessness is not relevant as an ingredient in the tort of libel, this plea was embarrassing and tended to prejudice the defendants and should, we suggest, have been struck out. But it stood on the record and the learned Judge clearly thought that it raised an issue fit for the jury to consider. In charging them he left to them five questions, of which the fourth was :—

"In omitting the occupation and address of the convicted man, were the defendants (a) reckless, (b) negligent?"

We have not the jury's answer to that question. As they could not agree on the first and vital question—whether reasonable people would understand that the words complained of applied to the plaintiff—the case had to await another jury. The defendants sought to establish when they reached the Court of Appeal that in spite of the disagreement of the jury on the first and vital question, their findings on the others—which were not read out in Court—were sufficient to support a judgment for them. So we may guess that the jury found in the defendant's favour on the issue of recklessness and/or negligence. Anyhow, as the case was presented in the Court of Appeal it became proper, or at least opportune, for that Court to say whether it agreed with the views expressed by Lord Justice Farwell and Lord Justice Fletcher Moulton in *Hulton v. Jones* (*supra*). The Master of the Rolls decided, with some respectful hesitation, against the view of Lord Justice Farwell that what is truly said of one man cannot be a libel on another. He could not accept the analogy between actions for libel and actions for deceit. In actions of that kind recklessness is only used to make out a fraudulent intent in law where there is no fraudulent intent in fact. If a man deceives others by false statements which he utters without caring whether they be true or not, he is, in actions for deceit, in the same position (in law) as though actual fraudulent intent could be brought home to him. But the recklessness only goes to supply, artificially, a motive in the eyes of the law. It should not be considered when a Court is estimating the meaning of the statement made. What you have to look at in libel cases is the meaning of the published words. If, when they are read in the light of surrounding circumstances, they are understood by reasonable people to refer to the plaintiff, then for all relevant purposes they *do* refer to him. Their meaning cannot be affected by the recklessness or honesty of the writer.

Lord Justice du Parcq concurred and, in spite of an attractive judgment by Lord Justice MacKinnon, we must now say with confidence that liability for libel does not depend on the intention of the defendant or alleged defamer, but on the

fact of defamation. A. may publish a libel "of and concerning" B., though he has never in his life heard of him and though there be some other B. of whom he wrote nothing but the truth. That is the law at present. We think it bears hardly on the proprietors of newspapers. Lord Justice MacKinnon's judgment supplies ready examples of the hardship. And it is plain that those who drew the abortive Law of Libel Amendment Bill which was presented with good support in the autumn of 1938 felt that hardship and meant to remedy it. Their very first stroke was to aim at the destruction of the *Hulton v. Jones* rule. The draftsman would make it a good defence to a claim for libel if the defendant can prove certain things. First, he must prove that he had no intention of referring to the plaintiff. Secondly, he must prove one or other of two things—*either* that he did not know of the existence of the plaintiff and that his ignorance was not due to want of reasonable care, *or* that he did not foresee, at the time of publication, that his words might reasonably be understood to refer to the plaintiff and that his want of foresight was not due to carelessness. This was a good Bill and some lawyers regret its withdrawal which took place, if our memory does not fail us, on official promises of a general inquiry into the law of libel. It will be observed that the defendant, if this Bill passed into law, would have to carry rather a heavy burden. He could not escape liability by merely proving that he did not intend to refer to the plaintiff. He must prove further one or other of the alternative states of fact which were sketched out in the second part of the defensive section. We wish the law were amended in this way, but there is at present little hope.—*L.J.*

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#### SERVANTS OR SERFS.

It is good in times like these to read the judgments of the House of Lords in *Nokes v. Doncaster Collieries* (1940, 3 All E. R. 549; *post*, p. 66). The problem before the House was whether an order made under s. 154 of the Companies Act, 1929, to transfer one company's property to another, could operate to transfer contracts of personal service, so that an employee of the first company might find himself, willy-nilly and without being consulted, the servant of another master. The question was not an easy one, because by sub-s. (4) the expression "property" includes property, rights and powers of every description, and the Court of instance, a Divisional Court, and the Court of Appeal had held that these words were wide enough to include a contract of service. With this view Lord Romer agreed. But the majority of the Law Lords happily found it possible to take a wider view. It is a commonplace that apart from the proposed operation of this section a contract of personal service cannot be transferred without the employee's consent. As Lord Atkin put it: "Ingrained in the personal status of a citizen under our laws is the right to choose for himself whom he will serve, and this right of choice constitutes the main difference between a servant and a serf. . . . It is said that one company does not differ from another, and why should not a benevolent Judge of the Chancery Division transfer the services of a workman to another admirable employer just as good and perhaps better. The answer is twofold. The first is that, however excellent the new master may be it has hitherto been the servant who has had the choosing of him, and not the Judge. The second is that it is a complete mistake to suppose that people do not attach importance to the identity of the particular company with which they deal." This was well said, and their Lordships were able to give effect to it by holding, in *Viscount*



Simon's words, that s. 154 did not contemplate the transfer of rights which in their nature were incapable of being transferred. To meet present necessities a certain temporary control of labour has been voluntarily accepted, but that makes a restatement of the main principle all the more timely.—*L.J.*

#### MASTER AND SERVANT.

MR. JUSTICE HUMPHREYS was in some interesting country recently. He had to decide on the liability of a hirer of motor cars for crimes committed by his servants (*Grey v. Gee Cars, Ltd., Times*, July 27). The defendants hired out a car to take the plaintiff, with a friend, on a long journey. The car was duly filled with valuable luggage. But before the passengers got into the car an air-raid warning sent them flying for refuge, and the hired driver made off with the luggage. For this the passenger sued, and framed her action both in negligence and in breach of contract. It was, she said, an implied term of the contract that the driver should be honest, and it was also careless to send out as a driver a car washer who was at best only satisfactory in that capacity. Both claims failed. The learned Judge decided that there was no negligence in sending out as a driver a man who was known to be a satisfactory washer, and further that his act in stealing the luggage was entirely outside the scope of his authority. A great array of decisions might be marshalled on the subject. It is true, of course, that a master is under a duty towards third persons to employ servants reasonably competent so far as the duties of the employment go (*Wanston v. Pooley*, 6 Cl. & F. 910 n.). But there is no guarantee or duty to strangers that the master of a servant will answer or must answer for anything which the servant may do.—*L.J.*

#### WHAT IS A "HOUSEHOLD" ?

It is strange, but true, that opinions may honestly differ as to the meaning of words which have been in common use amongst us ever since we began to talk and write English. Take, for instance, the word "household." Everybody has what is called a pretty good notion of what that word means; yet only this week two parties to an insurance contract had to come before a Judge of the High Court in order to find out which of them was right about it (*English v. Western, Times*, November 15). The plaintiff was an insured motorist who was sued by his own sister (a passenger) for negligence, and claimed relief from his insurers. They relied on a clause in their policy which cut out liability if a member of the assured's household were injured, unless that member were carried by reason of a contract of employment. The sister and brother were both unmarried, and lived with their father, who provided them with food, lodging and allowances. In these circumstances the plaintiff asserted that his sister was not a member of his household. He had no sort of control over the house where they both lived. The insurers said that a household is a family or club, and that people may live in each other's households if they just live under one roof. The learned Judge accepted the insurers' interpretation. As we say, there is room for difference of opinion. Once more we see that even insurance companies have not really learnt to write accurate English.—*L.J.*

## RELATING TO CHILDREN.

A NOTABLY superfluous passage in an affidavit read recently in the Chancery Division caused Mr. Justice Farwell to remark : "It seems a little unnecessary for a lady to say that she was present at the birth of her own infant. One assumes that usually. It is difficult to see how she could have been anywhere else." Oddly enough, this point is not free from authority, for no one has put the principle underlying the matter more eloquently than O'Brien, J., in the concluding passage of his judgment in *Walker v. Great Northern Railway Co. of Ireland*, 28 L. R. Ir. 69, at p. 83 : "In law, in reason, in the common language of mankind, in the dispensations of nature, in the bond of physical union and the instinct of duty and solicitude on which the continuance of the world depends, a woman is the common carrier of her unborn child, and not a railway company." In this connection one is reminded of the lady who, when asked in a Court of law how many children she had had, replied : "Four, to the best of my knowledge, information and belief." Then there was the case of the man who was being tediously cross-examined before Mr. Justice Darling. He had been asked how many children he had had, and replied two. Later on he was asked the same question again, and the Judge intervened : "He told you he had two children a few moments ago. There are hardly likely to have been any fresh arrivals since."—S.J.

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 LOTTERIES.

SOME people think that the law about lotteries will never be finally settled. As Mr. Justice Humphreys observed a few years ago (*Coles v. Odham's Press*, 100 J. P., at p. 89), a particular scheme is no sooner declared by the Court to be a lottery than a number of extremely able people apply their ingenuity to the discovery of some means of avoiding the judgment. One thing is, however, clear. If you publish something which is an unlawful publication (as one of a lottery), you cannot save yourself by publishing with it something else in the way of a purely skilful competition. And the recent decision of the Divisional Court in *Barker v. Mumby* (1939, 1 All E. R. 611) shows that you cannot make a lottery lawful by dressing it up in the guise of credit betting. The question "What is a lottery?" came before Mr. Justice Bennett last week (*Whiteman v. Atkins*, *Times*, August 29). The plaintiff was a director of a company against which she brought a friendly action to determine whether a venture on which they were about to embark was a lottery. It had two objects. The first was to collect funds which would go, amongst other things, to reward winners of a crossword competition. This might or might not be a lottery. The learned Judge had not enough information to decide that question. But part of the funds subscribed were to go to whoever applied for most competition tickets. No skill whatever is needed in the mere act of subscription and the result is entirely a matter of chance. We can conceive few clearer cases.—L.J.

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 THE WEIGHT OF EVIDENCE.

IF evidence is admissible at all, its weight is always for the jury. The legal truth is simple yet fundamental ; and one is reminded of it by the Court of Criminal Appeal in *R. v. Wright* (*Times*, August 27), in which the Court of Criminal Appeal

dismissed the appeal of a husband who had been convicted of murdering his wife. No motive of any kind for the murder was alleged by the prosecution. The husband and wife were apparently living in good friendship with three children, who left them together when they went to school. When they came back they found their murdered mother, and a meat chopper which had apparently been wiped was found in the barn. This fact did little or nothing for the prosecution; but on the husband's shirt was found a spot of blood. It might have come from his wife, and could not have fallen upon his shirt while he was out walking, it seems, after the fatal act and before his children found their dead mother. The evidence was slender, but no one can say that it was inadmissible. Some men may shrink from the conviction upon a capital charge of a man against whom nothing can be said but that he has one spot of blood on his shirt sleeve. In murder there is always a search for motive, and here, so far as the prosecution knew, there was none. There was no suggestion of insanity. Still, the jury thought the evidence sufficient. The summing up was perfect, and, quite properly, the Court held that that was an end of the matter.—*L.J.*

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#### A WILL.

A Wall Street broker left the following will :—

To my wife, I leave her lover, and the knowledge that I wasn't the fool she thought I was.

\* \* \*

To my son, I leave the pleasure of earning a living—for thirty-five years, he thought the pleasure was mine. He was mistaken.

\* \* \*

To my daughter, I leave £20,000—she will need it—the only piece of business her husband ever did, was to marry her.

\* \* \*

To my valet, I leave the clothes he has been stealing from me for the last ten years—also the fur coat that he wore last winter at Palm Beach.

\* \* \*

To my chauffeur, I leave my cars—he almost ruined them, and I want him to have the satisfaction of finishing the job.

\* \* \*

And lastly, to my partner, I leave the suggestion that he takes some other man in with him if he expects to do any business.—*N. S. & N.*

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#### RECENT ENGLISH CASE.

CRIMINAL LAW—*Evidence—Admissibility—Buggery—Charge of offence on specific date—Evidence of offence with same boy on previous occasion—Corroboration—Evidence relating to earlier occasion corroborated—Whether corroboration of evidence relating to date charged.* The appellant was convicted on a charge of committing buggery with H on a certain date. He gave evidence not only of the commission of the offence on the date charged, but also of a commission on an earlier occasion. There was no corroboration of H's evidence regarding the date charged, but there was

corroboration of his evidence regarding the earlier occasion. The Judge directed the jury that they might treat the evidence corroborative of H's evidence relating to the earlier occasion as corroborative of his evidence relating to the date charged :—*Held*, (a) that the evidence of H relating to the earlier occasion was rightly admitted; and (b) that the Judge had correctly directed the jury on the question of corroboration. *REX v. HARTLEY*, [1941] 2 K. B. 5.

## RECENT INDIAN CASES.

**CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 22, 23, 24—Transfer—Suit—pending in a subordinate Court—High Court, whether has power to transfer to a Court subordinate to another High Court.** The High Court has jurisdiction to transfer a suit pending in a Court subordinate to it to a Court subordinate to any other High Court. *KANHAIYALAL DAGA v. ZUMEN LAL*, [1941] NAG. 311.

**CONTEMPT OF COURT—Comment on pending proceedings in Court, whether amounts to contempt—Criminal Court proceedings pending—Calling of public meeting and delivering of speeches commenting on Court proceedings, effect of.** The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice, and on the same principle it is a contempt of Court to make a speech tending to influence the result of a pending trial, whether civil or criminal, or to deliver a speech at a meeting. Where, therefore, while a criminal case was pending, a public meeting was called and speeches were delivered there with the object of influencing the decision of the criminal Court, preventing witnesses from giving evidence, and bringing pressure on the complainant to withdraw his complaint, it amounted to contempt of Court. *RADHA KRISHNA v. RAJA RAM*, [1941] 16 LUCK. 61.

**CO-OWNER—Right of—Joint property—One co-owner in possession of more than his pro rata share—Whether liable for excessive use and occupation—Where his user amounts to ouster of others—His liability to others for such user.** The mere fact, that at any given time one co-owner is in actual possession of more than his *pro rata* share, would not render him accountable to others for excessive use and occupation. If, however, his possession or user of joint property amounts to exclusion or dispossession of others, then such possession or user becomes unlawful and he must account to the other co-owner either for the fair rental value or the profits, or be liable for mesne profits in excess of his just share. *THE PUNJAB NATIONAL BANK LTD., SHEIKHPURA v. PARS RAM*, [1941] LAH. 246.

**DIVORCE ACT (IV OF 1869), s. 10—Marriage of a Hindu with a Christian woman in a Registrar's Office in Scotland—Second marriage of the Hindu with a Hindu woman in Hindu form—Consummation of second marriage, whether amounts to adultery—First wife, whether entitled to divorce.** When a Hindu marries a Christian woman in a Registrar's Office in Scotland, and while the Christian wife is living, marries a Hindu woman in a Hindu form, though the second marriage does not amount to bigamy, if it is consummated the consummation amounts to adultery and forms a ground for divorce on the petition of the first wife. *CHITNAVIS v. CHITNAVIS*, [1941] NAG. 260.

**EASEMENT—Right of way—Person using a particular way over adjoining land for less than the prescriptive period—Obstruction by stranger—If action can be maintained by the former.** A person who has been using a particular way over land adjoining his, but for less than the prescriptive period, cannot, in ordinary circumstances, maintain an action to prevent a stranger from obstructing him using the way. Such an action can only be maintained, if the obstruction to user will have the effect of substantially depriving the person of the enjoyment of his property. *VENKATANARASIMHA RAJU v. RAMASWAMI*, [1941] MAD. 367.

**EVIDENCE ACT. (I OF 1872), s. 25—Accused charged with murder—Admission in the statement to police of offence of culpable homicide not amounting to murder—Admissibility of.** The prohibition contained in s. 25 of the Evidence Act is of a general nature. It forbids the proof at a trial of a criminal offence of any; confession of any offence made by the accused to a police. Therefore, the confession made by the accused to the police of an offence of culpable homicide not amounting to murder is not admissible in evidence in his trial for murder upon the same facts. *ALI GHOR MAHI MACCHI v. CROWN*, [1941] KAR. 292.

—S. 32 (1)—**Dying declaration—Admissibility, material time of, whether the date when the document is received in evidence or the date of the decision.** The admissibility of a particular piece of evidence has to be decided with reference to the time when the Court received the evidence, and not when the case was eventually decided. Failure of a charge of murder will not, therefore, make any difference to the admissibility of a dying declaration for the purpose of other offences committed in the course of the transaction, with which the accused is charged. *PARMANAND v. CROWN*, [1941] NAG. 110.

**HINDU LAW—Adoption—Son dying without male heir—Son's widow, re-marriage of—Widow—Power to adopt to her husband, whether revives.** Where a Hindu dies leaving a widow and a son and the son dies leaving a widow only, the power of the former widow to adopt a son to her husband revives on the re-marriage of the son's widow. *BAPUJI v. GANGARAM*, [1941] NAG. 178.

—**Alienation—Evidence Act (I of 1872), s. 91—Ancient transaction—Legal necessity—Presumption, whether to be made—Transaction more than thirty years old—Parties and witnesses not alive—Transaction, whether ancient—Compromise, alienation as a result of, when binds reversioners—Partition, separate shares, record of in revenue papers, whether sufficient proof of.** In the case of an ancient transaction relating to the alienation of Hindu joint family property, it must be presumed that the alienation was lawful (*i.e.*) justified by legal necessity.

On the principle underlying s. 90 of the Evidence Act the presumption in favour of legal necessity may be applied to transfers more than thirty years old provided that the original parties and witnesses to it are not available at the trial for bearing testimony to the circumstances in which the transaction was concluded.

• An alienation which is the result of a compromise that is reasonable and prudent and for the benefit of the estate binds the reversioners.

The record of separate shares in revenue papers is by itself not sufficient to prove a partition among the co-sharers. *BABULAL v. MANIKLAL*, [1941] NAG. 124.

—**Debts of father—Son's liability for original receipt of moneys by father, lawful—Subsequent misappropriation by him—Son liable.** A Hindu son is

bound, under the rule of pious obligation in Hindu law, to discharge the liabilities of his father, arising from lawful receipt of moneys by the father. The fact that the father subsequently misappropriates the moneys will not change the character of the debt and the son's liability, therefore is not affected by the supervening dishonest act of the father. The son is not liable in cases where the moneys are originally obtained by the father by the commission of an offence. *ANANDRAO v. Co-OPERATIVE CREDIT SOCIETY, PEDATADEPALLI*, [1941] MAD. 27.

**HINDU LAW—Maintenance—Widowed daughter, if entitled to maintenance from father's estate in his widow's possession.** Under Hindu law, a widowed daughter who has no means of subsistence and whose husband's family is unable to support her is entitled to maintenance out of her father's estate in the hands of his widow. The principle of the decision in *Janki v. Nand Ram* (1888, 11 All. 194, F.B.) that a moral obligation becomes a legal obligation when the estate of a person on whom the moral obligation lay comes into the possession of his heirs, applies to the case. *AMBU BAI v. SONI BAI*, [1941] MAD. 13, F.B.

———**Widow's maintenance—Residence in husband's house not a condition precedent—Husband's will imposing such condition, effect of—Amount of maintenance—Husband's will fixing amount, effect of.** Under the Hindu law a widow who leaves the residence of her deceased husband, not for unchaste purposes, and lives elsewhere does not thereby forfeit her right to maintenance. It is not enjoined in the Hindu *shastras* that a widow should remain in the residential house of her late husband under all sorts of circumstances. Even where the husband has, by his will, directed that the widow should get maintenance while residing in the house but would not be entitled to any if she discontinued living in it, the direction can be ignored if there was just cause for the widow to leave the house. The occurring of a litigation between the widow and the heir in possession of the house, resulting in strained feelings between the parties, is such a just cause. Arrears of maintenance are claimable as from the date on which the widow left the residential house of the family and took up her residence elsewhere. The right of the widow to get a reasonable and adequate amount of maintenance is derived from the Hindu law itself, and is not dependent upon any provision in respect thereof made in her husband's will. Where the husband's will has specified a particular amount, the Court is not bound by it beyond the fact that such suggestion may be taken into consideration in determining what amount would be adequate and reasonable. *JAMUNA KUNWAR v. ARJUN SINGH*, [1940] ALL. 739.

———**Widow's estate—Surrender in favour of a male reversioner of the second degree with the consent of the immediate female reversioner, if valid.** A Hindu widow can, with the consent of the immediate female reversioner, relinquish the estate in favour of the next male heir of her husband, provided the circumstances are such as would entitle the Court to construe the transaction, as amounting, in substance, to a relinquishment by the widow in favour of the next female heir and a similar second surrender by the latter in favour of the next male heir.

It would be against the doctrine of surrender, if the widow or the intermediate female heir would stipulate for any benefit to her save and except what is necessary for her maintenance, or would stipulate for a maintenance allowance not only to be paid to her during her lifetime but which will be payable to her heirs and successors

after her death. *JANKI NATH RAY v. JYOTISH CHANDRA ACHARJYA CHAUDHURI*, [1941] 1 CAL. 234.

*INCOME-TAX ACT (XI OF 1922), s. 14 (1)*—*Member of a Hindu undivided family—Widow of a coparcener—Maintenance received by her—Exempt from income-tax—Subsequent disruption of the joint family—Contributions by the separated members towards the maintenance—Exempt from income-tax—Hindu law.* The widow of a coparcener in a Hindu undivided family, though not herself a member of the coparcenary body, can nevertheless be a member of the undivided family; and money received by her as maintenance is therefore exempt from income-tax, under s. 14(1) of the Income-tax Act. *BHAGWATI v. COMMISSIONER OF INCOME-TAX*, [1941] ALL. 43.

*LAND ACQUISITION ACT, 1894, s. 18—Collector acting under s. 18—Whether acts judicially and is subordinate to the High Court—His order—Whether subject to revision by the High Court under s. 115 of the Code of Civil Procedure (Act V of 1908).* Collector acting under s. 18 of the Land Acquisition Act does not act judicially nor is he a Court subordinate to the High Court and, consequently, his order is not subject to the revisional jurisdiction of the High Court under the provisions of s. 115 of the Code of Civil Procedure. *AMAR NATH v. THE GOVERNOR-GENERAL IN COUNCIL*, [1941] LAH. 100.

*LANDLORD AND TENANT—Lease—Tenancy at will or from month to month—Tenancy, whether permanent—Question whether tenancy permanent or precarious a question of law.* When a tenancy is terminable at the will of the tenant, it must be held to be terminable at the will of the landlord also. Whether a tenancy is permanent or precarious is a legal inference from facts and not in itself a question of fact. Mere erection by the tenant of permanent structure upon the land let to him, in the knowledge of and without interference by, his landlord, will not suffice to raise an equitable estoppel in favour of the tenant. *RAM LAL SAHU v. MUSAMMAT BIBI ZOHRA*, [1941] 20 PAT. 115.

*LEGAL PRACTITIONERS ACT (XVIII OF 1879), s. 13 (f)—Rule 16 of the rules framed under the Legal Practitioners Act—Legal practitioner—Not maintaining accounts in respect of professional work—If professional misconduct.* Under r. 16 of the rules framed under the Legal Practitioners Act it is the duty of every pleader to keep regular accounts of all moneys received and disbursed by him in connection with each suit in which he is engaged. Even if he has not much work he is bound to keep accounts for whatever work he may have and failure to keep such accounts will amount to professional misconduct. *A PLEADER, In re*, [1941] MAD. 286.

*NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), s. 87—Construction of—Promissory note—Material alteration by stranger without any fraud or by laches of holder—Effect.* The holder of a promissory note is not affected by a material alteration in the instrument when the alteration has been made by a stranger without the consent of the holder and without any fraud or laches on his part. *GOUROCHANDRO v. KRUSHNACHARANA*, [1941] MAD. 295.

*PRACTICE—Remedy prescribed by an Act—Person entitled to the remedy, whether deprived of other forms of remedies.* When a specific remedy is given by an Act, it thereby deprives persons of other forms of remedies than that given by the Act. *JABBAR SHAH v. KANCHHEDILAL*, [1941] Nag. 203.

PRACTICE—*Witness under cross-examination incapable of giving rational answers*—*Court's power to stop cross-examination suo motu*—*Procedure to be followed in such cases*. When a person is called to give evidence and when there is reason to suspect that he may be incapable of giving rational answers to questions put to him, that is, as a rule, known either to the prosecution or to the defence or to both. In such a case the usual course is for the attention of the Court to be drawn to the matter and for the Court to question the witness with a view to ascertaining whether he is competent to give evidence or not. When a Court in India has once decided that a witness is competent, it ought not to intervene at a later stage *suo motu* and reverse its previous decision and expunge the evidence already recorded, especially when that evidence has been recorded at some length. *RAMPADARATH SINGH v. KING-EMPEROR*, (1941) 20 PAT. 339.

PROVINCIAL INSOLVENCY ACT, 1920, S. 9—*Joint Hindu Family trading firm*—*Petition for the adjudication of the firm as such*—*Whether competent*. A joint Hindu family trading firm *as such*, cannot be adjudicated insolvent, and that the petition for adjudication should be made individually by, or against, such members of the firm as are personally liable for its debts. *POHLO MAL v. BASANT RAM-MEHR CHAND*, [1941] LAH. 55.

TRANSFER OF PROPERTY ACT (IV OF 1882), s. 53-A—*Registration Act (XVI of 1908), ss. 17 and 49*—*Mortgage*—*Sale by mortgagor in favour of mortgagee invalid for want of registration*—*Mutation effected in favour of vendee*—*Nature of possession changed*—*Mortgage, if extinguished*. Where a sale-deed by a mortgagor in favour of the mortgagee was invalid for want of registration but there was mutation effected in favour of vendee and there was sufficient evidence to show that the nature of the transferee's possession had changed from that of a mortgagee to that of a vendee, *held* that the mortgage was extinguished and no suit for redemption could lie. *TANGIR ALI v. RAM RATAN SINGH*, (1941) 16 LUCK. 99.

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## REVIEWS

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*The Indian Stamp Act, 1899*. By the Right Hon. SIR DINSHAH F. MULLA, KT. C.I.E., M.A., LL.D. and E. M. PRATT, Retired Judge of the High Court of Bombay. CALCUTTA : Eastern Law House Ltd. P. 13 Ganesh Chander Avenue. Fourth edition, 1941. Roy 8vo. Pages xxxvi + 326. Price Rs. 7.

WE heartily welcome this new edition of the Indian Stamp Act. As the Stamp Acts enacted by the Provincial Legislatures have effected various changes in the scales of Stamp fees, an up-to-date edition of the statute law was highly necessary. The learned author of the present edition has very wisely relegated the Provincial Stamp Acts to a supplement so that it may be convenient to issue a fresh supplement to meet the vagaries of the Provincial Legislatures. All cases bearing on the Stamp Law since the publication of the last edition have been scrupulously incorporated and the commentaries have undergone a thorough and careful revision. Some portions have been amplified in the light of fresh decisions. The Stamp Rules have been brought up to date. Altogether this is a most authoritative, lucid and accurate commentary on the Indian Stamp Act and will be found very serviceable to those who have to tackle the provisions of the Act



*Law and Practice of Conveyancing.* By Sir JAI LAL, Ex-Judge, Lahore High Court. LAHORE : The University Book Agency, Kacheri Road. 1941. Royal 8vo. Pages xxx & 350. Price Rs. 10.

THERE is no other branch of the law which requires for its successful prosecution a more detailed and specialised study than the law and practice of conveyancing. In practice this is rendered more difficult in India because, unlike England, there is no statutory provision in this country directly laying down rules for drafting of documents. There is a dearth of literature on this important subject in India. The appearance of this book is therefore doubly welcome. The book opens with an introduction which, among other things, indicates the special features in outline of the law of Real Property in England as compared with the law relating to landed property in India. The opening chapters, which are mainly based on various Acts of the Legislatures bearing on the subject, contain a discussion of certain principles and provisions of law which are necessary for investigation of title to property and for preparation of satisfactory drafts of documents. Then follow chapters on the law relating to the preparation of testamentary documents and general observations on drafting of documents. A section of the book contains forms and precedents of documents. The author has, within a small compass, dealt with this vast and difficult subject with commendable lucidity and conciseness. This book can be recommended as a reliable guide to the study of the law connected with the drafting of deeds and of forms suitable to the requirements of this country.

*Excess Profits Tax.* By V. S. SUNDARAM. BOMBAY : Butterworth & Co. (India) Ltd., Phoenix Building, Ballard Estate. 1941. Royal 8vo. Pages 314 & xcvi. Price Rs. 7-8-0.

THE author's commentary on the Indian Income-tax Act, 1922, is now a well-recognised authority on the subject and he has now completed the survey of the entire law of income-tax in India by the publication of this book which deals, in the author's words, with a superstructure on Income-tax. The provisions of the Excess Profits Tax Act, 1940, are accurately summarised in the introduction to the book which is followed by a brief analysis, in bare outline, of the Act. Notes on the sections and the rules in the schedules deal not only with decided cases but with all problems that are likely to arise in practice under the law. The latter feature will be of great help to the practising lawyer and to those affected by the Act. A supplement containing notes on decided cases relating to income-tax which were published since the publication of the author's commentary on the Act of 1922, is included here. The book contains much useful matter including extracts from the United Kingdom Finance Act, 1940, the Income-tax Law (Amendment) Act, 1940, and the Indian Income-tax (Amendment) Act, 1940. It is meant as a supplement to the author's previous publication and will, without doubt, take its place by its side as a useful compilation on the subject of excess profits tax in India.

*Elements of the Law of Insolvency in British India.* By NANUBHAI BHIDAS ABUVALA, B.A., LL.B., Solicitor, High Court, Bombay. BOMBAY : N. M. Tripathi & Co., Princess Street. 1941. Seventh edition. Demi 8vo. Pages 349. Price Rs. 3-8-0.

IN this handbook the author has briefly set forth the law of insolvency as it obtains in the Provinces and Presidency towns in British India. The subject is

dealt with in a narrative form under suitable headings and the relevant case-law, which is brought down to May 1941, is adequately referred to. The appendices contain full texts of the two Insolvency Acts, forms of petitions and questions set at the law examinations. This handbook will be of great assistance to students making their first acquaintance with the law of Insolvency.

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*The All India Criminal Digest : 1904-1940. Vol. I.* By S. K. IYER, B.A., B.L., Advocate, High Court, Madras. LAHORE : Law Book Depot, Krishna Nagar. 1941. Royal 8vo. Columns 1816. Price Rs. 24 for three volumes.

To the busy lawyer a digest of cases is a *sine qua non* inasmuch as it helps him to lay his finger, without loss of time, upon the decision required. The test of a good digest is, therefore, apart from its accuracy, the facility which it affords to pick out a required decision. This publication contains all the features of a good digest. Along with the headnotes the reasoning of the Judges and their *obiters* are included where necessary. The cross references are adequate. Two more volumes are yet to appear and when completed this digest will be very serviceable to the profession.

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*Century Edition of All India Criminal Digest : 1840-1941. Vol. I.* By A. N. KHANNA, Advocate, High Court, Lahore. LAHORE : Atma Ram & Sons, Anarkali. Crown 4 to. Columns 1464. Price Rs. 30 per set of three volumes.

THIS is a digest of all the important criminal rulings of the High Courts in India from the year of 1840 to 1941. The cases are digested into appropriate headings and an analytical synopsis is given at the beginning of every subject. The sub-headings in the synopsis contain column references in the digest to facilitate easy reference. The case-law from 1901 to 1941 is digested more fully while the case-law before the year 1901 is compressed and appended to the former in an abbreviated form at the end of each particular subject dealt with. Where however a point is not covered by any recent ruling the cases relating to it are digested in full even if they were prior to 1901. This digest will be very useful to the profession.

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*The Arbitration Act, 1940.* By S. C. DAS, M.A., LL.B., Advocate, High Court, Allahabad. ALLAHABAD : The Allahabad Law Journal Press. 1941. Pages 346. Price Rs. 6.

THIS Act which is mainly based on the English Arbitration Acts of 1889 and 1934 is, however, not an exhaustive code as in many respects it gives only an outline and leaves the details to be supplied by judges in accordance with well established principles of law. A commentary, like the present, which extensively refers to English decisions on the subject, is therefore helpful in elucidating the provisions of the Act. The notes to the various sections, which are grouped under different sub-headings, are brief and to the point. The case-law, English and Indian, is brought down to the end of 1940. For those interested in the genesis of the law of arbitration in British India there is a short historical survey of the law from the beginning of the British rule in India. This book which is neatly got up will be of use to the profession as a handy conspectus on the law of arbitration.

*The Law of Arbitration in India.* By SHAMBHU DAYAL SINGH, M.A., LL.B. Allahabad. ALLAHABAD : Allahabad Weekly Reporter Office, Indian Law House. 1941. Royal 8vo. Pages 422. Price Rs. 5.

THE placing of a new Act of any importance on the statute book seems to be a signal for letting loose a plethora of commentaries on it. The recently enacted Arbitration Act of 1940 forms no exception. This commentary opens with an introduction which deals with the entire law of arbitration and allied subjects. The provisions of the Act are examined in the light of relevant English and Indian decisions. The exposition of the subject is clear and concise. This book will be useful not merely to lawyers but to all those who have to enter into arbitrations or to act as arbitrators for the settlement of commercial disputes.

*The Law of Benami Transactions in India.* By A. GHOSH, B.A., B.L., Advocate High Court, Calcutta. CALCUTTA : Eastern Law House Ltd., P 13 Ganesh Chander Avenue. Third edition. 1941. Demi 8vo. Pages 368. Price Rs. 5.

IN this revised and enlarged edition the author has traced the development of the law of benami in India from its earliest stage to its new form which assimilates the Indian law very nearly to the English doctrine of advancement. The system of benami not being based on any statute law the rules for determining benami transactions are derived from judicial pronouncements. In this treatise the case-law bearing on the subject is copiously referred to and principles deduced therefrom are lucidly set forth. The author has dealt with the subject in all its aspects including the economic and the moral. This treatise can be recommended to the profession as a complete monograph on the law of benami in India.

*The Law of Evidence in Criminal Cases.* By SARAT CHANDRA CHATTERJI, Advocate, High Court, Calcutta. CALCUTTA : Eastern Law House, P 13, Ganesh Chander Avenue. Third Edition. 1941. Demi 8vo. Pages 579. Price Rs. 5.

As the title of this book indicates, this is a commentary on those provisions of the Evidence Act which are of frequent application to criminal trials. The notes on the sections deal fully with the case law which is brought down to March 1941. Extracts from judgments and standard works on the subject are given. The appendices contain the texts of the Indian Oaths Act, 1873, the Bankers' Books Evidence Act, 1891, and the Commercial Documents Evidence Act, 1939. As a guide to the law of evidence in criminal cases this book will be useful.

*Law relating to Company shareholders in India.* By H. R. MEHROTRA, G.D.A. CALCUTTA : Progressive Publishing Co. 1941. Demi 8vo. Pages 336 & lxviii. Price Rs. 3-8-0.

THIS book which is mainly written for shareholders of limited companies in India supplies a want. It explains in simple language the provisions of the Indian Companies Act, 1913, which relate to shareholders of companies. The sections of the Act are grouped together so as to form separate topics of discussion and the relevant case-law is referred to in elucidating the legal principles involved. The changes effected by the Amending Act of 1936 are clearly explained. This book will be of assistance to shareholders who wish to have a clear and concise idea of their rights and liabilities.

# The Bombay Law Reporter.

## JOURNAL

October, 1941.

### "ORAL ADOPTION" OF DAUGHTER'S SON

It has been recently decided in *Swaminatha Aiyar v. Vageesam*<sup>1</sup> by the Chief Justice and Patanjali Sastri J. that an oral adoption, with corporeal delivery, of a daughter's son by a Brahmin of Tanjore District was by a text of Yama perfectly good as against the claims of the adoptive father's undivided brother and brother's son, in a suit for partition by the adopted son. The said text dispensing with *datta-homam* and other rites prescribed only *vag-dana* in the case of adoption of a son of a brother or daughter, and its authority and authenticity have been questioned or canvassed in Allahabad, Bombay and Calcutta High Courts. Their Lordships preferred to follow them and approved of the old Smṛiti text cited and based the decision solely on it. Patanjali J. even felt happy and thankful for the text that relieved him of the painful duty of balancing ceremonial and religious texts and disentangling civil rights and obligations from their meshes. True, Vaidyanatha at pp. 20-25 of his *Sraddha-kanda* in *Grantha* canvassed the point and finally left it to option of people to adopt any course they pleased. It is a difficult question and one should congratulate their Lordships on their easy solution.

But the only difficulty in the way of accepting their Lordships' decision as sound or satisfactory is that they sold an old and outworn coat and said that it was of the latest fashion, and worth the price paid for. The question naturally arises to the mind whether they would dare sell a similar wedding gown? I mean, would they take an equally easy view on the question of an oral marriage on the strength of certain ancient texts to be found scattered in *Manu* and other sages? They would at once go in for more modern texts and declare a marriage to be valid only on the completion of the *saptapadi* at the end of the *vivaha homam* which alone, they would say, would confer the status of wife and effect change of gotra from father's into husband's coupled with a consequent change in respect of pinda or funeral rites and *sutaka* or pollutions, not to speak of other civil rights and obligations such as inheritance and maintenance. Time was when an oral contract of marriage involving gift only of the girl, and no more by way of *homam* or other rite, was deemed sufficient to transfer the bride to the husband's family so completely that on his death she as

1 [1939] 2 M. L. J. 557.

his widow could embrace his brother in Niyoga (levirate), and beget issue for her husband (Manu, 9.69). But Yajnyavalkya (1.65) ruled that it became null and void if only a better bridegroom came upon the scene. Vasishtha (17.64), Baudhayana (4.1.17), Laghu Satatapa (43-45) and Narada (15.30) unanimously state that even if she had been orally gifted away with water, she continued to be in her father's dominion and gotra and did not pass on to her husband's for want of marriage with *homam* and other mantras. They do so in the teeth of Manu's assertion (9.71) that such a breach of promise of marriage or contract of gift in marriage is a heinous sin of untruth relating to person. This no doubt we know was an older state of the law of marriage that since gave way. It was on the main ground of absence of marriage with mantra and *homam* rites that continuously and exclusively kept woman or concubine had no status in her paramour's family either for herself or for her issue. It is true that, like the recent League of Nations' resolution in favour of better rights for illegitimate children all the world over in future, Yajnyavalkya (2.136-137) long ago anticipated it and allowed a Sudra's illegitimate son to go in shares with legitimate sons after his death, and to take the whole in their absence leaving no daughter's sons either. In the higher castes illegitimate sons get only maintenance. Thus enormous importance was given to *homa* and mantra even in the case of Sudras' 'marriage-samskara, not to say of Brahmins'.

Such being the case as regards marriage, what should be the law in the case of adoption which at once and equally affects the status and relationship of the adopted person towards those in the new as well as old family? It is of course conceded that if he were already no sapinda or sagotra there could be no valid adoption without *datta-homam* as well as oral and actual offer and acceptance of the boy in adoption, accompanied by water-pour. It is equally felt proper and reasonable to go through the whole prescribed procedure in the case of distant sagotra for the double reason of bringing a remote, long-ago divided kinsman nearer home and of ensuring the consequences of pinda and pollution leaving the old and binding the new family. But it does not look so very necessary in the case of a brother's son, whether joint or divided, since pinda and pollution continue as close as ever. It is also perhaps chiefly because of a special text of Vedic or even pre-Vedic origin found in all earlier Smritis, viz., that a brother's son is a son unto all (sonless) brothers as well. This certainly prevailed as law at a time when a Dattaka or adopted son was so low in the eyes of tradition, law and public opinion which hardly seem to have favoured even the highly prized Kshetrāja and Putrika-putra as in a little later age. Partition being rare, and all the family living together for generations, this was evidently thought most natural and desirable, notwithstanding the fact that sons were prayed for to discharge the three-fold debt one was thought to be born in. Perhaps the great (Maha Bharata) war was not yet waged to deplete the whole land of all adult men so much so that cries were to be heard everywhere of "sons at any cost", "sons of any kind" and "sons of any origin or birth", to keep lines of families from extinction, and perhaps to redeem Gaya also from going into oblivion or into Buddhist hands (Atri, 52-57; Likhita, 10-13; Brihaspati, 20.23; and Vasishtha, 11.39).

Hence in the face of such a text in favour of a brother's son being fully competent and sufficient to serve and save all brothers at once, and because of the nearness of his sapindaship, Yama was right in laying down the rule that mere word of gift would do without more by way of *homa* and other prescribed rites. Similarly, he would be in order if he had so ruled in the case of a Putrika-putra or son born

of a daughter appointed or constituted a Putrika, that is, married subject to a condition expressly agreed to by repeating the prescribed formulas at the time of gift in marriage to the effect :—"I give you this brotherless daughter of mine with all ornaments and attire ; but, your first son by her shall belong to me alone". "I do consent". If the last words of the father's formula be "shall belong to us both" then the son born should be a true Dwyamushyayana. It is a moot question if in this later contingency *homam* and all other rites would be necessarily gone through if the grandfather wanted to adopt the child exclusively as his own on finding other male children born to his daughter. But if there was no such express condition extorted from the bridegroom, but there was only a mental reservation to have the first son of the marriage for his own exclusive benefit then he was no better than any other grandson or "dauhitra" born of marriage without any such stipulation and it is only just and reasonable to expect the usual *homam* and other rites also to accompany as in the case of all adoptions from other gotras than one's own. The question is not solely as their Lordships seem to have been unnecessarily labouring and emphasising whether the daughter's son is not already competent to render spiritual benefit even before and without adoption ; for in that case it might be pertinently asked "Then, why adoption of him at all?" "Why do you deprive his father altogether when you have some benefit through him already?" But the question would be whether he need adopt at all when he has his brother's son, whether as a Brahmin he can defy the specific injunctions of Sastras against adoptions of daughter's sons, whether he can plead a valid custom to such an effect and whether he can utterly dispense with rite relating to 'any a-gotra-sweekaram' and merely content himself with gift of the boy yet be in order.

Saunaka is positive that adoption must be of a close agnate among all the four castes, that among Brahmins it must be of a sapinda, failing whom, a near or distant sagotra, and that never should one go out of one's gotra in search of a boy to adopt. But he is prepared however to allow Sudras to adopt a daughter's or sister's son on a principle that perhaps savours of the principle of a Sudra's dasiputra sharing in the inheritance. But Sākala would not extend this freedom to adopt son of daughter, sister or mother's sister to Sudras among whom there is only one gotra for all or none at all. A text of Narada asks sapinda and sagotra to be exhausted before resorting to a different gotra. Vriddha Visishtha insists that sons taken from different gotras or different branches of the same gotra must needs undergo all the prescribed rites before the adopted son can seek to establish his full rights and status in his new family. Vriddha (or Brihat) Manu is even unduly hard upon adoptions without the necessary rites and formalities by giving the adopted son no more than marriage-expenses like unto a female child born in the family, and the natural father is declared heir to the adopted son and not the adoptive father. Vriddha Gautama simply quotes the above and further adds that adoption rites while conferring new gotra do not produce a close sapindaship (such perhaps as to exclude a nearer agnate from inheritance in preference). This sapindaship evidently has not much to do with any supposed spiritual competency as of a daughter's son. A Smṛityantara or unidentified author remarks, "Though formally given and accepted in adoption, a son who has not undergone in the new family any of the rites such as Jāta-karma, fails in truth and in effect as such, and how can he become entitled to (a share in) the inheritance"! Lastly, Anusasanika-parva of Maha Bharata (84. 37-39) says that an adoption by mere taking or accepting delivery of an infant is only valid in certain

places (Mithila?) and the same is said to be Kritika form, and not dattaka.

In the light and in the fact of such a strong muster of authorities on the specific question of law before their Lordships it is impossible not to believe that the text of Yama relied upon by them was an out-and-out worn-out thing or his "dauhitra" meant only a putrika-putra appointed by an exclusive or common formula prescribed for the purpose at the time of the daughter's marriage. It is true that Katyayana (Kane, sl. 44) is emphatic that resort to self-willed courses of act or interpretation in defiance of express texts is ruinous to paradise in future and to established order in the present world. But it is hoped that this dictum does not apply to the present case pregnant with authorities to the contrary of Yama's dictum.

The faltering and faulty judgments of High Courts and even the Privy Council pronounced during the last forty years at least on Hindu law make out a strong case for the formation of a special panel of duly qualified experts with sufficient intimacy and research work experience in Hindu law to help the High Courts and the Privy Council at least, if not also the District Courts, whenever important questions of law have to be tackled. What is required today is a keen eye to essential principles, their true origin, evolution through the ages, and tendencies of further growth and future development in their impact with modern conditions and influences.

R. V. V. TATACHARIAR.

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### RECENT ENGLISH CASE

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**CONVERSION**—*Alternative remedies in contract and tort—Writ issued in contract against one defendant, but action discontinued—Whether a bar against another defendant.* A cheque payable to the appellants was converted by the M company and collected for that company by its bankers the B bank. The appellants brought an action against the M company for the amount of the cheque either as money lent or as money had and received to the use of the appellants, but they discontinued that action and no final judgment was obtained. The appellants afterwards brought the present action against the B bank for conversion of the cheque :—*Held*, that the appellants by merely initiating proceedings against the M company for money lent or for money had and received had not thereby elected to waive the tort so as to be precluded from bringing the present action in tort. In such a case it is judgment and satisfaction in the first action, and not merely the bringing of the claim which constitutes a bar to a second action. *UNITED AUSTRALIA LD., v. BARCLAYS BANK LD., [1941]* A. C. 1.

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### RECENT INDIAN CASES

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**CHEQUE**—*Cheque given in payment of a debt—Cheque dishonoured and outstanding in the hands of a third party—Assignment of the debt—Suit by the assignee—Maintainability.* Where a cheque, given for the price of goods by the buyer to the seller, is indorsed for value by the latter and delivered to a third party, and then the cheque is dishonoured by non-payment, neither the seller nor, in case of seller's insolvency in the meantime, the transferee from the Official Assignee of the seller's

claim to the price, can maintain a suit for price against the buyer of the goods, if at the date of the suit the cheque is outstanding in the hands of the third party. *RAM PRASAD LOHIA v. M. P. PATEL*, [1941] 2 Cal. 103.

CIVIL PROCEDURE CODE, S. 60(1) (b)—*Property exempt from attachment and sale—"Tools of artisans"—Whether the number of such tools, for which exemption can be claimed, is limited—Sewing machines used by a tailor.* A tailor who uses a sewing machine is an artisan and the sewing machine is a "tool of an artisan," within the meaning of section 60(1) (b) of the Civil Procedure Code. Section 60(1) (b) of the Civil Procedure Code, which enacts that tools of artisan shall not be liable to attachment, does not say that only such tools shall not be liable to attachment as are necessary for the maintenance of the artisan. So, where the judgment-debtor was a tailor who, along with his employees, worked at his shop with six sewing machines belonging to himself, it was held that all the six sewing machines were exempt from attachment and sale under section 60(1) (b). *AHMAD SAYEED v. KANIZ ZOHRA*, [1941] All. 278.

COMMISSION—*Examination of defendant—Pardānashin woman, if entitled to Commission—Personal appearance in Court and attendance in Court—Code of Civil Procedure (Act V of 1908), ss. 132, 133; O. XXVI, r. 1.* A *pardānashin* lady should not be compelled either to appear in Court personally or attend Court, even although she may have failed to observe the restraints of the *pardā* system on previous occasions. The words personal appearance in Court mean the same thing as attendance in Court. *KISSEN LAL KANKORIA v. PURSHOTTAM DAS HALLVASIYA*, [1941] 2 Cal. 155.

CONTEMPT OF COURT—*Privilege of press—Publication of article in newspaper, whether amounts to contempt of Court—Test in cases of contempt of Court.* As regards contempt of Court far from there being special privilege of the press there is a special responsibility affecting the editor of a newspaper, namely that he is in duty bound always to bear in mind the danger of prejudicing the course of justice by the publication of articles in his newspaper which though innocent in appearance may easily be so read by members of the public as to prejudice the course of litigation.

In judging whether the publication of an article in a newspaper will amount to contempt of Court or not the real and proper test is not whether the article will in fact prejudice the defendants or not, or scare away their witnesses, or lead them to compromise the suit, but the Court has to read the articles and see whether the articles may have that effect, and thereby tend to interfere with the proper course of justice. *HAKIM QARI NASIR AHMAD v. MR. ANIS AHMAD ABBASI*, (1941) 16 Luck. 506.

INJUNCTION—*Injunction to restrain a defendant from proceeding in another Court—Inherent power of the High Court—Code of Civil Procedure (Act V of 1908), ss. 10, 151.* The High Court in its original civil jurisdiction has inherent power to restrain a defendant by injunction from proceeding with a suit in another Court on grounds of convenience alone.

Section 151 of the Code of Civil Procedure, 1908, recognises the inherent power of the High Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. *BHAGAT SINGH BUGGA v. DEWAN JAGBIR SAWHNEY*, [1941] 1 Cal. 490.



LIMITATION ACT, S. 19—*Continuing guarantee—Acknowledgment by the principal debtor—Limitation when saved.* In the case of a continuing guarantee an acknowledgment by the principal debtor does not save limitation against the surety unless the latter allows himself to be represented by the person who makes the acknowledgment. *SUWALAL v. FAZLE HUSSAIN*, [1941] Nag. 415.

PENAL CODE, SS. 420 AND 511—*Cheating—Attempt to cheat—Contract not enforceable in civil Court, whether can be basis of prosecution for cheating—Person forewarned and therefore not cheated.* There is no general principle that a criminal prosecution must fail if it is based upon a contract which could not be enforced in a civil Court. A man may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is, therefore, not cheated. When the accused posed that he could double currency notes and a police officer knowing that he could not do so but with a view to get him convicted gave him some notes and caught him while, after going through a mock process of doubling notes, he tried to substitute some pages of a book in their place, *held*, that the accused went far beyond the stage of preparation and was liable to be convicted of the offence of attempting to cheat. *KING-EMPEROR v. RAGHUNATH*, (1941) 16 Luck. 194.

PRIVY COUNCIL—*Security for costs of respondent to Privy Council—Time allowed to appellant to furnish such security—Power of High Court to extend such time—Code of Civil Procedure (Act V of 1908), O. XLV, r. 7.* The High Court has no power to extend the time within which the intending appellant to the Privy Council must furnish security for the respondent's costs beyond the maximum allowed by O. XLV, r. 7, of the Code of Civil Procedure, 1908. *AKIMUDDIN CHAUDHURI v. FATEH CHAND MAHESRI*, [1941] 1 CAL. 299.

TRIAL BY JURY—*Confession—Judge to decide whether confession is voluntary for the purpose of admitting it—Jury to decide the question for the purpose of determining what weight should attach to it—Code of Criminal Procedure, 1898 (Act V of 1898), section 298(1)(c).* In a trial by jury the Judge should take upon himself [as s. 298(1)(c) of the Code of Criminal Procedure, 1898, requires him to do] the decision, for the purpose of admitting a confession into evidence, that it was voluntarily made, while at the same time leaving it to the jury, for the purpose of determining what weight should be given to it, to decide both whether it was true and whether it was voluntary. *SUKER DUSADH v. KING-EMPEROR*, [1941] 20 Pat. 547.

## REVIEWS.

*The Indian Limitation Act, Vol. I, Secs. 1-32.* By V. V. CHITALEY, B.A., LL.B., and K. N. ANNAJI RAO, B.A., LL.B. NAGPUR : The All India Reporter Ltd. 2nd edn., Royal 8vo. Pages 1023. Price Rs. 27 for three volumes.

IN this new edition the authors have incorporated all the reported decisions bearing on the law of limitation which have appeared since the publication of the first edition three years ago. The statutory changes made during this period are also incorporated. This volume deals with ss. 1 to 32 of the Act. All the features which have popularized the previous publications of these authors are to be found here. This book, like its predecessor, will be of use to the practitioners as a well digested repository of the entire case-law on the subject.

*The Law of Conveyancing in British India.* By S. K. DUTT, Advocate, Allahabad High Court. ALLAHABAD : Universal Law House, 26 Sheocharan Lal Road. 1941. Royal 8vo. Pages 874. Price Rs. 12.

THE art of conveyancing, which is concerned with the transfer of legal rights to property, is regulated by certain well-recognized rules. In order to be a competent draftsman one must have a thorough grasp of the principles governing this art. A mere ability to adapt precedents to a particular case is not enough to make one a successful draftsman without a thorough knowledge of the rules of drafting and an ability to apply these rules to practical cases. Realizing the importance of the above the author of this book has dealt at great length with the principles of conveyancing as obtaining in British India. These principles are explained in the form of lectures which cover the main body of the book and are lucidly and succinctly set forth. The forms and precedents embrace a wide range of subjects and to each precedent and form are appended notes which will be of practical use to the draftsman. Statutory forms and precedents are also given. The appendices deal with the stamp duty payable on instruments and the salient portions of the Indian Arbitration Act, 1940.

*The Indian Conveyancer.* By RAI BAHADUR P. C. MOGHA, B.A., LL.B. CALCUTTA : Eastern Law House, P 131, Ganesh Chunder Avenue. 1941. Second edition. Royal 8vo. Pages 676. Price Rs. 10.

THIS pioneer work on conveyancing in India which now appears in its second edition incorporates changes necessitated since its first appearance in 1938. The notes are revised and brought up to date and the precedents are also revised and a few new ones added. The book opens with a brief introductory statement on the general principles of conveyancing. For facility of reference the precedents are arranged in groups according to subjects and in the prefatory notes appended to the precedents the relevant law on the subject is briefly stated. Provisions of Stamp and Registration laws are referred to. This book, without doubt, will be invaluable to the draftsman on account of its exhaustiveness and general arrangement of the various precedents.

*Indian Company Law.* By M. J. SETHNA, Barrister-at-Law. BOMBAY : D. B. Taraporevala & Co., Hornby Road. 2nd edn., 1941. Roy. 8vo. Pages 398 & cclxl. Price Rs. 7-8-0.

THIS is an enlarged edition of a book which in its first edition was primarily meant for law students. While widening its scope so as to make it useful to the practitioners the author has retained the original scheme of arrangement. The entire statutory law on the subject is dealt with in a narrative style and the reader is taken logically through the different topics which are explained in the light of English and Indian cases bearing on the subject. References to the various sections of the Act are given in the commentaries to facilitate reference to the law dealing with the required point. The commentaries are lucid and the statement of law deduced from the decisions is accurately and briefly stated. Two chapters in this edition merit special mention, one which summarizes the salient features of the Indian Insurance Act, 1938, and another which deals with income-tax and super-tax in relation to registered companies. The full text of the Indian Companies Act as amended up to July 1941 is given and the appendices contain much useful matter. This book will be

useful to the lawyer, the student and the layman as a reliable and clear exposition of the law on the subject.

*An Introduction to the law of Limitation and Prescription.* By K. J. KHAMBATTA, M.A., LL.B., F.S.S., Advocate (O.S.). BOMBAY: N. M. Tripathi & Co., Princess Street. 1941. Fourth edition. Royal 8vo. Pages 238. Price Rs. 4-4-0.

IN this new edition of a popular handbook the author has carefully revised and brought up to date the text of the Indian Limitation Act, 1908. Several new topics are introduced including a detailed discussion of the effect of appropriation of an "open payment." Alterations made by recent Legislative enactments are incorporated and the case law is brought down to the end of June, 1941. The book is in three parts. The first one deals with the broad aspect of the law of limitation and prescription, the inter-relation of these two concepts and other allied topics. It will be of particular interest to practitioners as it contains matters which are not dealt with in the Indian Limitation Act. Part two contains an analysis of the Act. Here the various sections are regrouped logically and are explained in the light of decided cases with great lucidity and conciseness. The regrouping of the articles of the first schedule on the basis of certain generalisations will be of great help to the student in remembering the different periods of limitations. The last part explains certain concepts to be met with in the law of limitation. The book will serve as an excellent guide to students.

*Report of the Hindu Law Committee.* 1941. Government of India Press, SIMLA. Royal 8vo. Pages 49.

THIS publication contains the report of the Hindu Law Committee appointed by the Government of India in January, 1941, to examine the Hindu Women's Rights to Property Act, 1937, and two non-official Bills. One of the recommendations of the Committee is that the whole of the Hindu law should be codified beginning with the law of succession. A supplement to this report contains a draft memoranda relating to the Mitakshara law of male succession on which opinions are invited. The report makes very interesting reading and can be recommended to those who are alive to the needs of the codification of Hindu law. The present attempt takes us back to the original texts and dovetails them into the usages which have influenced the present day life of the Hindus. The task of reducing the behests of Hindu law as conceived by the sages in remote antiquity to clear-cut propositions of law is by no means a simple one. The committee of experts will deserve well of the Hindu community if they succeed in evolving rules which will harmonise the texts, take due account of different usages, and simplify the bewildering mass of judicial decisions.

*Indian Company Rules & Forms.* By LAKSHMI NARAIN MEHRA, B.A., LL.B. DELHI: S. Abdul Rahim, Chandni Chowk. Pages 64. Price As. 8.

THIS brochure contains the Indian Companies Rules, 1941, as amended up to date and forty-seven Forms which form part of the schedule annexed to these Rules. The author in the notes under each Form has given useful hints for their use and has also included other forms for use by limited companies.